

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
APPEAL - REASONS

Case no: CA 07/2013

In the matter between:

**SHIMBILINGA NEHEMIA**  
**PELASIUS SHANYENGANGE**

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

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Nehemia v S* (CA 07/203) [2017] NAHCNLD 85 (14 August 2017)

**Coram:** TOMMASI J and CHEDA J

**Heard:** 11 JUNE 2014

**Delivered:** 11 July 2017

**Reason released:** 14 August 2017

**Flynote:** Appeal — Sentence — Non-compliance with the provisions of section 114 (2) & (3) is fatal to the procedure adopted by the sentencing magistrate — Sentence set aside — Matter remitted with direction to comply with section 114 (2) and (3).

---

**ORDER**

---

1. The application for condonation for the late noting of the appeal is granted for both appellants;
2. The sentences of both appellants are set aside;
3. The matter is remitted to the regional court sitting at Tsumeb for the regional court magistrate to comply with the provisions of section 114 (2) and (3) of the Criminal Procedure Act, 1977 (Act 51 of 1977);
4. The regional court magistrate is furthermore directed, in the event that a formal finding of guilty is made, to take into consideration, when sentencing the appellants afresh, the term of imprisonment already served.

---

**JUDGMENT**

---

TOMMASI J (CHEDA J concurring):

[1] The appellants herein applied for condonation for the late filing of the notice of appeal and appealed against conviction and sentence.

[2] Having heard counsel for the appellants and counsel for the respondent the court granted the following order:

1. The application for condonation for the late noting of the appeal is granted for both appellants
2. The sentences of both appellants are set aside

3. The matter is remitted to the regional court sitting at Tsumeb for the regional court magistrate to comply with the provisions of section 114 (2) and (3) of the Criminal Procedure Act, 1977 (Act 51 of 1977);
4. The regional court magistrate is furthermore directed, in the event that a formal finding of guilty is made, to take into consideration, when sentencing the appellants afresh, the term of imprisonment already served.'

[3] Both appellants applied for condonation. Their applications were not opposed by the respondent.

[4] The appellants were charged in the district court with having stolen 13 head of cattle valued at N\$18 000. First appellant was represented by a legal representative who provided the court with a statement in terms of section 112 (A) which was signed by 1<sup>st</sup> appellant. It should have read section 112(2) and it may have been a typing error. The 2<sup>nd</sup> appellant was questioned in terms of section 112(1)(b). Both appellants were convicted of theft read with the provisions of the Stock Theft Act, 1990 (Act 12 of 1990) as amended. The case was thereafter referred to the regional court for sentence. Although not stated on record one may infer that the appellants were committed by magistrate's court for sentence by regional court after plea of guilty in terms of section 114 of the Criminal Procedure Act.

[5] The appellants appeared in the regional court for sentencing. The regional court magistrate, without making a formal finding of guilty as provided for by section 114(3)(a) of the Criminal Procedure Act, proceeded to hear the addresses in mitigation and aggravation. Section 114(3) provides that the court shall make a formal finding of guilty. The non-compliance with the provisions of section 114(2) & (3) is fatal to the procedure adopted by the sentencing magistrate. The regional court had to afford the appellants the opportunity to satisfy the court that their pleas or admissions were incorrectly recorded in terms of s 114(2). It is for this reason that this court did not consider the appeal against conviction.

- [6] In view of the aforesaid irregularity the court made the following order:
1. The application for condonation for the late noting of the appeal is granted for both appellants;
  2. The sentences of both appellants are set aside;
  3. The matter is remitted to the regional court sitting at Tsumeb for the regional court magistrate to comply with the provisions of section 114 (2) and (3) of the Criminal Procedure Act, 1977 (Act 51 of 1977);
  4. The regional court magistrate is furthermore directed, in the event that a formal finding of guilty is made, to take into consideration, when sentencing the appellants afresh, the term of imprisonment already served.

---

M A TOMMASI  
JUDGE

I agree

---

M CHEDA  
JUDGE

**APPEARANCES:**

For the Appellant:

Ms Kishi

**Of Dr Weder, Kauta & Hoveka Inc.**

**(Instructed by Legal Aid)**

For the Respondent:

Adv Shileka

**Of Office of the Prosecutor-**

**General**