



NOT REPORTABLE

CASE NO. CA 64/2009

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**IMMANUEL GOWASEB**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**CORAM:** HOFF, J *et* VAN NIEKERK, J

Heard on: 2010.03.26

Delivered on: 2010.03.26 (*Ex tempore*)

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**APPEAL JUDGMENT**

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**HOFF, J.:** [1] The appellant was convicted in the Magistrate Court of the crime of malicious damage to property and sentenced as follows:

*“Three years imprisonment wholly suspended for five years on condition accused compensate complainant in the sum of five thousand six hundred and ninety two Namibian Dollars and fifty cents (N\$5 692.50) compensation to be paid before release.”*

[2] I agree with the submission made by Ms Esterhuizen appearing on behalf of the respondent, that the sentence is vague. It is also common course that the appellant was never given the opportunity to pay the compensation ordered by the Court *a quo*. Neither has there been any application by the State to put the suspended sentence into operation

[3] What is common cause is that, the appellant soon after the sentence had been pronounced, was detained and sometime later served a term of imprisonment at the Omaruru prison. The appellant has at this stage served half of the three years imprisonment imposed by the magistrate.

[4] The appellant for obvious reasons at this stage is not in the position to compensate the complainant. The offence of which appellant had been convicted of is a serious offence. However, this Court is of the view that the magistrate erred in not allowing the appellant an opportunity to compensate the complainant as ordered by the Court. It is also unfair to the appellant not to be given the opportunity to compensate the complainant as ordered by the Court. This Court is at this stage justified because of misdirection of the magistrate to interfere with the sentence imposed in the Court *a quo*.

[5] In the circumstances the sentence imposed by the magistrate is set aside, but substituted with the following sentence:

The appellant is sentenced to three (3) years imprisonment of which eighteen (18) month imprisonment are suspended for a period of five years on condition the appellant is not convicted of the crime of malicious damage to property committed during the period of suspension.

The sentence is backdated to 2<sup>nd</sup> of September 2008.

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**HOFF, J**

I agree

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**VAN NIEKERK, J**

**ON BEHALF OF THE APPELLANT**

**IN PERSON**

**Instructed by:**

**ON BEHALF OF THE RESPONDENT**

**ADV. ESTERHUIZEN**

**Instructed by:**

**OFFICE OF THE PROSECUTOR-GENERAL**