

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

REVIEW JUDGMENT

Case no: CR 12/2019

In the matter between:

**THE STATE**

v

**WILBALD KAMATI**

HIGH COURT NLD REVIEW CASE REF NO.: 568/2018

**Neutral citation:** *S v Kamati* (CR 12/2019) [2019] NAHCNLD 25 (28 February 2019)

**Coram:** JANUARY J *et* SALIONGA J

**Delivered:** 28 February 2019

**Flynote:** Review — Sentence — Possession of housebreaking implement — Contravening s 9 (1) Proclamation 27 of 1920 — Not competent — Application and Interpretation of section 281 of the Criminal Procedure Act — Sentence set aside and substituted with a competent sentence.

**Summary:** The accused was charged with the statutory crime of unlawful possession of housebreaking implements in contravention of s 9(1) of the Police Offences Proclamation 27 of 1920. He pleaded not guilty to the charge and was convicted as charged. He was sentenced to N\$2500 or six months imprisonment. The reviewing court is satisfied with the Magistrate's response to the first query and the conviction has to be confirmed. The sentence imposed is incompetent and is set aside.

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**ORDER**

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- 1) The conviction is confirmed.
- 2) The sentence of N\$2500 or six months' imprisonment is set aside and substituted with a sentence of N\$50 or six months' imprisonment.

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**JUDGMENT**

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SALIONGA J (JANUARY J concurring):

[1] The accused appeared in the Oshakati Magistrate's Court in the Oshakati district, and was charged with contravening s 9(1) Police Offences Proclamation 27 of 1920. He pleaded not guilty, evidence was led and subsequently he was convicted. He was sentenced to N\$2500 or six months' imprisonment.

[2] When the matter came before me in terms of section 302 of the Criminal Procedure Act, I directed the following queries to the learned Magistrate;

- (1) whether the explanation given by the accused was not reasonable, and;
- (2) whether the sentence imposed was a competent sentence?

[3] The learned magistrate in his response to my first query, stated that even if the accused might have had such workshop where he was doing welding work, he

did not clarify why he was carrying such tools at such late hour e.g. that he had stopped at a certain place after work and still had the bag with him before going home. He could not take the police officers to his workshop or provide them with details of a person whom such officers could have gone to, to confirm. It is also strange that the defence witness contradicted himself about the type of mask the accused uses when welding. In cross-examination, the witness said accused uses a plastic but in re-examination he said accused uses a cotton mask. With the aforesaid explanation or reasons given, I am satisfied and confirm the conviction.

[4] On the second query, the learned magistrate in his reply reiterated the same reasons he gave in the first query, and further stated that the court imposed the said sentence to deter the accused from engaging in such behaviour.

[5] As far as the second query is concerned, the magistrate did not respond to my query. The sentence imposed by the magistrate is incompetent as it is not prescribed by law. 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 fine or imprisonment.

[6] The said 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. I do agree and endorse the above analysis and the sentence of N\$2500 or six months imprisonment imposed by the magistrate is not authorised by law. (See also Hiemstra *Criminal Procedure* [issue 2] s 281 at page 28 -42).

[7] For the aforesaid reasons, the conviction of contravening s 9(1) of the Police Offences Proclamation 27 of 1920 is to be confirmed and the sentence imposed

must be set aside and substituted with a competent sentence. It is with regret that at the time of finalizing the review, the accused had already served his sentence. If the accused had paid a fine, he must be refunded the balance.

[8] In the result, the following orders are made:

1. The conviction is confirmed;
2. The sentence of N\$2500 or six months' imprisonment is set aside and substituted with a sentence of N\$50 or six months' imprisonment.

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J T SALIONGA  
JUDGE

I agree

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H C JANUARY  
JUDGE