

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Kamaariurika Ngueezeta</i>	Case No.: 25/2023 Opuwo: OPU-CRM-1303/2021
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J <i>et</i> Honourable Mr Justice Kessler J	Delivered on: 06 July 2023
Neutral citation: <i>S v Ngueezeta</i> (CR 25/2023) [2023] NAHCNLD 60 (06 July 2023)	
It is hereby ordered that: <ol style="list-style-type: none">1. The sentence is set aside.2. The matter is remitted to the Magistrate or, if no longer available, any other Magistrate in terms of section 275 of the CPA, to comply with the guidelines in this judgment.3. Upon sentencing the accused afresh, the court must take into account the period of imprisonment already served by the accused in the matter.	
Reasons for the order:	
KESSLAU J (SALIONGA J concurring)	
[1] The matter is making a second appearance before this court on review in terms	

of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). Two accused were charged in the Magistrates Court of Opuwo with stock theft read with the provisions of the Stock theft Act 12 of 1990 as amended (The Act). The accused pleaded guilty, were questioned in terms of section 112(1) (b) of the CPA and subsequently convicted on the theft of one goat with a value of N\$ 200.

[2] When the matter came on review previously the sentence imposed for accused 1 was set aside while the sentence for accused 2, who had a relevant previous conviction was confirmed. Directions were given that considering the value involved on a charge of stock theft of less than N\$ 500 the magistrate should comply with the Stock Theft Act by explaining the provision¹ of substantial and compelling circumstances to the accused, give him the opportunity to address the court on such and thereafter make a decision if substantial and compelling circumstances are present, note these on the record and sentence him accordingly.²

[3] Upon receiving the matter this time and noticing that there was no compliance with the direction the magistrate was queried as follows:

‘1. Can Magistrate Amutenya explain why the sentence was imposed without following the guidelines as per the review judgement delivered previously in this matter i.e. to explain ‘substantial and compelling circumstances and proceed accordingly?’

2. The sentence reads: ‘Twelve (12) months direct imprisonment of which is wholly suspended for a period . . .’ Is the magistrate satisfied that this is a competent sentence?’

[4] The magistrate in reply stated that:

‘The learned Magistrate made an omission to explain the substantial and compelling circumstances to the accused person.

The learned Magistrate acknowledges that a wording of which as part of the sentence renders the sentence imposed incomplete. The wording of the sentence was supposed to read: Count 1- Contravening Section 11(1)(a) of the 12 of 1990-Stock Theft- 12 months imprisonment wholly suspended for a period of three years on the condition accused is not convicted of Contravening Section 11 (1)(a) of the 12 of 1990-Stock Theft committed during the period of suspension.’

[5] When the matter appeared in the lower court for re-sentencing, after the initial

¹ See Section 14(2) of the Stock theft Act 12 of 1990

² S v *Nguezeta* (CR 56-2022) [2022] NAHCNLD 113 (17 October 2022)

review, the State indicated that the sentence ‘should be revisited looking at the value of the stock involved and the imprisonment the accused person was given.’ Neither the prosecutor nor the magistrate bothered to read the review judgment and ignorantly proceeded with sentencing afresh while mentioning ‘his personal circumstances, the time he spends in custody awaiting review judgment and the values of the stock involved’.
(sic)

[6] In *S v Tjiveze*³ the current sentencing position, when the value is less than N\$ 500, was described in the following terms:

‘To sum up, the position in relation to sentence for first offenders in terms of section 14 of the Stock Theft Act is as follows:

1. Cases where the value of the stock is less than N\$500, i.e. ‘section 14(1)(a)(i) cases’ and the accused is a first offender

1.1 The prescribed sentence is any period of imprisonment for a period of not less than two years without the option of a fine, but not exceeding the normal sentence jurisdiction of the magistrate.

1.2 The court must explain section 14(2) to the accused and if satisfied that substantial and compelling circumstances exist, enter those circumstances on the record and may impose a lesser sentence than two years imprisonment, which must still be a period of imprisonment.

1.3 If the court finds that there are substantial and compelling circumstances it may impose a shorter period of imprisonment. The court may in its discretion also wholly or partly suspend any period of imprisonment imposed (see section 297(1) (b) of the CPA, read with paragraph [7] of the *Tjambiru*⁴ judgment).

2.1 If the court is not satisfied that there are substantial and compelling circumstances, it must impose a sentence of at least two years imprisonment without the option of a fine, but it may suspend part of the sentence (see section 297(4) of the CPA, read with paragraph [3] & [6] of the *Tjambiru* judgment).’

[7] The sentence imposed, as conceded by the magistrate, is confusing in that the words ‘of which’ are included before it is stated that it is wholly suspended. Furthermore, without finding substantial and compelling circumstances, the sentence does not comply

³ *S v Tjiveze* (CR 27-2013) [2013] NAHCMD 110 (24 April 2013) par 13; *S v Lwishi* 2012 (1) NR 325 (HC)

⁴ *State v Mbahuma Tjambiru and two other cases* (Case No’s CR47/2008; CR48/2008 & CR 49/2008) delivered on 21 July 2008

with the penalty clause. The magistrate needs to comply with the provisions of section 14(2) of the Act in respect of the accused before sentencing him afresh.

[8] Another misdirection by the magistrate was suspending the sentence on the condition that the accused is not convicted of contravening section 11 (1) (a) of the Stock theft Act 12 of 1990. Section 11 refers to the possible verdicts on a charge of theft of stock and does not create the offense. The correct citation of the charge would be 'Theft of stock (read with the provisions of The Stock Theft Act 12 of 1990, as amended)'.⁵

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

1. The sentence is set aside.
2. The matter is remitted to the Magistrate or, if no longer available, any other Magistrate in terms of section 275 of the CPA, to comply with the guidelines in this judgment.
3. Upon sentencing the accused afresh, the court must take into account the period of imprisonment already served by the accused in this matter.

Judge(s) signature	Comments:
KESSLAU J:	None
SALIONGA J:	None

⁵ *S v Katzoa* (CR 99/2021) [2021] NAHCMD 503 (29 October 2021); *S v Kamavei* (CR 32/2014) [2014] NAHCMD 198 (25 June 2014).