

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

<b>Case Title:</b> <i>The State v Nalwendo Yusiku, Nawa Nosiku and Kutunga Kapu</i>	<b>Case No:</b> CR 49/2020
<b>Heard before:</b> Honourable Ms Justice Usiku Honourable Mr Justice Unengu	<b>Division of Court:</b> Prison Division
<b>Neutral citation:</b> <i>S v Yusiku</i> (CR 49/2020) [2020] NAHCMD 295 (17 July 2020)	<b>Delivered on:</b> 17 July 2020
HIGH COURT MAIN DIVISION REVIEW REF NO. 742/2020)	
<b>Neutral citation:</b> <i>S v Yusiku</i> (CR49/2020) [2020] NAHCMD 295 (17 July 2020)	
<b>The order:</b>  a) The sentence imposed by the learned magistrate is set aside and substituted with the following sentence.  b) A fine of N\$50,00 or six months imprisonment. The sentence is ante dated to 11 February 2020.	
<b>Reasons for order:</b>  USIKU J (concurring Unengu AJ)  [1] The matter came before me on review in terms of s 302 of the Criminal Procedure Act, where after I directed the following query to the learned magistrate.  [2] The accused was convicted of possession of housebreaking implements contravening s 9 (1) of Proclamation 17 of 1920.	

[3] Upon conviction the accused was sentenced to pay a fine of N\$300 or in default of payment three months imprisonment.

[4] The learned magistrate was queried whether the sentence imposed by him was a competent one.

[5] In his response to the query the magistrate answered as follows:

‘First and foremost the magistrate would like to apologise for the record reaching the High Court without the pages being numbered and the magistrate date of appointment wasn’t affixed on the typed charged sheet. These omissions have since been attended to.

The sentence imposed is that of N\$300 in default of payment three months imprisonment, in addition the hammer and the chisel are forfeited to the state.

The sentence clearly exceeds the penalty provisions as per what was stated in the case of *S v Kamati* CR 12/2019 [2019] NAHCMD 25 (28 February 2019) it was stated that “penalty provision was summarised by Van Niekerk J in *S v Kamadulunge* 2007 (2) NR 608 (HC) as follows: the maximum sentence provided for by Proclamation 27 of 1920 is a penalty of £20 (i.e. N\$40) or in default of payment imprisonment for a period not exceeding six months with or without hard labour or to either such penalty or such imprisonment. By virtue of the provision of s 281 of the Act, a fine of N\$40 is considered to be a fine of N\$50 and the imprisonment with or without hard labour is construed to be a reference to imprisonment only. The effect therefore is that the maximum sentence is one of a fine of N\$50 or six months imprisonment.

The magistrate herein was mistaken with the wording of the act. According to the above mentioned case, the penalty clause calls for a fine not exceeding N\$50, as such a sentence which reads N\$300 or three months imprisonment, is one which clearly exceeds the penalty clause and it cannot be a competent one and allowed to stand.

I pray that the sentence be set aside and a competent one be inserted.’

[6] The concessions made by the learned magistrate are correct and as a result the sentence imposed cannot be allowed to stand. The matter referred to by the magistrate is a case in point.

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

- a) The sentence imposed by the learned magistrate is set aside and substituted with a sentence of a fine of N\$50, 00 or six months imprisonment.
- b) The sentence is ante dated to 11 February 2020.

<b>D N USIKU</b> <b>JUDGE</b>	<b>E P UNENGU</b> <b>ACTING JUDGE</b>