



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## JUDGMENT

Case no: CA 16/2012

**NOMAENICIA ANGELINE KLUWOSKI****APPELLANT**

and

**THE STATE****RESPONDENT****Neutral citation:** *Kluwoski v State* (CA 16/2012) [2012]

NAHCMD 24 (15 October 2012)

**Coram:** SHIVUTE, J and NDAUENDAPO J**Heard:** 30 July 2012**Delivered:** 15 October 2012

**Flynote:** Appeal - against sentence - Imposition - Factors to be taken into account - offer of reimbursement to complainant - ignored - position of trust - aggravating factor - first offender - factor to be considered - but not entitlement to escape term of imprisonment - breadwinner should have considered family before resorting to crime - when is an appeal court entitled to interfere - court failed to exercise its discretion judiciously.

**Summary:** Appeal - against sentence - Imposition of: - Factors to be taken into account. - The fact that the appellant has offered to reimburse the complainant is a factor to be taken into account when sentencing - ignorance of its irregularity - position of trust - first offender - The fact that the offender was in position of trust and used her privilege to abuse the trust is an aggravating factor. Being a first

offender is a factor to be considered but does not entitle her to escape a term of imprisonment. Where such offender breadwinner - she should have considered that by resorting to crime she was placing her family well being in jeopardy - When an appeal court will interfere - when the trial court has misdirected itself on the facts or the law- an irregularity in the proceedings has taken place - The trial court failed to take into account material facts or overemphasized the importance of other facts; - The sentence imposed is startlingly inappropriate, induces a sense of shock or a striking disparity exists between the sentence imposed by the trial court and that which would have been imposed by the court of appeal - The fact that the court *quo* ignored the appellant's offer to reimburse the complainant is an irregularity which amounts to a misdirection - the sentence of 4 years of which 1 year is suspended for 5 years on certain conditions to a first offender who pleaded guilty and offered to reimburse complainant is startlingly inappropriate and induces a sense of shock. Appellant established justifiable grounds for court to interfere because the court *quo* has failed to exercise its discretion judiciously.

---

### ORDER

---

The appeal against sentence succeeds.

The sentence imposed by the learned magistrate is set aside and substituted with the sentence of 2 Years' imprisonment of which 1 year is suspended for 5 years on condition that the accused is not convicted of theft committed during the period of suspension. The sentence is antedated to 27 February 2012.

---

### JUDGMENT

---

SHIVUTE J (NDAUENDAPO J concurring):

[1] The appellant was convicted of theft in the magistrate's Court Windhoek upon her own plea of guilty. She stole cash in the amount of N\$31 656,64 from her employer. She was sentenced to a term of imprisonment of four years of which one year was suspended for five years on certain conditions. She now appeals against sentence.

[2] The appellant is represented by Mr Isaacks and Mr Kumalo appears on behalf of the Respondent.

[3] The appellant's grounds of appeal as articulated by her legal representative are that:

The sentence imposed by the court is shockingly inappropriate, in that it induces a sense of shock; the court erred in overemphasising the nature of the offence and the deterrent effect of the sentence and in doing so the court failed to individualise the sentencing of the appellant; and attaching too little weight to the mitigating factors.

[4] It is trite that sentencing is a matter for the discretion of the trial court and a court of appeal will only interfere with the sentence where –

- (a) The trial court has misdirected itself on the facts or law;
- (b) An irregularity which was material occurred during the sentence proceedings;
- (c) The trial court failed to take into account material facts or overemphasized the importance of other facts;
- (d) The sentence imposed is startlingly inappropriate, induces a sense of shock and where there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.

*S v Tjiho* 1990 NR 361 at 366

Both counsel have referred this court to the guidelines when a Court of appeal may interfere with the sentence as stated above.

[5] The appellant was employed as an account clerk by the complainant hence she stole from her employer. She gained a reasonable salary of N\$4000 per month. She stole the money from March 2011 till February 2012. She is 24 years old; single, mother of a son of age 2. She is the only breadwinner; first offender; and stole because she had financial problems. Although she was unemployed, she offered to pay back the money in two installments or to pay a fine of N\$10 000. The court chose to ignore it.

[6] It is trite that an offer to reimburse the victim of a crime is a factor which the court should have considered when imposing sentence.

*S v Clay* 1996 NR (NAHC) 184 at 186 F.

[7] The learned magistrate emphasized the seriousness of the offence as well as the prevalence of the offence and the fact that the accused stole from her employer which in my view she is entitled to do so. However, she paid lip service to the fact that the appellant was a first offender who pleaded guilty and offered to reimburse the complainant.

[8] In my view the fact that the court *a quo* ignored the appellant's offer to reimburse the complainant and that she is a first offender who pleaded guilty to the charge and did not waste the court's time the appellant has established justifiable grounds for me to interfere with the sentence imposed by the court *a quo* because it failed to exercise its discretion judiciously. The sentence of 4 years imprisonment of which 1 year is suspended for five years in the circumstances appears to me to be severe, inappropriate and it induces a sense of shock.

[9] Having said that, the sentence imposed is startlingly inappropriate I am entitled to consider the sentence afresh. I do not lose sight of the fact that the appellant was in a position of trust and has used her privilege position to steal from her employer and abused the trust. In a circumstance like this one although the appellant is a first offender she has been engaged in a concerted plan to dispossess

her employer. Again the fact that she is a sole breadwinner with a minor child of 2 years, she could have considered that by resorting to crime she was placing the well being of her family in jeopardy.

[10] Having considered the above factors, I am of the opinion that the term of imprisonment is inevitable, to mark publicly the gravity of the offence to send a message to would be offenders.

[11] In the result the following order is made.

The appeal against sentence succeeds.

The sentence imposed by the learned magistrate is set aside and substituted with the sentence of 2 Years' imprisonment of which 1 year is suspended for 5 years on condition that the accused is not convicted of theft committed during the period of suspension. The sentence is antedated to 27 February 2012.

-----

N N Shivute  
Judge

-----

G N Ndauendapo

6  
6  
6  
6  
6

Judge

APPEARANCES

APPELLANT:

Mr Isaacks

Of Isaacks and Benz Inc., Windhoek

RESPONDENT:

Mr Kumalo

Of Office of the Prosecutor-General Windhoek.