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| <b>Case Title:</b><br><i>The State v Matheus Kavari</i>  | <b>Case No:</b><br>CR 35/2019              |
| <b>High Court MD Review No:</b><br>23/2019   | <b>Division of Court:</b><br>Main Division |
| <b>Heard before:</b><br>Mr Justice Liebenberg <i>et</i><br>Mr Justice Miller (Acting)  | <b>Delivered on:</b><br>03 May 2019        |
| <b>Neutral citation:</b> <i>S v Kavari</i> (CR 35/2019) [2019] NAHCMD 132 (03 May 2019)  |  |
| <b>The order:</b> <ol style="list-style-type: none"> <li>a) The conviction is confirmed.</li> <li>b) The sentence is set aside and is substituted with the following: N\$3 000 or 6 months' imprisonment, plus a further 6 months' imprisonment suspended for 5 years on condition that the accused is not convicted of a contravention of any offence under section 82 of Act 22 of 1999, committed during the period of suspension.</li> <li>c) The sentence is antedated to 15 March 2019.</li> <li>d) In terms of s 51(3) of Act 22 of 1999 the accused is disqualified from obtaining a driver's licence for a period of 3 months.</li> </ol> |  |
| <b>Reasons for order:</b>  |  |
| LIEBENBERG J (concurring MILLER AJ) <ol style="list-style-type: none"> <li>1. This is a review in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA).</li> <li>2. The accused was charged in the magistrate's court for the district of Windhoek (Katutura) for contravening section 82(5)(a) of the <i>Road Traffic and Transport Act</i>, Act 22 of 1999 (Act 22 of 1999) for driving a motor vehicle on a public road with an excessive breath alcohol level.</li> </ol>   |  |

3. The accused pleaded guilty and after the court's questioning in terms of 112(1)(b) of the CPA he was convicted. Thereafter the court sentenced him to 12 months' imprisonment of which 6 (six) months' was suspended for 5 (five) years' on the usual conditions, additionally the accused was disqualified from obtaining a learner's and/ or driver's licence for a period of six (6) months.
4. The conviction is in order. The Review Court's qualm is directed to the trial court's sentencing of the accused to direct imprisonment.
5. A query was then directed enquiring whether a sentence of direct imprisonment was suitable in the circumstances, imposed on a first offender who has pleaded guilty for a road traffic offence. Furthermore, whether in circumstances where an accused cannot raise funds immediately to pay a fine, imprisonment was the only appropriate sentence.
6. The trial magistrate replied and stated that he imposed a sentence of imprisonment because he had come to the conclusion that the accused is without financial means to pay a fine. Whereas the accused unsuccessfully instructed two private lawyers which delayed plea proceedings for over 15 months, this was interpreted by the court to mean that the accused intentionally delayed plea proceedings to defray the fine which the court may impose. The magistrate further remarked that '... after running out of delaying tactics and his lawyers abandoning him, he could still afford a fine of N\$1 500 which is clearly is (*sic*) disproportionate to the alternative period of imprisonment of 12 months'.
7. What is evident from the magistrate's reasoning in reply to the query is that he was side-tracked by issues related to the trial (delaying tactics) without same having any bearing on the question as to what would be an appropriate sentence in the circumstances of the case. Although the court was under no duty to impose a fine which would be within the means of the accused, it was indeed a factor the court had to take into account when deciding on the appropriate sentence. It is settled that the mere fact that the accused cannot pay a fine is not necessarily a reason *not* to impose it; moreover in this

instance where the accused was able to pay a significant amount towards a fine. The court has to make a proper enquiry into the accused's financial means which, in this instance, was done.

8. The crisp issue for determination is whether the sentence imposed by the trial court, given the circumstances of the case, is not in accordance with justice.
9. In *S v Brand and Various Others*<sup>1</sup> it was held that 'not all offences warrant a sentence of imprisonment and a first offender should not be sent to gaol if there is some other adequate punishment'. The court identified such other adequate punishment as a fine. Furthermore, the court had the option of imposing a suspended or partly suspended sentence, or to defer payment of the fine where the accused is afforded the opportunity to pay the fine off in regular instalments. The court's conclusion that a deferred fine would not be feasible and which the accused did not implore the court to consider ignores the fact that the accused was able to immediately pay the amount of N\$ 1 500 towards a fine. Furthermore, the accused being a lay person, the court was under a duty to explain the option of a deferred payment to the accused.
10. What is clear from the magistrate's reasons is that the court did not approach sentence with an open mind when coming to the conclusion that the accused misled the court under oath in mitigation and should not 'get away with murder'. The accused is a first offender and had a monthly income of approximately N\$500 from doing casual employment. He managed to save the amount of N\$1 500 over a period of 15 months for purposes of paying a fine. The accused was out on bail (N\$4 000) which had been paid by a friend who was in court during the proceedings. However, it was not enquired as to whether this person was willing to further assist the accused to pay a fine. The prosecutor was also of the opinion that a fine of N\$3 000 would be just punishment, not that the court was bound by the proposal.

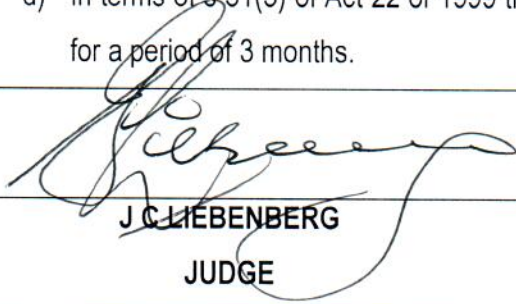
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<sup>1</sup> 1991 NR 356 (HC) at 357.

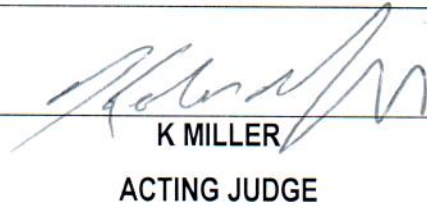
11. With regards to the offence committed, the court found that it was aggravating that a person without a driver's licence, drove a vehicle '*whilst under the influence of alcohol*'. To this end the court clearly misdirected itself as the accused was convicted of driving with an excessive breath alcohol level (c/s 82(5) of Act 22 of 1999), a less serious offence.
12. From the above it is evident that there were other options open to the sentencing court other than that of direct imprisonment. Where the court dealt with the accused being a first offender who pleaded guilty, it merely paid lip service thereto as being mitigating factors and did not accord it the necessary weight. Whilst at the same time over-emphasising the seriousness of the offence and the need to impose a deterrent sentence. This probably came about by laboring under the misapprehension that the accused was guilty of driving under the influence. To this end the court clearly misdirected itself.
13. For the aforesaid reasons, we are of the view that the sentence of direct imprisonment imposed by the magistrate was shockingly inappropriate in the circumstances of the case (*S v Tjiho* 1991 NR 361 (HC)).
14. Lastly, the court erroneously disqualified the accused from obtaining a learner's licence under s 52(3) of Act 22 of 1999 for a period of 6 months, whilst the relevant section is s 51(3) of the Act. In terms of s 51(2) the prescribed minimum period is 3 month in the case of a first conviction.
15. In the premises the sentence imposed by the trial magistrate is not in accordance with justice and it falls to be set aside.

16. In the result it is ordered:

- a) The conviction is confirmed.
- b) The sentence is set aside and is substituted with the following: N\$3 000 or 6 months' imprisonment, plus a further 6 months' imprisonment suspended for 5 years on condition that the accused is not convicted of a contravention of any offence under section 82 of Act 22 of 1999, committed during the period of suspension.
- c) The sentence is antedated to 15 March 2019.
- d) In terms of s 51(3) of Act 22 of 1999 the accused is disqualified from obtaining a driver's licence for a period of 3 months.



**J.C. LIEBENBERG**  
**JUDGE**



**K MILLER**  
**ACTING JUDGE**