



CASE NO.: CA 183/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FILLEMOM SHAKETANGE

Appellant

and

THE STATE

Respondent

CORAM: **SILUNGWE, AJ et MARCUS, AJ**

Heard on: 2009/03/06

Delivered on: 2009/03/19

APPEAL JUDGMENT:

SILUNGWE, AJ: [1] The appellant appeared before the Magistrate's Court at Eenhana on a charge of theft of two oxen valued at N\$5 100-00, in contravention of section 14(1) read with 11(1) of the Stock Theft Act, Act 12 of 1990 as amended by Act 19 of 2004. After trial, he was convicted as charged and the record was then placed before the Regional Court for sentence. Thereafter, the appellant was sentenced to twenty years' imprisonment, five years of which were suspended for five years on condition that he was not convicted of stock theft

committed during the period of suspension. It is against the said conviction and sentence that this appeal lies.

[2] Mr Norman Tjombe, the Director of the Legal Assistance Centre, appears *amicus curiae*, while Mr Kuutondokwa, the Deputy Prosecutor General, appears for the respondent.

[3] The facts of the case are both straightforward and unchallenged. Sergeant Hans Neumbo (Sgt) of Eenhana Police Station was on police patrol in a police bakkie with two of his colleagues on September 13, 2006, when he saw the appellant driving two oxen. When Sgt. Neumbo requested the appellant to produce a certificate of ownership of the oxen, he was unable to produce one but alleged that he had bought the animals from a Mr Thomas Kawasha. In his testimony for the Respondent, Mr Kawasha told the Court that he knew the appellant as *cuca* shop owner and that they both lived in the same village. When he was approached by the Police on September 13, 2006, and asked whether he had sold two oxen to the appellant, he denied having done so, whereupon the appellant claimed that the animals belonged to himself. In reality, however, the animals belonged to Messrs Reinhold Patelia and Asser Simon, respectively, both of whom testified to that effect. None of the respondent's witnesses was ever subjected to cross-examination by the appellant. Moreover, the appellant elected to remain silent and did not call any witnesses. Hence, the appellant was convicted on unchallenged evidence against him.

[4] The grounds of appeal against conviction and sentenced are: firstly, that the learned magistrate allegedly failed to explain the rights of an unrepresented accused at the close of the case for the State; secondly, that the said court allegedly permitted the respondent to lead evidence of four other witness after the closure of the case for the State; and thirdly, that in the

light of the appellant's mitigating factors, the Regional Court should have found that there were substantial and compelling circumstances present to justify the imposition of a lesser sentence than the prescribed minimum sentence; or alternatively, that the Regional Court should have suspended a greater portion of the sentence than five years, on account of the mitigating factors. On reflection, however, Mr Tjombe now appreciates that the rights of the accused were properly explained to him and that there was no premature closure of the case for the State. In the result, both grounds against conviction have been abandoned. It follows that the only live issue is the appeal against sentence.

[5] Mr Tjombe contends that the Regional Court misdirected itself in coming to the conclusion that there were no substantial and compelling circumstances, notwithstanding the fact that the appellant was a first offender; the stolen oxen had been recovered as a consequence of which the complainants suffered no loss; and the appellant was a father of six children (aged between three and ten years) whom he was supporting. He further submits that, in any event, and regard being had to the mitigating factors aforesaid, the sentencer should have suspended a greater portion of the sentence.

[6] With regard to the question whether substantial and compelling circumstances were present *in casu*, the Regional Court considered the question and answered it in the negative. It seems to me that in so doing, and given the circumstances of the matter, the sentence cannot reasonably be impugned. The recovery of the oxen, for instance, was none of the appellant's doing as he had been caught red-handed. Hence, although such recovery remains a mitigating factor, it carries negligible weight for purposes of computing substantial and compelling circumstances. In the final analysis, the cumulative effect of the relevant circumstances in the matter are not such as to justify a departure from the standardized response that the Legislature

has ordained. It follows that no basis has been laid upon which the Regional Court's decision that substantial and compelling circumstances were non-existent in the matter can be disturbed.

[7] What remains to be considered is the extent of the suspended sentence, namely, five years, which leaves fifteen years as the operative custodial sentence. In the light of the mitigating factors, we are of the view that the operative sentence of fifteen years imprisonment is startlingly inappropriate. As a consequence of this, the sentence imposed will be disturbed to the extent of suspending a greater portion thereof.

[8] In the circumstances, the following order is made:

1. the conviction is confirmed.
2. the appeal against sentence is allowed to the extent set out hereunder:
 - 2.1 20 years imprisonment 10 years of which are suspended for a period of 5 years on condition that the appellant is not convicted of stock theft committed during the period of suspension;
 - 2.2 the operative sentence of 10 years imprisonment takes effect from April 25, 2007, when the original sentence was passed.

SILUNGWE, AJ

I agree

MARCUS, AJ

COUNSEL ON BEHALF OF THE APPELLANT:

Mr Tjombe

Instructed by:

Legal Assistance Centre

COUNSEL ON BEHALF OF THE RESPONDENT:

Mr Kuutondokwa

Instructed by:

Office of the Prosecutor General