

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 33 /2017

THE STATE

v

IITA MUNDONDONGA

FIRST ACCUSED

IMMANUEL KAPUKU

SECOND ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1245/2016)

(MAGISTRATE'S SERIAL NO. 53/2015)

Neutral citation: *S v Mundondonga* (CR 33 /2017) [2017] NAHCMD 137
(12 May 2017)

Coram: LIEBENBERG J et SHIVUTE J

Delivered: 12 May 2017

ORDER

- a) The conviction on contravening s 27 (1) in respect of each accused is set aside and substituted with conviction on prohibition of hunting huntable game in contravention of s 30 (1) of Ordinance 4 of 1975.
 - b) The sentence is confirmed but amended to read:
A fine of N\$1000 (One thousand Namibia Dollars) or 6 (six) months' imprisonment each.
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REVIEW JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

[1] The accused persons were convicted of hunting protected game, namely an Eland in contravention of section 27 (1) read with subsecs 1, 27(2), 85, 87 and 89 (A) of the Nature Conservation Ordinance 4 of 1975, as amended and further read with subsecs 90 and 250 of 51 of 1977.

[2] I directed the following query:

'Is Eland a protected game? Furthermore, the accused persons were sentenced to 'N\$1000 (One Thousand Namibia Dollars) or six (6) months' imprisonment.' The sentence appears to be vague. Does this mean that both accused persons will pay N\$1000 sharing N\$500 each or does it mean that each accused will pay N\$1000?'

[3] The learned magistrate replied as follows:

'According to Schedule 4 of the Nature Conservation Ordinance 4 of 1975 an Eland is Protected Game. However, further guidance from the Honourable Justice will be highly appreciated.

The accused persons were sentenced to N\$1000 (One thousand Namibia Dollars) or six (6) months' imprisonment each. The order made on Namcis proves that each accused person was sentenced accordingly; however I omitted to type it on the record.

It was a complete oversight on my side to which I wish to apologize to the Judge accordingly; the same will not repeat itself.'

[4] In terms of schedule 5 of the Ordinance, an Eland is neither specially protected nor protected game. Therefore the sections under which he was charged and convicted were clearly wrong.

[5] The accused was supposed to be charged with the prohibition of hunting huntable game in contravention of s 30 (1) (c) of Ordinance 4 of 1975.

[6] Since the accused persons were charged with and convicted of contravening the wrong sections of the applicable statute, the conviction cannot be allowed to stand. It also follows that the sentence imposed is not competent. The reviewing court is competent to amend a charge sheet if the accused persons could not possibly be prejudiced by it. See *S v Karenga* 2007 (1) NR 135 (HC) para 6. In this matter, the accused persons admitted all the elements of the offence under s 30 (1) and no prejudice is to be suffered by them, if the charge sheet is amended.

[7] As the accused persons have already served the sentence, there is no need to remit the matter back to the learned magistrate.

[8] In the result, the following order is made:

- a) The conviction on contravening s 27 (1) in respect of each accused is set aside and substituted with the conviction on prohibition of hunting huntable game in contravention of s 30 (1) of Ordinance 4 of 1975.
- b) The sentence is confirmed but amended to read:
A fine of N\$1000 (One thousand Namibia Dollars) or 6 (six) months' imprisonment each.

N N Shivute

Judge

J C Liebenberg

Judge