REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 115/2016

In the matter between:

ENRICH KAMBUEZA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kambueza v S* (CA 115-2016)[2017]NAHCMD 34 (10 February 2017)

Coram: LIEBENBERG J and USIKU J
Heard: **27 Jaunary 2017**
Delivered: **10 February 2017**

Flynote: Criminal procedure – Appeal – Sentence – Theft – Accused convicted of theft of cash of N$20 000 and sentenced to 36 months' imprisonment – Alleged on appeal that a fine should have been imposed instead – No misdirection committed by trial court – Accused in position of trust as he stole from employer – Previous conviction of housebreaking with

intent to steal – Deterrence as sentencing objective emphasised – Sentence imposed not startlingly inappropriate – No striking disparity between the sentence imposed and what court of appeal would have imposed.

Summary: The accused was convicted of theft of N$20 000 in cash which he stole from his employer. He was sentenced to 36 months' imprisonment and on appeal contends that the trial court misdirected itself as a fine should have been imposed instead of a term of imprisonment. In sentencing the court was of the view that a deterrent sentence was called for to deter the accused and other likeminded persons to commit similar crimes. The accused has one previous conviction of housebreaking with intent to steal which the court was entitled to take into account at sentencing. Court of appeal satisfied that the circumstances of the case are such that direct imprisonment is the only appropriate punishment. The sentence imposed is not found to be startlingly inappropriate and neither is there any striking disparity between the sentence imposed and what the court of appeal considers to be appropriate. Appeal against sentence dismissed.

ORDER

The appeal against sentence is dismissed.

JUDGMENT

LIEBENBERG J (USIKU J concurring):

[1] Appellant was arraigned in the magistrate's court for the district of Swakopmund on a charge of theft of cash to the amount of N$20 000. He was convicted on a plea of guilty and sentenced to 36 months' imprisonment. He now appeals against the sentence imposed.

[2] Two grounds are tabulated in the notice of appeal namely, that the merits of the case were over-emphasised which resulted in the court imposing a custodial sentence, secondly, there is a real possibility that another court would have imposed a fine.

[3] Appellant argued his appeal in person and the court during oral submissions informed him that the first contention is vague and clearly does not satisfy the requisites set by Rule 67(1) of the Magistrate's Court Rules, namely that grounds of appeal must be set out clearly and specifically in the notice of appeal.[1] Appellant did not pursue his appeal on this ground any further but argued the matter on the second ground, essentially praying for the sentence to be substituted with a fine.

[4] For appellant to succeed on this ground the court of appeal must be satisfied that '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 a court of appeal'.[2]

[5] At the stage of sentence the appellant was 22 years of age, single and unemployed. He has one child of 18 months and his girlfriend is pregnant. He was employed by the complainant, from whose account he unlawfully on diverse occasions withdrew cash to the sum of N$20 000. Appellant has one previous conviction in that he in November 2010 was convicted of the offence of housebreaking with intent to steal and theft and sentenced to a custodial sentence, wholly suspended on condition of good conduct. This was a factor the trial court in sentencing was entitled to take into account in aggravation of sentence.

[6] From a reading of the court *a quo's* reasons on sentence it is evident that the court considered the main principles applicable to sentencing and was equally cognizant of the objectives of punishment referred to and endorsed in

---

[1] *S v Gey van Pittius and Another* 1990 NR 35 (HC) at 36H.
[2] *S v Tjiho* 1991 NR 361 (HC) at 366A-B.

S v Van Wyk.[3] The court was of the view that in the circumstances of the case a deterrent sentence was called for, moreover because the appellant stole from his employer with whom he stood in a relation of trust; a position he misused to enrich himself. Appellant is not a first offender and he, as well as other likeminded criminals, had to be deterred from stealing the hard earned properties of innocent citizens.

[7] Given the seriousness of the offence and the particular circumstances under which it was committed, considered against the personal circumstances of the appellant who has had one previous brush with the law and seemingly did not learn from his mistakes, it seems to me inevitable to come to the conclusion that a sentence of direct imprisonment was the only suitable punishment open to the court below. I am therefore unable to fault the trial court in coming to the same conclusion and this is clearly not an instance where a fine should have been imposed.

[8] Appellant did not attack the severity of his sentence of 36 months' imprisonment and even if he had, I do not in the circumstances of the case find it startlingly inappropriate, neither that there is a striking disparity between the sentence imposed by the trial court and what this court would have imposed, had it sat as court of first instance. There is accordingly no basis in law to interfere with the sentence imposed by the trial court.

[9] In the result, the appeal against sentence is dismissed.

_____

JC LIEBENBERG

JUDGE

[3] 1993 NR 426 (SC) at 448B-D.

_____

D USIKU

JUDGE

APPEARANCES

APPELLANT	In person.
RESPONDENT	M Olivier Of the Office of the Prosecutor-General, Windhoek.