

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

<b>Case Title:</b> <i>Jeremia Mingu Katambo v The State</i>	<b>Case No:</b> HC-NLD-CRI-APP-CAL-2022/00035
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr Justice Munsu, J <i>et</i> Honourable Mr Justice Kessler J	<b>Heard on:</b> 21 April 2023 <b>Delivered on:</b> 21 July 2023
<b>Neutral citation:</b> <i>Katambo v S</i> (HC-NLD-CRI-APP-CAL-2022/00035) [2023] NAHCNLD 65 (21 July 2023)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The Respondent's point <i>in limine</i> is upheld.</li><li>2. The appeal is struck from the roll and considered finalized.</li></ol>	
<b>Reasons for decision:</b>	
KESSLAU J (MUNSU J concurring)	

### *Introduction*

[1] The appellant was charged in the Opuwo Magistrates Court on a charge of theft of stock (Read with the provisions of the Stock Theft Act 12 of 1990, as amended). The allegation was that the accused stole fifteen goats with a combined value of N\$ 8 000. The accused pleaded guilty and was convicted. The matter was thereafter transferred to the Regional Court for sentencing. He was sentenced to seven years imprisonment on 7 April 2022.

[2] The appellant's notice of appeal was filed out of time. He filed his notice of appeal, accompanied by an application for condonation for the late filing thereof, which now forms part of documentation before this court. The Correctional Facility stamp dates his documents at 1 June 2022. It is unclear when it was served on the clerk of court. However, the magistrate's reasons were received, an indication that service was done. Appellant, who is a self-actor, did not address prospects of success as part of his application for condonation.

[3] The appellants' grounds of appeal against the sentence imposed, and drafted in layman's terms, can be summarized as follows:

Firstly that the learned magistrate misdirected himself when imposing a sentence that is shockingly disproportionate to the offence, excessively harsh and induces a sense of shock. Secondly that the learned magistrate misdirected himself by over-emphasizing the seriousness of the offence and the need for deterrence and by so doing failed to consider the mitigating factors before him in order to individualize the sentence.

[4] The respondent raised a point *in limine* on which judgement was reserved. The parties proceeded to address the court on the merits of the appeal. I will now deal with the point *in limine*.

### *Respondent's point in limine*

[5] The respondent's submitted that the notice of appeal was filed out of time and that the appellant's explanation in his condonation application failed to meet the requirement of reasonableness. In addition to that, that the appellant failed to indicate any prospects of success on appeal against the imposed sentence.

[6] In reply the appellant explained the reason for his late filing and attempted to address the prospects of success. Mainly his argument was for a lesser sentence, alternatively, that part of it should run concurrently with another stock theft sentence.

[7] Considering the application for the condonation of the late filing, the requirements are twofold. It consists firstly in deciding on the reasonableness of the explanation for the late filing and secondly the prospects of success on the merits. Gibson J in *S v Nakapela and Another*<sup>1</sup> stated the following at para 185G-H:

'In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the sub-rule is given; and where the appellant has shown that he has good prospects of success on the merits of the appeal.'

*The appellant's reason for late filing*

[8] The background, which was confirmed by both the appellant and respondent, is necessary to understand the appellant's reason. Prior to being sentenced on this matter, on the same day and in the same court, he was sentenced on another case of theft of stock. In the other matter the appellant was sentenced to 6 years imprisonment of which 1 year was suspended on the usual condition.

[9] The appellant initially noted his appeal, apparently within time, at the clerk of court against both these matters using one notice of appeal. However due to a confusion with the case numbers only the other was registered. As self-actor he was relying on the officers of the Correctional Facility and clerk of court for assistance. When the mistake was realised the appellant filed his notice of appeal in this matter. I find his reason for the

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<sup>1</sup> 1997 NR 184 (HC).

late filing reasonable under these circumstances.

*Prospects of success*

[10] Turning to the second requirement of condonation, to wit the prospects of success, the appeal lies against sentence only. It is trite law that sentencing is primarily at the discretion of the trial court<sup>2</sup>. In *S v Tjiho* it was stated that:

'The appeal court is entitled to interfere with a sentence if:

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentencing proceedings;
- (iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by any court of appeal.'<sup>3</sup>

[11] The appellant failed to address the prospects of success in both his written application for condonation and oral arguments in this court. Instead of pointing out misdirection committed by the trial magistrate, his submissions were focused on getting a reduced sentence or having a part of the sentence run concurrently with the sentence imposed in the other matter.

[12] According to the record of the court *a quo*, the magistrate considered the effect of stock theft on subsistence farmers in the area of Opuwo and the prevalence thereof. The magistrate tailored the sentence after he considered the cumulative effect of the second sentence imposed on the appellant that day.<sup>4</sup> Furthermore the magistrate considered the fact that section 14(3) of the Stock Theft Act 12 of 1990 states that sentencing for the offence of stock theft shall not be ordered to run concurrently. Only thereafter did he impose sentence.

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<sup>2</sup> *S v Ndikwetepo and Others* 1993 NR 319 (SC).

<sup>3</sup> *S v Tjiho* 1991 361 (HC) at 366 A-B.

<sup>4</sup> *S v Shapumba* 1999 NR 342 (SC)

<p>[13] In conclusion, even though the explanation given by the appellant for the delay is reasonable, we find that he failed to satisfy this court on the second leg of condonation, namely the prospects of success.</p>	
<p>[14] In the result the following order is made:</p> <ol style="list-style-type: none"> <li>1. The Respondent's point <i>in limine</i> is upheld.</li> <li>2. The appeal is struck from the roll and considered finalized.</li> </ol>	
<b>Judge(s) signature:</b>	<b>Comments:</b>
KESSLAU J	None
MUNSU J	None
<b>Counsel:</b>	
<b>APPELLANT</b>	<b>RESPONDENT</b>
Mr J.M. Katambo-In person Oluno Correctional Facility	Ms M Hasheela Of the Office of the Prosecutor-General, Oshakati