

NOT REPORTABLE



CASE NO.: CA110/2009

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

AUGUSTUS JUSTUS THEODOR

APPELLANT

and

THE STATE

RESPONDENT

CORAM: LIEBENBERG J & TOMMASI J

Heard on: 26/04/2011

Delivered on: 23/09/2011

APPEAL JUDGEMENT

TOMMASI J: [1] This is an appeal against sentence. The appellant was charged in the magistrate's court and pleaded guilty to a charge of theft of two heads of cattle valued at N\$5200.00 read with provisions of section 11(1)(a), 1, 14 and 17 of the Stock Theft Act¹, as amended². The magistrate convicted the appellant on his plea and committed him for sentence in the regional court. The regional court sentenced the appellant to twenty (20)

¹ Act 12 of 1990

² Stock Theft Amendment Act 19 of 2004

years imprisonment and suspended ten (10) years thereof for a period of five years on condition that the appellant is not convicted of the same offence committed during the period of suspension.

[2] The appellant noted his appeal out of time and applied for condonation for non-compliance with rule 67(1). The respondent initially raised a few points *in limine*, but abandoned it in view of the irregularity that occurred during the sentencing of the appellant in the regional court.

[3] The grounds of appeal in short were that: there was non-compliance with section 114 of the Criminal Procedure Act³; the regional court magistrate did not fully take into account the mitigating circumstances when he concluded that no substantial and compelling circumstances existed; the magistrate failed to assist the unrepresented appellant; and the sentence imposed induces a sense of shock.

[4] A number of appeals before this Court on appeal display the same irregularity largely due to the fact that the regional court magistrate used the same *pro forma* form when sentencing an accused in terms of section 114. (See *Erastus Munongo v The State*⁴ and *Elizabeth likela v The State*⁵). This case is no exception as the same *pro forma* form was used. This resulted in the same failure by the magistrate to exercise his limited powers of review

³ Act 51 of 1977,

⁴ Case no CA 104/2010 an unreported case delivered on 9/12/2010 (reasons released on 17/01/2011)

⁵ Case no CA96/2009 an unreported case delivered on 30 July 2010

provided for in terms of section 114 and to make a formal finding of guilty as is required in terms of section 114(3)(a).

[5] It is a mandatory requirement for the regional court to make a formal finding of guilty after having satisfied itself that the plea of guilty has been correctly recorded and that the accused is guilty of the offence charged with. A failure to do so constitutes an irregularity. Moreover the regional court magistrate failed to afford the appellant to opportunity to satisfy the court that the admissions made and/or his plea of guilty have been incorrectly recorded.

[6] In view of the above irregularity it becomes unnecessary to consider the other grounds raised by the appellant.

[7] In the premises the following order is made:

1. Condonation is granted for the non-compliance with the rules;
2. The sentence is set aside.
3. The matter is remitted to the regional court sitting at Ondangwa for sentencing afresh in accordance with the provisions of section 114 (2) & (3) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

4. The magistrate is furthermore directed to take into consideration, in whatever sentence is to be imposed, the period of imprisonment already served.

TOMMASI J

I concur

LIEBENBERG J