

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

LEAVE TO APPEAL JUDGEMENT

<b>Case Title:</b> The State  v  Uahakerua Muhenje	<b>Case No:</b> HC-NLD-CRI-APP-SLA-2021/00042   Accused
<b>Heard before:</b> Kessler AJ	<b>Division of Court:</b> Northern Local Division
	<b>Delivered on:</b> 19 May 2022
<b>Neutral citation:</b> <i>S v Muhenje</i> (HC-NLD-CRI-APP-SLA-2021/00042) [2022] NAHCNLD 52 (19 May 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The condonation application is granted.</li><li>2. The application for leave to appeal against sentence is granted.</li></ol>	
<b>Reasons for decision:</b>	
KESSLAU AJ:	

[1] The respondent was convicted in the Magistrate's Court of Opuwo on a charge of stock theft and sentenced to three years imprisonment which was wholly suspended. This is an application for leave to appeal in terms of section 310(2) (a) of the Criminal Procedure Act 51 of 1977 as amended (the CPA), against the sentence imposed.

[2] The notice for leave to appeal was correctly served on the respondent within the prescribed period and, in the lack of any statement filed by the respondent or his counsel opposing the application, it is accepted that the application is unchallenged.

[3] The applicant did not file their notice of application for leave to appeal within the required 30 days period and is requesting condonation for this failure. Condonation for the applicant's failure will only be granted once it is established that the applicant had an acceptable explanation for this failure and secondly that there are reasonable prospects of success on appeal.<sup>1</sup>

[4] The applicant is submitting that the reason for the late filing of the leave to appeal was due to a bona fide mistake in that the date of sentence was misread and priority was then given to more pressing matters. Furthermore that immediately upon realising the oversight the documents were prepared and filed. I find the reason provided reasonable and acceptable under the circumstances.

[5] Turning to the second requirement to wit the prospects of success. The grounds upon which the applicant wants to appeal are summarized that, the magistrate erred in fact or in law by: imposing a shockingly lenient sentence in comparison with similar cases considering the theft of twenty-three heads of cattle with a combined value of N\$ 80 200; overemphasising the personal circumstances of the respondent whilst underemphasising the serious nature of the offence and; failed to consider aggravating circumstances such as the fact that the respondent is a police officer, the prevalence of the crime and the *modus operandi*.

[6] The trial magistrate provided reasons for the sentence imposed stating that he considered: the personal circumstances of the accused; that all cattle were recovered and returned to their lawful

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<sup>1</sup> *Abraham Ruhumba v State* (case no. CA 103/2003) [delivered on the 20th February 2004]

owner; the fact that the offence was committed twelve years prior and; the interest of society.

[7] The respondent was convicted on a charge of stock theft involving twenty-three cattle with an estimated value at the time of N\$ 80 200. The prosecutor before sentence requested direct imprisonment for a period of twelve (12) years with three (3) years suspended (even though jurisdiction in the Magistrates Court only allows for five year imprisonment). With the value of the stolen cattle proved in excess of N\$ 500, Section 14(1) (a) (ii) of the Stock theft Act 12 of 1990 as amended applies. The said section prescribes, in the case of a first conviction, a sentence of imprisonment without the option of a fine. Furthermore the respondent was a first offender and for that reason the magistrate had the option to suspend the sentence, which he did.<sup>2</sup>

[8] Considering the principle of uniformity in sentencing, it is necessary to compare the sentence imposed with similar matters. In *Nabita v S*<sup>3</sup> a sentence of fifteen (15) years imprisonment, with three (3) years suspended, was imposed for the theft of twenty-two heads of cattle valued at N\$ 72 000. *Ramseb v S*<sup>4</sup> a sentence of eight (8) years imprisonment for the theft of one head of cattle was confirmed on appeal. In *Kalaluka v S*<sup>5</sup> a sentence of twelve (12) years imprisonment of which four (4) years were suspended was confirmed on a conviction of theft of seven heads of cattle (valued at N\$ 9 000) with all stock recovered. In *Onesmus Natangwe & Another v S*<sup>6</sup>, the theft of four cattle valued at N\$ 11 900 attracted a sentence of ten (10) years' imprisonment of which two (2) years imprisonment was suspended. In *Shilula v The State*<sup>7</sup> appellants appealed against the 20 years imprisonment imposed for a conviction on the theft of two heads of cattle. The court of appeal substituted the imposed sentence with a custodial sentence of eight (8) years imprisonment of which one (1) year was suspended.

[9] In *Petrus Lwishi v State*<sup>8</sup>, the theft of three cattle valued at N\$ 5 400 attracted ten (10) years imprisonment and Liebenberg J furthermore stated that: 'Although the courts now have an unfettered discretion when it comes to sentencing in cases where the value of stock is N\$500 and more, the approach of

<sup>2</sup> See Section 14(4) of the Stock Theft Act 12 of 1990

<sup>3</sup> *Nabita v S* (CA 140/2013) [2014] NAHCMD 292 (07 October 2014)

<sup>4</sup> *Ramseb v The State* (CA 05/2013) [2014] NAHCNLD 40 (11 JULY 2014)

<sup>5</sup> *Kalaluka v S* (CA 14/2017) [2017] NAHCMD 279 (6 October 2017)

<sup>6</sup> *Natangwe v The State* (CA 65/2011) [2013] NAHCNLD 26 (30 APRIL 2013)

<sup>7</sup> *Shilula v The State* (CA 66/2010) [2002] NAHCNLD 37 (27 June 2014)

<sup>8</sup> *S v Petrus Lwishi* 2012 (1) NR 325 HC

the sentencing court, in any 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.'

[10] It is clear from the abundance of case law that the offence of stock theft is prevalent and regarded as serious where a partially suspended term of imprisonment is the norm. When considering the personal circumstances of the respondent recorded, there is nothing out of the ordinary apart from his occupation at the time, which rather served as an aggravating factor. I furthermore failed to understand how the sentence imposed was in the interest of society whilst the majority of society is depending on some form of farming for their living.

[11] Considering the above I am satisfied that the applicant has shown that there are reasonable prospects of success on appeal in that another court may come to a different conclusion than the trial court regarding an appropriate sentence.

[12] In the result, it is ordered:

1. The condonation application is granted.
2. The application for leave to appeal against sentence is granted.

<b>Judge's signature</b>	<b>Note to the parties:</b>
Kessler Acting Judge	
<b>Appearances:</b>	
Applicant	Respondent
Ms. M Nghiyoonanye Office of the Prosecutor-General, Oshakati	Mr. L. Kabajani Directorate of Legal Aid (Ondangwa)