



SPECIAL INTEREST

CASE NO. CA 209/2007

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**LEHTO MUNGANDJERA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**CORAM:** HOFF, J. *et* MARCUS, AJ.

Heard on: 2009.02.20

Delivered on: 2009.02.20 (*Ex tempore*)

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**APPEAL JUDGMENT:**

**HOFF, J.:** [1] The appellant was convicted in the Outapi Magistrate's Court of the theft of stock namely one goat valued at N\$250.00 in contravention of the provisions of Section 11 (1)(a) of the Stock Theft Act, Act 12 of 1990. The matter was thereafter referred to the Regional Court Magistrate who based on the fact that the appellant was a second offender sentenced the appellant to a period of thirty (30) years imprisonment of which fifteen (15) years were suspended for a period of five (5) years on condition that the appellant

is not convicted of the crime of theft read with the provisions of Act 12 of 1990 committed during the period of suspension. The appellant subsequently appealed against the conviction as well as the sentence.

[2] At the inception of the proceedings before this Court Mr Rukoro who appears on behalf of the appellant *amicus curiae*, indicated to the Court that the appeal against conviction has been abandoned. Mr Rukoro submitted that this Court should interfere on appeal with the sentence imposed by the Magistrate *inter alia* because the Regional Court Magistrate did not explain the provisions of Section 14 of the Stock Theft Act, Act 12 of 1990 to the appellant and that the Court also did not indicate whether or not the Court found compelling and substantial circumstances prior to sentencing the appellant. This Court has in the unreported review judgment in the matter between the *State v Victor Mbishi Mishe* as per Liebenberg AJ, (Damaseb JP concurring) set out some guidelines to follow after an accused has been convicted of stock theft, and I will again refer to those guidelines.

- “1. *At least after the accused has been convicted, he or she should be informed which provisions of the Act are applicable for purposes of a specific minimum prescribed sentence.*
2. *At least the following should be explained to the accused person:*
  - 2.1 *that unless the Court finds that substantial and compelling circumstances exist which would justify the imposition of a lesser sentence the Court will have to impose at least a period of imprisonment as prescribed by the Legislature.*

2.2 *it must be explained to the accused that if the Court is satisfied that the accused particular circumstances considered with all the relevant factors rendered a minimum prescribed sentence unjust the Court will be entitled to impose a lesser sentence.*

2.3 *that the Court will take into consideration all the facts and factors the accused wishes to advance in order for the Court to come to a just conclusion. As usual it must be pointed out that the accused may make statements from the dock, or that he or she may testify under oath in which instance the State will be entitled to cross-examine. Also that more weight would be attached to evidence given under oath and that the accused besides himself testifying may call witnesses to testify on his behalf.”*

[3] I also wish to refer to a passage in the review case the *State v Freddy Kamukaeb and Gerhard Kamukaeb* review case no. 593/06 where this Court per van Niekerk J said the following on page 2 of that record:

*“The Learned Regional Magistrate points out that he omitted to explain the provisions of Section 14 of Act 12 of 1990, as amended, to the accused. More particularly he says he did not explain the fact that the accused were facing a minimum sentence of twenty years without the option of a fine, and that if substantial and compelling circumstances exist which justified imposition of a lesser sentence the Court may impose a lesser sentence. In his view the accused did not have a fair trial as far as sentence is concerned and he requests this Court to set aside the sentence he imposed in order for him to explain the relevant provisions properly to the accused so that they might avail himself opportunity to place such circumstances before him. I agree that this should be done”.*

[4] It appears from the record of this appeal that the Magistrate in the Regional Court did not explain to the accused the provisions of Section 14 of the Stock Theft Act, and although it appears from the record that the magistrate explained to the accused “*compelling and substantial principle*”, this Court sitting as a Court of Appeal, is in the dark as to exactly what has been explained to the appellant. There is also a second reason why the sentence imposed by the Regional Court Magistrate should be set aside, and that is for the reason that the sentence imposed is *ultra vires*.

[5] As I have indicated earlier the Regional Court Magistrate suspended part of the sentence imposed by him. Section 14 (4) of the Stock Theft Act, Act 12 of 1990 as amended reads as follows:

*“The operation of a sentence imposed in terms of this Section in respect of a second or subsequent conviction of an offence referred to in Section 11 (1)(a)(b)(c) or (d) shall not be suspended as contemplated in Section 297 (4) of the Criminal Procedure Act, if such person was at the time of the commission of any offence 18 years of age or older.”*

[6] The appellant is a second offender and older than 18 years. Thus the magistrate was not entitled to suspend any part of that sentence. The conviction is confirmed. The sentence imposed by the Regional Court magistrate is set aside. The matter is referred back to the regional court, and the magistrate is required to comply with the guidelines set out in this judgment, and thereafter sentence the appellant afresh. The appellant remains in custody.

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**HOFF, J**

I agree

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**MARCUS, AJ.**

**ON BEHALF OF THE APPELLANT**

**MR RUKORO**

**Instructed by:**

**LORENTZ ANGULA INC.**

**ON BEHALF OF THE RESPONDENT**

**ADV. KUUTONDOKWA**

**Instructed by:**

**OFFICE OF THE PROSECUTOR-GENERAL**