

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Nepolo Paulus Kashikukumwa</i>	<b>Case No.:</b> CR 48/2022 Ruacana: 108/2020  <b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice Small AJ <i>et</i> Honourable Mr. Justice Munsu AJ	<b>Delivered on:</b> 27 September 2022
<b>Neutral citation:</b> <i>S v Kashikukumwa</i> (CR 48/2022) [2022] NAHCNLD 97 (27 September 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction is confirmed.</li><li>2. The sentence is amended to read as follows: 'Eighteen [18] months imprisonment wholly suspended for a period of three [3] years on condition that the accused is not convicted of theft committed during the period of suspension.'</li></ol>	
<b>Reasons for the order:</b>	
Small AJ (Munsu A J concurring):	
[1] The matter came before this court on automatic review in terms of section 302 of Act	

51 of 1977.

[2] Accused in this matter was charged with Theft, framed as follows:

'In that upon or about the 14<sup>th</sup> day of March 2020 and at or near Ruacana Community Hall in the district of Outapi the said accuse did wrongfully and unlawfully and intentionally steal goods, the property or in the lawful possession and control of Shikulo Maria to wit 1 x Gold Hauwayi Cellpone valued at N\$2000.00.'

[3] The accused pleaded guilty to the aforesaid charge and after questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 the court entered a plea of not guilty as the accused alleged that he picked up the phone and did not steal it. After two witnesses gave evidence, it was apparent that the accused stole the cell phone and sold it to one Brave Mapure for N\$1400.00. He was correctly convicted, and his conviction will be confirmed.

[4] The learned magistrate thereafter sentenced him as follows: '18 months direct imprisonment which is wholly suspended for a period of 3 years on condition that the accused is not convicted of Theft during the period of suspension and the accused person compensates the following individuals the amount of each as follows with effect of 11.03.2021 to the Clerk of the court, Outapi Magistrate Court;

1. Accused to compensate Shikulo Maria cellphone number 0811220913 an amount of N\$2000.00. With effect of 11.03.2021 to the Clerk of the court, Outapi Magistrate Court;
2. Accused to compensate Brave Mapure cellphone 0814526308/0817352243 and amount of N\$14000.00 with effect of 11.03.2021 to the Clerk of the court, Outapi Magistrate Court.'

[5] When the matter initially came before my brother Munsu AJ, he queried the learned magistrate pointing out that the sentence omits the words "committed" during the period of suspension and asked whether such sentence is competent. As the cell phone was recovered the judge also enquired how did the learned magistrate arrived at the amount of N\$2000.00 as compensation to the complainant.

[6] The learned magistrate in his reply agreed with the Honourable Judge's query regarding the omission of word "committed" during the period of suspension and that renders

the sentence incompetent and indicated that the aforesaid word should have been included. This concession was correctly made and does not need to detain this, Court. <sup>1</sup>

[7] On the question of the compensation ordered, the learned magistrate stated that the complainant testified that she bought her cell phone for N\$2000.00. Upon recovery, the cell phone colour had faded, and the sim card and memory card were not inside. There was a massive depreciation in the cell phone as an item; therefore, she considered it pointless to place the complainant in a position owning an old cell phone which is not in the same condition as the one she had in the first place. Therefore, she concluded compensation was necessary.

[8] Section 297 of the Criminal Procedure Act, 1977, mainly deals with the conditional or unconditional postponement or suspension of sentences. It also provides for cautions or reprimands as a sentence.

[9] Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of section 297(1)<sup>2</sup> which the court may specify in the order. The conditions may include one or more of compensation<sup>3</sup>, the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss<sup>4</sup>, the rendering of some service for the benefit of the community,<sup>5</sup> submission to instruction or treatment,<sup>6</sup> submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Children's Act, 1960 (Act 33 of 1960)<sup>7</sup>, the compulsory attendance or residence at some specified centre for a specified purpose<sup>8</sup>, good

<sup>1</sup> Terblanche SS, 2007 *Guide to Sentencing in South Africa*, 2<sup>nd</sup> ed. Lexis Nexis, Durban, p 362, *S v Maimbolwa and Another* (CR 7/2022) [2022] NAHCNLD 20 (15 March 2022), *S v Nauyoma* (CR 5/2022) [2022] NAHCNLD 18 (15 March 2022), *S v Antonio* (CR 20/2022) [2022] NAHCNLD 42 (19 April 2022) and *S v Tyali* (CR 28/2022) [2022] NAHCNLD 62 (16 June 2022) to mention a few.

<sup>2</sup> Section 297(1)(b) read with Section 297(1)(i).

<sup>3</sup> Section 297(1)(a)(i)(aa).

<sup>4</sup> Section 297(1)(a)(i)(bb).

<sup>5</sup> Section 297(1)(a)(i)(cc).

<sup>6</sup> Section 297(1)(a)(i)(dd).

<sup>7</sup> Section 297(1)(a)(i)(ee).

conduct<sup>9</sup> and any other matter<sup>10</sup>.

[10] What is essential to consider when imposing a suspended sentence is that the accused is released immediately if the whole sentence imposed is suspended or released immediately when the unsuspended part thereof is served. Therefore, the suspended sentence or the suspended part thereof cannot directly enforce a suspensive condition like compensation. The same applies to other similar suspensive conditions.

[11] If an accused did not comply with a suspensive condition, the suspended sentence, or suspended part thereof, must be put into operation. It, therefore, only comes into operation once the accused is brought back to court and the suspended sentence or the unsuspended part of the sentence is put into operation upon proof that the condition was breached.<sup>11</sup> Even if there was a breach, the court requested to put the sentence into operation may either further suspend it on the same conditions or, in some instances, may even add other conditions.<sup>12</sup> This principle applies and would include the suspensive conditions of paying compensation to a victim on or before a given date or not being convicted of a specific crime committed during the period of suspension.

[12] A sentencing court cannot enforce the immediate payment of compensation by giving the compensation date the same date as the suspended sentence like the court did in this instance. I reiterate, an accused is released if the entire sentence of imprisonment is suspended. If an accused does not pay the compensation, he is brought back to that court for the suspended sentence to be put into operation. It remains a suspended sentence, and he is not detained until the compensation is paid and then released afterwards.

[13] The suspended sentence imposed by the learned magistrate in this matter and the word 'and' between the two sets of suspensive conditions means that both conditions suspending the imprisonment must be breached before the court can bring this suspended

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<sup>8</sup> Section 297(1)(a)(i)(ff).

<sup>9</sup> Section 297(1)(a)(i)(gg).

<sup>10</sup> Section 297(1)(a)(i)(hh).

<sup>11</sup> Section 297(9).

<sup>12</sup> Section 297(8).

sentence into operation. In addition, if the accused, for example, paid the two victims' compensation, it would negate the first suspensive condition. Therefore, again using the example above, if the accused is convicted of a subsequent offence of theft committed during the period of suspension, the court cannot put the suspended sentence into operation as he did not breach the compensation condition too.

[14] A perusal of the record indicates that the accused said he could pay a fine of N\$500.00. However, without any additional examination into the financial position of the accused, the learned magistrate decided to include the accused paying the two victims N\$3400.00 as a suspensive condition. Imposing a suspended sentence in this manner is inappropriate without a proper inquiry to establish whether the accused will be able to compensate the victims or not.

[15] As a result it is ordered that:

1. The conviction is confirmed.
2. The sentence is amended to read as follows:

'Eighteen [18] months imprisonment wholly suspended for a period of three [3] years on condition that the accused is not convicted of theft committed during the period of suspension.'

<b>Judge(s) signature:</b>	<b>Comments:</b>
Small AJ:	
Munsu A J:	