

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case no: HC-MD-CRI-APP-CAL-2023/00002

In the matter between:

**HIKUAMA KATEZUA  
PETRUS LAZARUS**

**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Katezua v S* (HC-MD-CRI-APP-CAL-2023/00002) [2023] NAHCMD  
826 (15 December 2023)

**Coram:** January J *et D* Usiku J

**Heard:** 17 July 2023

**Delivered:** 15 December 2023

**Flynote:** Criminal Procedure – Appeal – Conviction and Sentence – Stock theft – State proved its case beyond reasonable doubt – Trial court correct to reject both appellants' versions - Convictions confirmed.

Sentencing – Punishment pre-eminently a matter for the discretion of the trial court – Court *a quo* did not properly weigh all factors applicable to sentencing – Misdirection found – Sentence set aside and substituted with another sentence.

**Summary:** The two appellants were charged with stock theft taking into consideration of the provisions of s 11(1)(a), 1, 14 and 17 of the Stock Theft Act 12 of 1990, as amended. They pleaded not guilty and remained silent. After evidence was led, they were each convicted. The convictions are confirmed. The matter was referred to the Regional court for sentence and they were sentenced each to 18 years' imprisonment. The sentencing magistrate did not properly consider their personal circumstances, paid lip service to it, over-emphasized the deterrence aspect of sentencing and failed to show mercy. The appeal court interfered, set aside the sentence and sentenced the appellants to 10 years' imprisonment each of which two years are suspended on conditions.

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## ORDER

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1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence of 18 years' imprisonment imposed on each appellant is set aside.
4. The appellants are each sentenced to 10 years imprisonment of which two years are suspended for five years on condition that each appellant is not convicted of stock theft, committed during the period of suspension.
5. The sentences are back dated to 10 September 2021.

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## JUDGMENT

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JANUARY J (USIKU J concurring)

### Introduction

[1] The appellants were charged in the Gobabis Magistrates Court on one count of stock theft taking into consideration the provisions of s 11(1)(a), 1, 14 and 17 of the Stock Theft Act 12 of 1990, as amended.

[2] The allegations were that, upon or about the 30<sup>th</sup> day of January 2019 and at or near Farm Labora Unit B, Steinhausen area in the district of Otjinene the accused did unlawfully and intentionally steal stock, to wit 11 cattle valued at N\$99 000 (N\$9 000 each) the property of or in the lawful possession of George Mayumbelo.

[3] Both appellants pleaded not guilty. The first appellant was represented by Mr Mugale in the court *a quo* and the second appellant by Mr Kahungu. In this court the first appellant is represented by Mr Scheepers and the second appellant by Mr Shikwa. The respondent is represented by Mrs Esterhuizen.

[4] Both appellants opted not to give plea explanations and put the State to the proof of all the allegations.

[5] The State called seven witnesses and the appellants testified in their own defence without calling any witnesses. The appellants were eventually convicted in the Gobabis district court on 10 September 2021. The case was thereafter transferred to the Regional court for sentence. They were each sentenced to 18 years' imprisonment

on 18 October 2021. The notice of appeal was filed on 01 November 2021, well within time.

### The grounds of appeal

[6] The first appellant's grounds of appeal are as follows:

#### Ad conviction

1. The court erred in fact by finding the appellant knew that the cow was stolen, as this finding is not supported by the evidence.
2. The court erred in law by rejecting the appellant's version of events when considering the totality of evidence; that same is reasonably possibly true.
3. The court erred in law when it failed to give the appellant the benefit of the doubt as the appellant's version of events were reasonably possibly true in the circumstances.

#### Ad sentence

1. The imprisonment term imposed by the court in the prevailing circumstances are shockingly inappropriate.
2. The court unjustifiably overemphasised the seriousness of the offence at the expense of mitigating circumstances.

[7] The second appellant's ground of appeal are:

#### Ad conviction

1. The learned magistrate misdirected herself, alternatively erred in law and/or in fact by finding that the elements of the offense contained in the charge sheet have been proved beyond reasonable doubt, particularly;
  - 1.1 That appellants appropriated 11 cattle valued at N\$99 000 the property of the complainant. This is despite the fact that none of the State witnesses has actually physically seen appellant appropriating the said cattle or found in possession of such.
  - 1.2 That the evidence of State witness 2 alone, was sufficient to convict the appellant, despite that there is no evidence on record of a cell phone call which was allegedly made by the appellant to the State witness 2
  - 1.3 That she has wrongly referred to the appellant as having offloaded the cattle at farm Labora, while there is no evidence to this effect (particularly that State witness 2 said he never saw the appellant apart from the phone call). This has been repeated throughout the judgment.
  
2. The learned magistrate misdirected herself, alternatively erred in law and/or in fact by finding appellant guilty by having applied the doctrine of common purpose, while the requirements of the said doctrine are not met, particularly that there is no evidence on record that appellant was present at any scene or acted together or in consent with any other person to appropriate the complainant's cattle.
  
3. The learned magistrate misdirected herself, alternatively erred in law and/or in fact by finding that the only reasonable inference to be drawn from the evidence led in respect of appellant's conduct is that he is guilty as charged in that he has the characteristics of a thief, that she accepted the evidence of State witness 2, to constitute proof beyond doubt, while it is not validated that it was indeed the appellant who called him (it can be anybody else).

4. The learned magistrate misdirected herself. Alternatively erred in law and/or in fact by rejecting the appellant's (version) as false beyond reasonable doubt, despite the fact that appellant's version has been collaborated (sic) by the fourth State witness.

### The evidence

#### State`s case

#### *Complainant*

[8] The complainant testified that he is a farmer on a resettlement farm Labora where he farms with cattle. The farm is situated in the Epukiro area. It is divided in three portions with him on one portion, Toivo Andreas on another portion and the late Mr Kandombo who occupied the third portion. The witness did not know the first appellant but knew the second appellant because he was employed by the witness as a foreman since about 2007. The second appellant was responsible for the whole farming operations because the complainant is a part-time farmer.

[9] Late one evening, the complainant was called by Mr Toivo Andreas who informed him that seven cattle were loaded and driven on a trailer from the direction of his farm towards the direction of Mr Kandombo's farm with the latter's motor vehicle. Mr Toivo tried to stop the vehicle with the trailer. The driver was apparently reluctant to stop but eventually stopped. Upon inspection, Mr Toivo discovered seven cattle in the trailer and took photos thereof. The photos were forwarded to the complainant who identified the cattle as his on their breed type, earmarks and brand marks. The witness identified the photos in court from a bundle of photos handed up, by comparing them to photos on his cell phone which were forwarded from Mr Toivo. Mr Toivo informed the witness that he tried to phone the police to no avail.

[10] The complainant phoned the second appellant who seemed not to care about the situation. The second appellant was simply giggling and laughing. The witness testified that another four of his cattle were later found with the brand marks having been tampered with. In total, 11 cattle were missing of which only four were recovered. The complainant drew sketches of the appearance of his earmarks, wrote down his brand mark as OGM with the M under the OG. He handed up his meat board membership card reflecting the same letters, OGM as his brand mark, as an exhibit. He stated the value of his cattle as N\$9000 per head. The complainant did not give any right or permission to anyone to possess his cattle. (p325 continues at p166 of copy in front of record) The witness testified that, when he decides to sell animals, he personally selects them, writes down their ear tag numbers and isolates them in a particular camp. He did not give permission for his animals to be sold.

[11] The witness further testified that he and the late Kandombo farmed separately and their cattle did not mix. The cattle only mixed if somebody herded them from his farm to Kandombo's farm. The complainant only had his cattle drink water on the farm of Mr Toivo at times. He testified that the brand marks of his cattle in issue were tampered with and ear tags were removed. New brand marks were re-branded over the complainant's brand marks.

[12] Cross-examination on behalf of the first appellant was brief. The witness testified in cross-examination that he is quite familiar with farming in the Otjinene/Gobabis district. He confirmed that many other cattle in the area have ear marks but he emphatically stated that he knows his particular ear mark.

[13] During cross-examination on behalf of the second appellant, the complainant confirmed that the second appellant was the foreman on the farm. Further, the witness confirmed that the second appellant appeared careless when he was confronted with the situation of possible theft of stock. The witness confirmed that he was disappointed in the behaviour of the second appellant. He conceded that some of his testimony does

not appear in his witness statement to the police. He speculated that the cattle were pushed/driven to the farm of Mr Karamata from where they were loaded onto the trailer.

[14] It was put to the complainant, upon instruction from the second appellant, that he spoke to the complainant in a nice manner, the complainant denied that and repeated that the second appellant acted strange, giggling and laughing, expressing no concern when the possibility of stock theft was brought to his attention. The second appellant did not speak politely according to the witness. It was put to the complainant that the second appellant phoned the police and later handed himself to the police. The witness denied that. It was lastly put to the complainant that second appellant denies any involvement.

*Henry Nguvitjita Kandombo*

[15] The second witness was Henry Nguvitjita Kandombo, the son of the late Kandombo who occupied the third portion of the resettlement farm. He had been staying at farm Labora for five years at the time. In 2019 he was staying on the farm. He knows the first appellant for about a year from seeing him at his late father's farm and the second appellant he knows as also staying on the same farm Labora.

[16] He testified that on 28 January 2019, the second appellant called him and stated that the late Kandombo instructed him to bring 11 cows to the farm where the witness was. The second appellant brought the cattle to be put in a kraal and told him that he will give the cattle to late Kandumbo. His late father called the witness the next day stating that he will send a motor vehicle to collect the cattle on the Wednesday. The motor vehicle driven by the first appellant, arrived with a trailer on the Wednesday. The witness and the first appellant went to search for the cattle in a camp as they were not in the kraal. When they found the cattle, it was already dark. They drove them into a kraal/manga. The two of them branded all the cattle gathered and loaded five of them into the trailer. Six of the cattle could not fit into the trailer. His late father phoned him



the same night and instructed him to drive the remaining cattle and put them in the camp of a certain Kahorere. The witness accordingly complied and put the cattle in Kahorere' camp the following morning.

[17] The witness further testified that his father told him that he bought the cattle. The second appellant told him that he will take the cattle to the witness's father. The cattle had yellow ear tags with an OGM brand mark. The witness knew that the brand mark, OGM, belonged to the complainant. The cattle were a mix of Brahman and Bonsmara. All the collected cattle were brand marked. The witness knew that the cattle belonged to the complainant and knew at which farm the complainant was farming.

[18] The witness stated that the first appellant brought the brand iron that was used to re-brand the cattle. The witness wrote down the brand mark in court as S161F with a sketch. He stated that the re-branding was done at night between 19h00 and 20h00. The witness stated his father's brand mark as SKK. The witness was not instructed by his late father that the cattle should be re-branded. The first appellant is the one who came with the brand iron and instructed the re-branding. He confirmed that the new brand was done over an existing brand mark. The ear tags were also cut out and burned. When the witness enquired why the ear tags should be burned, the first appellant said he should not ask a lot of questions. About 9 out of 11 cattle had ear tags which were removed.

[19] They only loaded five cattle as the other six did not fit onto the trailer. The witness's father told him the next day to chase the remaining six cattle to Kahorere's farm. The cattle were chased to farm Westbank (Witbank). The witness identified the cattle on photos that were before court.

[20] In cross-examination, the witness stated that the motor vehicle and trailer belonged to his late father. He identified his witness statement to the police. He was confronted with his evidence in court compared to the witness statement and that much

of the evidence that he testified about was not in the statement. He gave a plausible explanation that the police did not ask him about it. He conceded that his late father is the one who gave instructions that the cattle should be loaded to do.

[21] In cross-examination on behalf of the second appellant, the witness stated that he was called by the second appellant to gather the cattle. The second appellant brought the cattle there with a horse. He confirmed that he, the second appellant and one Seun van Wyk re-branded the cattle. The witness denied that he partook in any criminal activity but did what he was instructed.

[22] In re-examination, the witness indicated that his father only told him that he will send someone with a car.

*Andreas Tiovo*

[23] Andreas Tiovo is also farming at farm Labora, which borders the farm of the complainant and the farm of the late Mr Kandombo. The witness does not know the first appellant but remembers meeting him once, while he was transporting some of the cattle in question. He knows the second appellants as an employee of the complainant. He testified that a motor vehicle with a trailer passed his house one day at around 12h00 in the direction of the complainant's farm and the farm of the late Kandombo. The motor vehicle and trailer returned around 22h00 at night. The witness observed some things carried in the trailer. He tried to stop the motor vehicle. The driver, however, did not stop but kept on driving. The witness realised that there were cattle on the trailer.

[24] He followed the motor vehicle and trailer with his motor vehicle, flashing with his lights for the vehicle in front to stop, it however did not. He overtook the vehicle and forced it to stop. When he confronted the driver, who turned out to be the first appellant, he said that the animals were for the late Kandombo. The witness observed that there were no ear tags on the animals and enquired about it. The first appellant showed him

new ear tags which were inside the motor vehicle. The witness asked to be shown the ear tags that were removed, but the first appellant did not answer him but instead started to shake/shiver.

[25] The witness eventually took photos of the cattle at the back of the trailer. There were seven cattle on the trailer. He realised that the cattle belonged to the complainant. He unsuccessfully tried to call the complainant whereafter he called the second appellant who was known to him. The second appellant informed him that he was in Gobabis. When the second appellant was informed of the suspected stolen cattle, he responded: 'Oh my God, trouble has come!'

[26] The witness later on got a hold of the complainant via his wife`s cellphone and informed him about the incident. In the meantime the first appellant rushed into the car and drove away when the witness informed him that the police will be called. Whereafter witness went back home. He phoned the police, reported the incident and drove to the police station. He met the police on his way and sent the photos of the cattle that he took to the police. The witness identified the cattle as those belonging to the complainant on the brand mark and ear marks. There was a new brand mark over the original brand marks of the complainant reflecting S16 and a letter that was not clear. It was, however not the brand mark of the late Kandombo. The witness confirmed that his animals and those of the complainant sometimes drank water at his water point. He also stated that the first appellant informed him that he was taking the cattle to the late Kandombo`s farm.

[27] The witness further testified that one is not allowed to transport animals at night. In addition, he testified that normally when the complainant sold animals, they were loaded at the witness`s loading bank as it is the only one for his farm, the complainant`s farm and the late Kandombo`s farm.

[28] The witness testified that at some stage afterwards, he went with the police to Mr Kahorere`s farm, farm Witbank. They found four animals on this farm belonging to the complainant. The brand marks of these animals had also been tampered with.

[29] In cross-examination, the witness conceded that other animals in the area also had earmarks but was quick to add that it is not the same earmark. Further, he confirmed his evidence in chief. The witness was confronted with the fact that his statement to the police contained less information than what he testified in court. It was alleged that this was new evidence. The witness denied this. The witness further denied that he had been coached to testify about facts that do not appear in his witness statement. He stated that all his evidence is related to the case and what he informed the police about.

*Seun van Wyk*

[30] Seun Van Wyk does not know the first appellant but knows the second appellant. On 27 January 2019, the second appellant sent the witness to collect cattle and kept them separate from other cattle. They chased the separated cattle in a kraal and was again sent to a cattle post by the second appellant who was the foreman on the farm of the complainant. The cattle belonged to the complainant. The witness at the time was employed by the complainant. He knows the brand mark and earmarks of the complainant and wrote the brand mark OGM on a piece of paper in court and explained how the ear marks appeared. The reason why the cattle were put in the kraal was for them to be taken to the cattle post. When the witness returned from the post, the separated cattle which were about 12 or 14 were no longer in the kraal. From that day he never saw these cattle again. They followed the cattle tracks from the kraal in the direction of Kandombo`s farm through a fence that was cut nearby a gate. Six of the cattle were eventually found at farm Witbank. Four of the cattle belonged to the complainant. The ear tags of the cattle had been removed.

[31] There was no cross-examination on behalf of the first appellant. The sketches in relation to the brand marks and ear tags were then handed up as exhibits. The cross-examination on behalf of the second appellant centred more on the difference in the statement and his evidence in chief. Otherwise, he confirmed his evidence in chief. The witness confirmed that he did not see who removed the cattle after they were chased into the kraal.

*Chris Anton*

[32] Chris Anton was an employee of the late Kandombo. He knows the first appellant as someone who came to farm Labora with a motor vehicle and trailer. He did not see the second appellant although he knows him as he worked at one of the farms, in particular the complainant's farm. The witness was supposed to assist with the branding of donkeys and horses when the vehicle with the trailer arrived. The witness continued with other tasks. Later, the late Kandombo's son requested him to assist by making a fire and putting the brand iron in it. The son cut out the ear tags of the cattle and threw them into the fire. The first appellant and the son then branded the cattle with the brand iron that was heated in the fire. Thereafter five cattle were loaded. The son and the first appellant drove away and said that they would return to collect the rest of the cattle but never came back.

[33] The following morning, the witness noticed that the remaining cattle were missing. He observed the shoe prints of the son of late Kandombo around the kraal and where the cattle were taken out. Thereafter police came and took the witness to the kraal. The first appellant branded the cattle over an existing brand mark. He remembered the old brand mark as OGM from the farm of the complainant where the second appellant was working. The first appellant handed the brand iron to the witness to put it into the fire before the branding. The witness remembers the numbers 161 on the brand iron. The old ear tags of the cattle were cut out. Only five cattle were branded and the ear tags were removed. Five cattle were loaded onto the trailer. The other six cattle were put into a camp at farm Witbank after a fence was cut nearby the gate.

*Cst. Mingeneeko Japuirá*

[34] Cst. Mingeneeko Japuirá is a police officer from scene of crime who compiled the photo plan. He took photos of the suspected stolen cattle at farm Witbank. He also took a photo on one of the head of cattle before and after the shaving. The fresh brand mark S161F appeared and is clearly visible after the shaving of the cattle. The new brand mark was branded over an old brand mark reflecting separately and clearly as OGM which is unusual. The old brand mark reflected as OGM belonged to the complainant. The new brand mark belonged to the first appellant according to a certificate. In some of the photos the ear mark of the complainant as testified to by witnesses clearly reflects a hole where ear tags were removed. A photo of a calf identified as his by the complainant and which was on the trailer when stopped, also clearly reflects the brand mark S161F. This witness received some of the photos from the investigating officer.

[35] In cross-examination, the witness confirmed that the first appellant was not found in possession of the cattle he took photos of on farm Witbank. He confirmed that only two cattle were branded on the thigh while others were branded on the shoulder. The brand mark, S161F was not in dispute as belonging to the first appellant.

*Lesley Kairua*

[36] Lesley Kairua is the investigating officer in the matter. On 30 September 2019, he received a call from the charge office about stock theft at farm Witbank. The allegations were that there was a motor vehicle and trailer involved. He followed up and drove in the direction of the farm. It was at night and it was raining. Although he saw a motor vehicle and trailer at a distance, he could not reach them as the road was slippery. Eventually the complainant registered a case of stock theft of 11 head of cattle. The witness confirmed the testimony of witnesses in so far as what they told him and stated in their witness statements in relation to the case.

[37] The investigating officer testified that upon receiving information about the suspected stolen cattle at farm Witbank, he went there with Cst.Kavepura, an officer from scene of crime and the two appellants. He found six cattle in a kraal, shaved clean with the brand marks and showed them to the appellants. The first appellant confirmed the brand marks as his, but denied that the cattle belonged to him. The second appellant remained quiet and said nothing. The ear tags on the cattle were cut out. One calf was running around without its mother. After having shaved the cattle, the witness observed two brand marks on the thigh of some of them. It reflected a new brand mark as S161F and an older one, OGM, lower down on the thigh. The brand mark, S161F belonged to the first appellant and the one OGM belonged to the complainant. The complainant identified the cattle as his whereafter they were handed over to him with the consent of both appellants.

[38] The witness at a later stage established from the veterinarian office that the brand mark S161F belonged to the first appellant. The witness could not trace the other five cattle that were allegedly transported with the trailer. He obtained a warning statement wherein the first appellant denied having transported cattle. The first appellant, however admitted that he drove the motor vehicle after the late Kandomo instructed him to feed dogs.

[39] In cross-examination, the witness was confronted with the fact that other witnesses who were present when the cattle were loaded on the trailer, testified that there were seven cattle loaded on the trailer and that only five cattle were now missing. The witness conceded that the numbers did not tally to establish that 11 cattle were stolen. He further conceded that none of the cattle were found in possession of the first appellant. Further, the investigating officer did not find neither the trailer nor the motor vehicle in his possession.

Defence case

*First Appellant*

[40] The first appellant testified in his defence. He conceded that it is impermissible to brand over an existing brand mark. He denied having stolen the cattle in question. He testified that he was requested by the late Kandombo to assist in bringing cattle to his farm. Further, that he was directed to the place where the cattle was to be loaded. The late Kandombo provided a motor vehicle and trailer to him to use to transport the cattle. He stated that he knew the late Kandombo as a person who worked at the agricultural office in Epukiro Post 3 but did not personally know him, suggesting that Kandombo could have reproduced the brand iron. He stated that Mr Kandombo asked for assistance and that he promised to pay him.

[41] The first appellant testified further that he drove straight to the place where he was directed to and met with the son of Kandombo. The son informed him that the cattle were in the kraal and everything was done. He testified that the cattle were maybe already brand marked as he did not see any brand marking. He also did not see any ear tags being removed. He loaded five cattle and drove. When he drove through gates on the road, he was informed that there was a motor vehicle behind him trying to stop him. He stopped and was approached by Toivo, who asked him to whom the cattle belonged. He responded that they belonged to Kandombo. When questioned about the ear tags, he showed Toivo the new ear tags which were inside the motor vehicle. Toivo phoned Kandombo, came back to the first appellant and offered to let him go. He stated that he did not want to run away and that Toivo lied when he testified to that effect. He took the five cattle to Kandombo and received money.

[42] The first appellant further testified that he does not know how his brand mark came to be on the cattle. He stated that the son brand marked the cattle on instructions by his father, the late Kandombo. He stated that he never gave his brand iron to Kandombo or asked it from him. The appellant stated that Kandombo knew his brand mark because he processed applications in relation to brand marks. Therefore,



Kandombo knew all the first appellant's details. Further, it was his first time driving to the farm where the cattle were loaded.

[43] In cross-examination, the first appellant confirmed that he loaded the cattle. He, however did not know the brand mark of Kandombo. He testified that when he was confronted about the ear tags of the cattle, he pointed out new ear tags which were in the car. He stated that he did not establish that the cattle were without ear tags when he loaded them as he was just sent to load them. He did not have a permit to transport them. He confirmed that he drove through the complainant's farm to the farm of Kandombo, passing through the farm of Mr Toivo.

[44] He denied that he instructed anybody to make a fire to warm the brand iron as the fire was already burning. Further, he did not find any brand iron. He denied that he used his brand iron to brand the cattle. Further that he did not instruct anyone to cut out the ear tags. He stated that he did not challenge the persons who assisted in loading the cattle about his brand mark on the cattle, because the cattle did not have brand marks or numbers.

[45] After loading the five cattle he did not go back to load the remaining ones because Kandombo told him not to go back. He stated that he saw the cattle between 17h00 and 18h00 contrary to witnesses who testified that it was at night time. He disagreed that photos that were taken at night reflect that it was night time but that it was in the afternoon. He denied that he was stopped by Mr Toivo, but was emphatic that he stopped on his own accord when Mr Toivo approached him. Further, he testified that he did not know his co-accused before and only met him whilst in custody.

### *Second Appellant*

[46] Lazarus Petrus is the second appellant. He testified in his defence and denied that he stole 11 head of cattle from his employer, the complainant. He further denied

that he called Henry, the son of the late Kandombo, informing him that he brought 11 cattle to be collected. He denied having chased cattle through a fence. He confirmed that he was called by Toivo and informed about cattle being transported by the first appellant. At the time he was in Gobabis. He confirmed that he responded; 'Trouble has come' because he realized that the incident happened when he was not on the farm and it was a problem. He further denied the allegations that he ordered that cattle should be gathered.

[47] In cross-examination the second appellant admitted that he was the farm manager of the complainant. He stated that there were no other farm workers apart from a certain Yaril and Tutu. Seun van Wyk did not work on the farm. He conceded that he sent Yaril and Tutu to look for cattle in a camp. He denied that he sent Seun van Wyk twice for cattle and stated that van Wyk was lying when he testified about that. He could not identify the brand mark of his co-accused. He confirmed that he identified six cattle in a kraal after returning from Gobabis.

[48] When the first appellant was confronted about how his brand mark appeared on the six cattle that remained in the camp, he stated that they were branded by the son of late Kandombo on instruction of his father. He did not know why they were brand marked with his brand iron. When he was pressed for an answer he stated that Kandombo told him that the cattle had his brand mark. He denied that he brand marked and transported the cattle at night.

#### The record of proceedings

[49] It is alarming that the record of proceedings is flawed with 'indistinct' to such an extent that nothing makes sense to discern what the questions and answers were during especially the cross-examination of the witness. One can make out that some witnesses were cross-examined about their statements to the police but it appears more

a waste of time and could not have assisted the court a quo and all the more this court of appeal.

[50] In addition, the record of proceedings was not bound in sequence to what transpired in court and chronologically how witnesses testified. The sequence in which it is bound is starting with the J15 charge sheets of the lower court and regional court, annexures, postponements and followed by documentary exhibits in front of it. The heads of argument of the first appellant, heads of argument by second appellant, the State's heads of arguments, the judgment on the merits, the outcome of legal aid applications for both appellants, further documentary exhibits, presumably in mitigation of first appellant, the warning statement of first appellant, the notice of appeal of first appellant, a duplicate of his notice of appeal, the notice of appeal of second appellant and a duplicate thereof before the record of proceedings reflecting at page 151 on 2018/09/22.

[51] The record of proceeding continues at page 152 with 'on resumption' of proceedings, reflecting the evidence of a witness in the middle of his cross-examination, which on perusal of the record was not the first witness in the proceedings. The record continues until re-examination at p162 followed by the evidence of another witness. The evidence of this witness reflects, only halfway up to page 165 followed by the evidence of the complainant who was the first witness in the middle of his testimony at page 166 of the record. This witness's evidence, cross-examination and re-examination continuous up to page 189. The commencement of the proceedings reflects on page 314 with the pleas and beginning of the State's case with the complainant as the first witness testifying until page 325 in the middle of his examination in chief. The record continuous in the middle of the testimony of another witness. This record of proceedings is, to say the least, in shambles and almost impossible to decipher in order to do justice to the appeal.

[52] Surprisingly, this record was certified to be correct. It is the duty of the appellant to ensure that a proper record of proceedings is placed before a court of appeal and for the clerk of court and the presiding magistrate to ensure that it is bound in accordance with the codified instructions. This court was on the verge of striking this matter from the role due to the unintelligible record, but decided to go through the strenuous exercise to decipher it, despite the indistinct portions and that the record is in a shambolic state, not to prejudice the appellants.

[53] It is important for clerks of court and magistrates to once again acquaint themselves with *Chapter XII and XIII of the Codified Instructions: Clerk of the Criminal Court*, dated 12 May 2008 and, if amended with a newer version, to acquire that. This court referred in relation to the proper binding and importance of the record of proceedings in *S v Kamenye*<sup>1</sup> (reviews) and with reference to *Coetzee v S (infra)* (appeals).

[54] In the unreported case of *Coetzee v S*<sup>2</sup>, the record was in shambles. The learned Judge President criticized a shambolic record and stated that the record of proceedings must be prepared in accordance with '*Chapter XIII of the Codified Instructions: Clerk of the Criminal Court*' issued by the Permanent Secretary of Justice to create certainty about proceedings in fairness to an accused and the State - and to avoid the appeal Court from guessing what is before it.

[55] In paragraph 188 of the Codified instructions, the arrangement of the record of proceedings for appeal case records reflects as follows –except where indicated otherwise:

- (a) Original covering sheet JIII;
- (b) Index of witnesses, exhibits and documents;

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<sup>1</sup> *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019).

<sup>2</sup> *Coetzee v S* (CA 52/2009) [2011] NAHCMD 72 (11 March 2011).

- (c) Charge sheet with annexures, if any, on which the name of the police station, the CR number and, if available, the fingerprint number of the accused appears;
- (d) Evidence with certificate of true record of proceedings on the last page thereof;
- (e) Documentary evidence and a short description of other exhibits of which no copies were made;
- (f) List of previous convictions on form 12 – 0/0009 or Pol 81(a);
- (g) Reasons for conviction and sentence;
- (h) Notice of appeal and power of attorney, where applicable; and
- (i) Other notices if any.

Further, in paragraph 189 thereof, it is stipulated:

(a) The pages of the original case record and the copies must be punched on the left hand side of the folios and bound firmly with pink office tape in such a way that it does not encroach on the text.

(a) If the case record exceeds 30 mm in thickness, use must be made of screw binders and screws. If bound volumes exceed 50 mm in thickness, the record must be divided in two parts and clearly marked e.g. Part I – pages 1 to 400 and Part II – pages 401 to 750.

Common sense dictates that the record should be bound reflecting the plea proceedings first followed by the chronological sequence of evidence of witnesses and whatever follows. It is clear that there is no room for a haphazard arrangement and binding of the case record like in this appeal case.

#### The judgment and reasons

[56] The reasons for the judgment consists of 13 paragraphs reflecting that the magistrate restated the charge, who the legal representatives were, the pleas of the

appellants, that the onus is on the State to prove its case beyond reasonable doubt and that the State called seven witnesses. The magistrate found it unnecessary to summarise the evidence and stated that the evidence is succinctly on record and there was no need for her to repeat same for the purpose of convenience. We need to re-emphasise that the record is in shambles.

[57] The reasons continued; that she firstly needed to consider the elements of the offence and with competent verdict thereto. It must be pointed out that when the charge was put, the appellants were not informed of competent verdicts. She restated the competent verdicts. She mentioned that there was an application for the discharge in terms of s 174 of the CPA which was dismissed. She re-stated that she found that a prima facie case was established. Further, she considered that intention was required and what it entails, followed by what was not in dispute.

[58] Further, she briefly analysed the evidence and made inferences. The magistrate inferred that consent for the removal of the cattle was not given, although, the complainant gave direct evidence that he did not give consent thereto. She considered if the re-branding of cattle proved the intention to permanently deprive the owner and inferences that could be drawn from the proven facts. She found that the evidence suggests that the second appellant had the characteristics of a thief. She stated that differently put, the evidence proved that he had the intention to steal. Further that the second appellant had no right to take the 11 cattle to the farm of the late Kandombo. She found that the first appellant came into play at the re-branding of the cattle when he informed the second State witness to use his brand iron to re-brand cattle that were brought by the second appellant. Further, five of the 11 rebranded, stolen cattle were loaded by the first appellant.

[59] We find that, considering the reaction of both appellants when confronted, first appellant shaking and driving away when he was informed that the police will be contacted, second appellant being surprised, exclaiming that trouble has come and

remaining silent when he was confronted and shown the six stolen cattle, speaks volumes.

[60] The magistrate considered the doctrine of common purpose with reference to *S v Mgedezi and others*.<sup>3</sup> She found that the second appellant brought 11 cattle to farm Labora, unit B and the first appellant re-branded the cattle and removed ear tags of which five were loaded by him due to limited space on the vehicle. She found that the second appellant called the second State witness to offload the 11 cattle and that he provided his brand iron to re-brand the cattle. She found that the two appellants acted in concert or agreement and with intent to permanently deprive the owner of his cattle. She rejected the appellants' version and found that the case was proven beyond reasonable doubt.

[61] The crux of both appellants' grounds of appeal is that the magistrate misdirected herself in convicting them by finding that they, with the necessary intention, acted with a common purpose. Considering the magistrate's reasons, although terse, and the evidence that was strenuously deciphered and summarized above, we do not find any misdirection in relation to their conviction. Mindful that no judgment can be all embracing and the fact that when something is not stated does not mean that it was not considered, we concluded that the appeals against conviction stand to be dismissed.

[62] From a reading of the record in the instant case it is evident that the findings relied upon by the trial court when convicting the appellants were supported by proven facts, and the court's rejection of the appellants' defence was accordingly justified in law.

### Ad Sentence

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<sup>3</sup> *S v Mgedezi and others* 1989 (1) SA 687 (A).

[63] Both the appellants did not testify in mitigation. Their personal circumstances were placed on record by their legal representatives. Both are first offenders. The first appellant is 35 years old. He has three minor children aged 15, 11 and 7 years' old respectively. He was employed as a truck driver before his arrest. His educational history is that he advanced to grade 10 and never had formal employment but did part time jobs.

[64] The second appellant is 48 years old and has eight children between the ages of two years and 18 years old. He is not married and stayed with a girlfriend who was pregnant at the time. He progressed only to grade two. He was employed on the complainant`s farm for 10 years. He lost his job after the case was registered. He never had any formal employment and only did farm work. Their legal representatives pleaded for mercy and left sentencing in the hands of the court. When pressured by the court, he suggested a sentence of eight years imprisonment, partly suspended considering the value of the stock and the factor of deterrence.

[65] The State called a witness, the crime investigation unit commander, stationed at Epukiro police station. He testified that the most prevalent crime in the area is stock theft, more specifically theft of cattle. Further, that the community in the area rely much on cattle farming. He stated that, although, cases of stock theft are frequently reported to the traditional authority and the police, the community sometimes take the law into their own hands when dissatisfied with delay or outcome of cases. In some instances they follow and trace their cattle, identify the culprits and eventually end up beating them. The witness further testified that numerous cases of assault in this regard have been registered. He further stated that the community is losing trust in the judicial system and administration of justice.

[66] Cross-examination continued and again the record is flawed with 'indistinct'. One can at least decipher that the witness was cross-examined to the effect that it is not only courts that are to be blamed for the distrust in the administration of justice. In addition,



the address, testimony and cross-examination are duplicated at page 504 to page 509 of the record of proceedings. At page 510 the address of the public prosecutor reflect from the middle of his address without the commencement thereof anywhere in the record. This confirms the suspicion that the record of proceeding was prepared without any proofreading and simply paginated in this shambolic state.

[67] The magistrate delivered an *ex tempore* sentence. He found that not much turned out in mitigation when considering the personal circumstances of both appellants. He emphasised that the second appellant was in a position of trust of his employer which he betrayed and that it is an aggravating factor that needs not be underemphasised. He further considered deterrence, the amount and value of the head of cattle, the prevalence of the crime and that it was committed out of greed and not hunger. He applied the principles of sentencing with reference to *S v Zinn* and the principle of uniformity where he sentenced accused persons for stock theft crimes of high value to 19, 17 and 16 years imprisonment, respectively. He considered an appropriate sentence of 18 years' imprisonment for each of the appellants.

[68] It is trite that this court's powers are limited to interfere with sentence and discretion of a trial court. Sentencing is pre-eminently within the discretion of the sentencing court. A court of appeal has limited powers when it comes to an appeal against sentence and it can only do so in certain circumstances as it was stated in *S v Tjiho*<sup>4</sup>, where Levy J stated that:

'The appeal court is entitled to interfere with a sentence if:

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentencing proceedings;
- (iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;

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<sup>4</sup> *S v Tjiho* 1991 NR 361 HC at 366 A-B.

- (iv) 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 any court of appeal.'

[69] This court was referred to the case of *S v Lwishi*<sup>5</sup> where the following was stated:

'Although the courts now have an unfettered discretion when it comes to sentencing in cases where the value of the stock is N\$500 and more, the approach of the sentencing court, in my view, should be to consider the usual factors applicable to sentence, whilst mindful of the need to impose deterrent sentences. Where appropriate, lengthy custodial sentences should be imposed to serve as deterrence in a particular case, as well as generally. Ultimately, that would give effect to the Legislature's intention to address the problem of stock theft (which is rampant in this country), by the imposition of deterrent sentences. Hence, deterrence, as an objective of punishment, in cases of this nature, and where appropriate, should be emphasised.'

[70] Stock theft is inherently serious. The second appellant was in a position of trust of his employer and this fact in itself is aggravating. The modus operandi of both appellants on how the crime was committed further serves as an aggravating circumstance. Although it is inescapable that custodial sentences are justified in the circumstances and that deterrence should be emphasised, some weight should be attached to the personal circumstances of the appellants.

[71] We find with regard to the sentence imposed by the court *a quo*, it indeed misdirected itself when it sentenced the appellants who were first time offenders to a term of 18 years' imprisonment. The appellants' personal circumstances had not been properly and adequately considered. In reading the court's reasons on sentence, it is evident that mere lip service was paid to the accused's personal circumstances which were not accorded sufficient weight. This unfortunately resulted in the court *a quo* over-emphasising the seriousness of the offence and the interests of society. By so doing, the court *a quo* failed to exercise its discretion in sentencing judiciously.

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<sup>5</sup> *S v Lwishi* 2012 NR (1) 325 at 330 B-D.

[72] The magistrate refers to three other cases of stock theft where the value was very high when he imposed sentences of 19, 17 and 16 years imprisonment respectively. He provided no citation of the cases or any additional information about the circumstances thereof for this court to determine if those were similar cases. Those sentences might have been confirmed, altered or set aside on appeal or review. However, it is not for this court to speculate. It is trite that each case should be considered and adjudicated according to its specific circumstances. This Court therefore finds it appropriate to interfere with the sentences imposed by the court *a quo*. In effect, the appellants were sacrificed on the proverbial altar of deterrence. The sentences of 18 years' imprisonment for first offenders is harsh and inappropriate.

[73] In the result:

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence of 18 years' imprisonment imposed on each appellant is set aside.
4. The appellants are each sentenced to 10 years imprisonment of which two years are suspended for five years on condition that each appellant is not convicted of stock theft, committed during the period of suspension.
5. The sentences are back dated to 10 September 2021.

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**H C JANUARY**  
**JUDGE**

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**D N USIKU  
JUDGE**

**APPEARANCES:**

First Appellant:

T P Brockerhoff

Of Brockerhoff and Associates Legal Practitioners

Windhoek

Second Appellant:

E T Shikwa

Of The Directorate of Legal Aid

Windhoek

Respondent:

K Esterhuizen

Of The Office of the Prosecutor

Windhoek