REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 37/2012

In the matter between:

ERODIUS NDAKOLUTE	**FIRST APPELLANT**
EROBIAM NDAKOLUTE	**SECOND APPELLANT**
AARON MALAKIA	**THIRD APPELLANT**
AKWENYE ANDREAS	**FOURTH APPELLANT**
and	
THE STATE	**RESPONDENT**

Neutral citation: *Ndakolute v State* (CA 37/2012) [2012] NAHCMD 70 (12 November 2012)

Coram: MILLER AJ and PARKER AJ

Heard: **12 November 2012**

Delivered: **12 November 2012**

Flynote: Criminal procedure – Appeal – Against sentence – Interference by court of appeal – Lower court paid lip service to the consideration of a fine as alternative appropriate sentence – Lower court failed to consider circumstances of the commission of offence.

Summary: Criminal procedure – Appeal – Against sentence – Appellants convicted and sentenced for malicious damage to property – Offence inspired by

misconceived belief they were entitled to break down works they have carried and for which employer had failed to remunerate them – Appellants' action therefore not gratuitous violence though appeal court condemning offence – Lower court failed to give due regard to circumstances of the offence, that appellants were gainfully employed and they were first offenders – Lower court paid lip service to consideration of a fine as alternative appropriate sentence – Court entitled to interfere with sentence and impose appropriate sentence.

ORDER

That the sentence imposed by the Magistrate is set aside and substituted with the following sentence:

(a) Each of the appellant is sentenced to 2 years imprisonment the whole of the sentence imposed is suspended for 5 years on condition firstly that he is not again convicted of the offence of malicious damage to property committed during the period of suspension.

(b) Each of the appellants' sentences is further suspended on condition that each of the appellants pays the sum of N$5000-00 in compensation. If the appellants are to pay, the amounts must be deposited with the Clerk of Court at the Magistrate's Court in Windhoek to be held and trust and to be paid over to the complainant as compensation for the damage to her property.

JUDGMENT

MILLER AJ (PARKER AJ concurring):

[1] The Appellants in this matter were charged before the magistrate sitting in the Magistrate's Court in Windhoek with the crime of malicious damage to property. In substance the allegation against them was that on the 23rd of February 2011 in the

area of Khomasdal they maliciously and intentionally damaged a wall valued at twenty thousand Namibian Dollars (N$20 000-00) and tiles to the value of thirty thousand Namibian Dollars (N$30 000-00) such being the property of the complainant Marlinda Leonarda Maasdorp.

[2] The Accused were unrepresented at the trial and all pleaded not guilty to the charge. After hearing evidence the magistrate convicted all the Appellants as charged and after hearing some argument and submissions as to sentence imposed the following sentences. The first Appellant was sentenced to a period of three years direct imprisonment and Appellants two, three and four were each sentenced to direct imprisonment for a period of twenty four months each.

[3] An appeal was initially noted against both the conviction and sentence. Moreover the Notice of Appeal was filed three days out of time which necessitated an Application for condonation by Mr Elago who appeared for the Appellants before us to condone the late filing of the Notice of the Appeal. We heard argument from both Mr Elago and counsel for the State on the reasons for the delay and the prospects of success. Mr Elago explained that in calculating the days in which the Appeal should be noted he make use of a civil method of computation which of course is wrong, the reason being that the ordinary method of calculation applies. As far as the prospects of success are concerned it is necessary firstly to refer to the background upon against which these offences were committed. I pause to indicate that Mr Elago before us abandoned the Appeal against the conviction and in our view rightly so.

[4] To return to the circumstances under which the offence was committed it appears from the evidence that the four Appellants had been engaged in certain building operations and renovations which the Complainant was constructing at her place of residence. Somewhere along the line and while the work was still in progress certain disputes as to payment for the work done arose. The Appellants so it would appear in those circumstances decided to take the law into their own hands and to demolish the wall and the tiles that they had built on the property.

[5] I am satisfied upon a perusal of the reasons given by the magistrate for the sentences imposed and on the submissions made before us today that the sentence imposed by the magistrate is startingly inappropriate to the extent that we should

interfere with it. I point firstly to the fact that the magistrate in the reasons for sentence paid mere lip service as to whether in the circumstances a fine should be considered as an appropriate option. It is dealt with in two very brief sentences which does not amount to my mind as a serious consideration of that aspect of sentence. Moreover all the Appellants at the time of the commission of the offence were first offenders gainfully employed, and finally in my view the magistrate paid inadequate regard to the circumstances and the background against which this offence was committed. The acts of destruction caused by the Appellants were not those of gratuitous violence but instead one inspired by a misconceived belief that they were entitled to act as they did. In so doing I do not want the Appellants to understand that this Court will condone behaviour of this kind. It is and remains unlawful and punishable.

[6] Taking into account the considerations I have mentioned I would propose that the sentence imposed by the magistrate on the Appellants be set aside. I also see no reason to differ between the four Appellants as to the period or the nature of the sentence imposed. In my view the one is as guilty as the other. I would propose in the circumstances as I have indicated that the sentence imposed be set aside and substituted with the following sentence.

[7] That the sentence imposed by the Magistrate is set aside and substituted with the following sentence:

(a) Each of the appellant is sentenced to 2 years imprisonment the whole of the sentence imposed is suspended for 5 years on condition firstly that he is not again convicted of the offence of malicious damage to property committed during the period of suspension.

(b) Each of the appellants' sentences is further suspended on condition that each of the appellants pays the sum of N$5000-00 in compensation. If the appellants are to pay, the amounts must be deposited with the Clerk of Court at the Magistrate's Court in Windhoek to be held and trust and to be paid over to the complainant as compensation for the damage to her property.

P J Miller

Acting Judge

C Parker

Acting Judge

APPEARANCES

APPELLANTS:	P S T Elago Of Tjombe-Elago Law Firm Inc., Windhoek
RESPONDENT:	I O Husslemann Of Office of the Prosecutor-General, Windhoek.