

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case no: CA 67/2016

In the matter between:

ABIATAR NEPENDA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nependa v S* (CA 67-2016) [2017] NAHCNLD 27 (07 April 2017)

Coram: TOMMASI J and JANUARY J

Heard: 31 MARCH 2017

Delivered: 07 April 2017

Flynote: Appeal — Sentence — 20 years' imprisonment for theft of one ox valued at N\$4080 as per the prescribed minimum — Prescribed minimum struck down as unconstitutional — Court to interfere as sentence is shockingly inappropriate.

ORDER

1. Condonation for the late noting of the appeal is granted;
2. The appeal is upheld;
3. The sentence imposed by the regional court is set aside and substituted with the following sentence:

The accused is sentenced to imprisonment of 8 years, 5 months and 13 days.
4. The sentence is ante-dated to **24 October 2008** and the immediate release of the appellant is ordered.

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This is an appeal against sentence. The appellant was convicted of stock theft read with the provisions of the Stock Theft Act, 12 of 1990 as amended in that he stole one ox. He was sentenced to 20 years' imprisonment, the minimum period prescribed by s 14(1)(a)(ii) of the Stock theft Act as the court found no substantial and compelling circumstances existed.

[2] The appellant filed his notice of appeal out of time and applied for condonation. This application was not opposed.

[3] The penalty provision for stock theft where the value of the stock exceeds N\$500 has been struck down as unconstitutional.¹ Both counsel herein conceded that this court should interfere with the sentence imposed as the sentence of 20 years' imprisonment is shockingly inappropriate. Counsel

¹ *Daniel v Attorney-General and Others; Peter v Attorney-General and Others* 2011 (1) NR 330 (HC):

agreed that this court should determine an appropriate sentence, in view of the prejudice the appellant would suffer if the matter is remitted for sentence.

[4] The appellant was sentenced on 24 October 2008. He has thus already served 8 years and 5 months and 10 days to date hereof. The appellant was 37 years old. He informed the court that he has 5 children; he is single; his mother was old and was not able to take proper care of the children; and he has no one to take care of his livestock. The appellant found stock of the complainant which were lost. He divided it between himself and his co-accused to take care of it whilst they announce over the radio that they have the missing stock in their possession. He however, together with one co-accused, sold one of the cattle and it was slaughtered. The valued of the ox was N\$4080.

[5] Stock theft remains a serious offence and one of the biggest threats to the livelihood of communal farmers. The striking down of the penalty provision as unconstitutional does not mean that the courts should disregard the plea for deterrent sentence by farmers who suffer greatly at the hands of thieves. It was held in *S v Haufiku & Others* 2016 (1) NR 120 (HC) that the courts are called upon to, where appropriate, consider a lengthy custodial sentence as deterrence.

[6] Having considered the personal circumstances, the seriousness of the offence, the interest of society, and this court is of the view that the period which the appellant had already served would, in the circumstances of this case, would be an appropriate sentence.

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

1. Condonation for the late noting of the appeal is granted;
2. The appeal is upheld;
3. The sentence imposed by the regional court is set aside and substituted with the following sentence:

The accused is sentence to imprisonment of 8 years, 5 months and 13 days.

4. The sentence is ante-dated to **24 October 2008** and the immediate release of the appellant is ordered.

M A TOMMASI
JUDGE

HC JANUARY
JUDGE

APPEARANCES

FOR THE APPELLANT:

Mr Greyling
Of Greyling & Associates

FOR THE RESPONDENT:

Ms Amupolo
Of Prosecutor General Office