

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REVIEW JUDGMENT

CR NO: 2 /2018

In the matter between:

THE STATE

v

JOHANNES PAHANGWASHIMWE NGHUYOONANYE

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **270/2017**

Neutral citation: *S v Nghiyoonanye* (CR 2/2018) [2018] NAHCNLD 2 (24 January 2018)

Coram: TOMMASI J and JANUARY J

Delivered: 24 January 2018

Flynote: Review – Sentence – Theft from employer – Guilty plea – Section 113 of CPA applied – Evidence led – Charge alleges N\$10 000 – Evidence N\$11 000 – No prejudice to accused – Section 86 of CPA applied – Charge amended – Accused convicted and sentenced to 3 years imprisonment wholly suspended on condition he

compensates complainant within 6 months from date of sentence – No opportunity afforded to accused to address or present evidence on compensation – No enquiry held to issue of compensation – Sentence put into effect when accused did not compensate – No enquiry again – Order set aside.

Summary: The accused in this matter was sentenced upon conviction to 3 years imprisonment wholly suspended on condition that the accused compensates the complainant through the clerk of court in Eenhana the amount of N\$10 000 within the next 6 months as from 01 August 2016 to be completed on or before 31 January 2017. The charge alleges that he stole N\$10 000 from his employer. He pleaded guilty but a plea of not guilty was entered in terms of section 113 of the CPA. The complainant testified that the accused stole N\$11 000. The accused testified and admitted that he stole N\$11 000. The court *a quo* did not amend the charge and convicted the accused for theft of N\$10 000. This court on review amended the charge to read N\$11 000.

Upon failure to comply with the condition of compensation, the accused was arrested and the court *a quo* put into effect the 3 years imprisonment. The court *a quo* did not afford the accused the opportunity to address the court on compensation or to present evidence thereto. Nor did the court enquire from the accused on his ability to compensate and if in instalments, what amount he could afford. Likewise when the sentence was put into effect, no enquiry was held if at that stage he could afford to comply with the condition to compensate the complainant. The sentence and order to put into effect the 3 years imprisonment are set aside and the matter is remitted to the magistrate to sentence the accused afresh.

ORDER

1. The charge is amended to read N\$11 000 instead of N\$10 000.

2. The sentence of 3 years imprisonment wholly suspended on condition that the accused compensates the complainant Joseph Mandume through the clerk of court Eenhana, the full amount of N\$10 000 within the next 6 months as from 01 August 2016 to be completed on or before 31 January 2017 is set aside;
3. The order putting into effect the 3 years imprisonment is set aside.
4. The matter is remitted to the magistrate to enquire from the accused if he is able to compensate the complainant and if able what instalment he can afford. The complainant must be afforded the opportunity to address the court and or present evidence on compensation.
5. The magistrate is directed to consider the period of imprisonment the accused already served when sentencing the accused afresh.

JUDGMENT

JANUARY J (TOMMASI J concurring)

[1] This case is before me on automatic review in accordance with the provisions of section 302 of the Criminal Procedure Act, Act 51 of 1977 (the CPA). The accused pleaded guilty to theft of N\$10 000 from his employer. A plea of not guilty was however recorded in terms of section 113 of the CPA. Evidence was presented and he was convicted. He was sentenced on 29th July 2016 to; '3 years' imprisonment wholly suspended on condition that the accused compensates the complainant Joseph Mandume through the clerk of court Eenhana, the full amount of N\$10 000 within the next 6 months as from 01 August 2016. Such should be completed on or before 31 January 2017.

[2] It is to be mentioned that the complainant testified that N\$11 000 was stolen and the accused also testified that he was given N\$11 000 which he stole. In accordance

with section 86 of the CPA the court may have ordered that the charge be amended. That was not done. This court is empowered to amend the charge to read N\$11 000 because the evidence proves that that was the amount stolen.¹ This is what the learned magistrate ought to have done.

[3] The accused did not pay the compensation and he was consequently arrested and appeared before the court *a quo* on 03 March 2017. An enquiry was held why he did not pay. The accused stated that he did not get the money and that he was out of the country. The court did not accept the explanation and put into effect the 3 years imprisonment.

[4] The learned magistrate at the initial sentencing did not enquire from the accused if he was in a position to compensate and what amount he could afford in instalments. The accused was also not afforded the opportunity to address the court on the issue of compensation. This is an irregularity. The same mistake was made when the accused was arrested for non-compliance of the compensation order. The sentence for the aforementioned reasons therefore stands to be set aside and the matter must be remitted for the magistrate to do the necessary enquiry and/or afford the accused an opportunity to address the court or present evidence on compensation.

[5] In the result:

1. The charge is amended to read N\$11 000 instead of N\$10 000.
2. The sentence of 3 years imprisonment is wholly suspended on condition that the accused compensates the complainant Joseph Mandume through the clerk of court Eenhana, the full amount of N\$10 000 within the next 6 months as from 01 August 2016 to be completed on or before 31 January 2017, is set aside.
3. The order putting into effect the 3 years imprisonment is set aside.

¹ See: Commentary on the Criminal Procedure Act, Du Toit *et al* [Service 4, 1989] discussion on section 86, Amendment of charge on appeal and review at p 14-24.

4. The matter is remitted to the magistrate to enquire from the accused if he is able to compensate the complainant and if able what instalment he can afford. The complainant must be afforded the opportunity to address the court and or present evidence on compensation.
5. The magistrate is directed to consider the period of imprisonment the accused already served when sentencing the accused afresh.

**H C JANUARY
JUDGE**

**M A TOMMASI
JUDGE**