



CASE NO.: CR 72/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

**JOHN KADIMBA
SIMION MBENGELA**

**ACCUSED 1
ACCUSED 2**

(HIGH COURT REVIEW CASE NO.: 1217/2011)

CORAM: MULLER, J et SWANEPOEL, J

Delivered on: 12 August 2011

REVIEW JUDGMENT

MULLER, J.: [1] The accused was convicted on his plea of guilty of the theft of one goat valued at N\$250.00. He was sentenced to two years imprisonment on 18 February 2010, a year and 6 months ago.

[2] I addressed the following queries to the magistrate:

- “1. Was the provisions of s 14(2) of the Stock Theft Act no. 12 of 1990, as amended, in respect of substantial and compelling circumstances explained to the undefended accused? Did the accused understand it and

did he provide any such circumstances? Was the said provision considered?

2. *Why did the magistrate not consider suspension of part of the compulsory sentence in the circumstances?*

[3] On 9 August 2011 I received the following reply:

- “1. *Kindly be informed that the Magistrate Ms Sakala who presided over this matter is no longer in the employed (sic) by the Ministry of Justice // State, as he (sic) contract terminated December 2010.*
2. *As a result it is highly impossible to reply to such queries, as I am not in a position to answer with regard to the omissions of Ms. Sakala.*
3. *The record of proceedings is herewith returned for your attention.”*

[4] In the light hereof I have to determine from the record without any assistance by the presiding magistrate whether the proceedings were in accordance with justice.

[5] From a perusal of the record it is obvious that the presiding magistrate committed an irregularity by not informing the unrepresented accused of the provisions of S 14(2) of the Stock Theft Act, no. 12 of 1990 (the Act) as amended, in respect of substantial and compelling circumstances. A presiding magistrate is compelled to explain this to an unrepresented accused and to ascertain that the accused understands it. (See *S v Victor Mbishe Mbishe*, case no: CR 101/2006, delivered on 14 November 2006; *S v George Kambonde*, case

no: 109/2006, delivered on 22 November 2006; *S v Franciscus Cloete*, case no: CR 109/2009, delivered on 23 October 2009; and *Erastus Munongo v The State*, case no: CA 104/2010, an appeal judgment delivered on 9 December 2010).

Thereafter the magistrate has to be satisfied that no such substantial and compelling circumstances exist which may entitle the magistrate to impose a lesser sentence than the prescribed sentence.

[6] Nothing had been done in this regard and the magistrate approached the issue of sentencing as if it was just another conviction and not one in terms of the Act. This is also apparent from the magistrate's very brief judgment on sentencing.

[7] The conviction of the accused will be confirmed. However, in respect of sentence, I consider the facts that the accused is young, a first offender, pleaded guilty, as well as that only one goat with had been stolen with a value of N\$250.00 as factors that should have satisfied the court *a quo* to deviate from the prescribed minimum sentence of two years. That *per se* constitutes substantial and compelling circumstances to impose a lesser sentence than the prescribed sentence. (See *Erastus Munongo v The State, supra*, at 9-10 [23-24].)

[8] Taking the mitigating factors into account, I believe an appropriate sentence would have been one year imprisonment for this accused and that imposing the prescribed minimum sentence would be an injustice. Because the

accused had already been sentenced in February 2010 and in the light of my above decision, I gave instructions to the Registrar to arrange for the immediate release of the accused and will follow that up with this judgment substituting the sentence imposed by the presiding magistrate with one of one year imprisonment. The sentence will be backdated to 18 February 2010.

[9] In the result, the following orders are made:

1. The conviction of the accused is confirmed;
2. The sentence imposed by the presiding magistrate on 18 February 2010 is set aside and is substituted with the following sentence:
“1 year imprisonment”.
3. The sentence is back dated to 18 February 2010.

MULLER, J

I agree

SWANEPOEL, J