



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CA 24/2015

**MAYUMBELO MACHINGA**

versus

**THE STATE**

**Neutral citation:** *Mayumbelo v State* (CA 24-2015) [2015] NAHCMD 188 (11 August 2015)

**Coram:** LIEBENBERG, J *et* SHIVUTE, J

**Heard:** 20 July 2015

**Delivered:** 11 August 2015

**Fly note:** Appeal against – Sentence – Appellant jointly charged with two others – Appellant’s co-accused persons in position of trust – Not apparent from record that appellant in similar position – All accused persons sentenced to same sentence – Magistrate misdirecting himself by not drawing a distinction between a person in position of trust and the one who was not – Misdirection also not to reflect youthfulness of appellant in the sentence – Sentence vitiated by misdirection and set aside – Appellant’s appeal upheld and fresh sentence imposed.

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**ORDER**

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(a) The appeal is upheld.

(b) The sentence of five (5) years' imprisonment of which two (2) years are suspended for a period of five (5) years on condition that the accused is not convicted of theft committed during the period of suspension imposed by the court *a quo* is set aside and replaced with the following sentence:

'Three (3) years' imprisonment of which one (1) year is suspended for five (5) years on condition that the accused is not convicted of theft committed during the period of suspension.'

(c) The sentence is antedated to 9 February 2015.

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## JUDGMENT

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### **SHIVUTE J (LIEBENBERG, J concurring):**

[1] The appellant was jointly charged with two others in the Katima Mulio Magistrate's Court of theft of goods valued at N\$22565.30

[2] They all pleaded guilty and were convicted as charged. The appellant's co-accused persons were working for the complainant. They were each sentenced to five (5) years' imprisonment of which two (2) years are suspended for a period of five (5) years on certain conditions.

[3] Aggrieved by the sentence imposed on him, the appellant now appeals against such sentence. Mr Kamwi argued the appeal on behalf of the appellant while Mr Muhongo appeared on behalf of the respondent.

[4] The grounds of appeal may be summarized as follows:

The learned magistrate misdirected himself or erred in law and or in fact:





[7] On the other hand, counsel for the Respondent argued that the *court a quo* was justified by treating the offence of theft as a serious one and by imposing a stiffer sentence. Furthermore, the fact that there was no economic loss to the victim as all the stolen goods were recovered does not diminish the seriousness of the offence.

[8] Concerning the alleged overemphasis of the deterrent purpose of punishment, counsel argued that a balance approach was normally required but courts are justified in certain instances to attach more weight to some aims of punishment or to emphasis one or more factors at the expense of other sentencing considerations. In the present matter, it is counsel's submission that the court was justified to attach more weight to deterrence due to the prevalence of the offence of theft and the substantial value of the property involved.

[9] As to the option of a fine suggested by the appellant, counsel argued that a fine would not do justice in the circumstances as the appellant indicated that he could only afford to pay N\$600 and imprisonment is not an unrealistic sentence in relation to the offence committed having due regard to all relevant factors to sentencing. Counsel referred us to several authorities which we have considered.

[10] Sentencing is pre-eminently a matter for the trial court and that a Court of Appeal would only be entitled to interfere with a sentence where the trial Court exercised its discretion improperly.

(*S v Van Wyk* 1993 NR 426 SC at 447G.)

[11] Counsel for the appellant argued that the appellant was supposed to be afforded an opportunity to pay a fine. However, from the record it is clear that the trial court did not consider an option of a fine because the accused said he could only afford to pay N\$600. Considering the value of the property involved, a fine of N\$600 would amount to an injustice in the circumstances. I am of the view that the circumstances of the case called for a custodial sentence and there is no misdirection on the part of the magistrate in imposing a custodial sentence. Therefore, the ground based on the decision not to impose a fine cannot succeed.

[12] Although the learned magistrate stated that the appellant was a youthful offender, this factor does not appear to have been taken into account in the sentence imposed as the appellant was given the same sentence as the one imposed on the older co-accused persons.

[13] With regard to the ground that the magistrate misdirected himself by imposing the same sentence on the appellant as that imposed on his co-accused persons, I agree with counsel for the appellant that the learned magistrate neglected to draw a distinction between the appellant and his co-accused persons. His co-accused persons were in a position of trust. One was a security guard who was entrusted with the responsibility of protecting the property and the other was an employee of the business against which the offence was committed. It is not apparent from the record that the appellant was also in a position of trust. By stealing from their work place the co-accused persons clearly breached the trust placed upon them by their employer and it appears that they deserved stiffer punishment than the appellant. The trial court

therefore misdirected itself in not drawing a distinction between the appellant who was not in a position of trust and his co-accused who were. In view of this finding, a significant reason exists justifying interference with the sentence imposed on the appellant. In light of the conclusion arrived at, it is not necessary to deal with the remaining ground of appeal or the argument advanced in relation to it. The sentence imposed by the learned magistrate cannot be allowed to stand and this court is at large to consider a fresh sentence.

[14] The appellant was 23 years old and a first offender who pleaded guilty to the charge thereby saving the trial court valuable time. He admitted to have participated in the theft. The stolen food stuff has all been recovered. On the other hand theft is a relatively prevalent offence and the amount involved is substantial. As already stated, a custodial sentence was called for. In the circumstances, I would consider three (3) years' imprisonment of which one (1) year is suspended for five (5) years on condition that the accused is not convicted of theft committed during the period of suspension to be an appropriate sentence.

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

(a) The appeal is upheld.



(b) The sentence of five (5) years' imprisonment of which two (2) years are suspended for a period of five (5) years on condition that the accused is not convicted of theft committed during the period of suspension imposed by the court *a quo* is set aside and replaced with the following sentence:

'Three (3) years' imprisonment of which one (1) year is suspended for five (5) years on condition that the accused is not convicted of theft committed during the period of suspension.'

(c) The sentence is antedated to 9 February 2015.

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**N N Shivute**  
**Judge**

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**J C LIEBENBERG**  
**Judge**

APPEARANCES

APPELLANT: Mr Kamwi  
Sibeya & Partners Legal Practitioners

RESPONDENT: Mr Muhongo  
Office of the Prosecutor-General



