

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: CA 10/2012

In the matter between:

LUTHER KAHIIHA

APPELLANT

vs

THE STATE

RESPONDENT

Neutral citation: *Kahiha v State* (CA 10/2010) [2013] NAHCMD 206 (22 July 2013)

Coram: NDAUENDAPO J and SIBOLEKA J

Heard on: 15 October 2012

Delivered on: 22 July 2013

Flynote: Criminal Law – Application for leave to appeal against sentence.

Criminal Law: The applicant failed to satisfy this court that there are reasonable

prospects of success on appeal – application dismissed.

Summary: On 17 March 2011 the Regional Court Magistrate at Gobabis sentenced the applicant, a stock theft repeat offender, to five years imprisonment for stealing twenty three sheep valued N\$18 400.00.

Held: The application can only succeed if the Appeal Court is satisfied that there are reasonable prospects that the Supreme Court would come to a different conclusion should the appeal be granted.

Held: The application for leave to appeal had to be dismissed.

ORDER

The application for leave to appeal against sentence is dismissed.

JUDGMENT

SIBOLEKA J (NDAUENDAPO J concurring):

[1] On 15 October 2012 this court dismissed the appellant's application for leave to appeal, and stated then that the reasons would follow later. Here follows the reasons.

[2] During the proceedings the appellant appeared in person, while Mr Eixab acted for the State. The court is indebted to his valuable assistance in this regard.

[3] The appellant, a second stock theft offender was convicted in the Regional

Court at Gobabis for stealing 23 sheep valued N\$18 400.00 and sentenced to five years in prison. He lodged an appeal against that sentence which was dismissed in this court on June 08, 2013. He now seeks for leave to appeal against that ruling on the following grounds:

Grounds for leave to appeal:

- '1. Their Lordships erred in wrongly summarizing the Application for leave to appeal for an alternative imprisonment.
2. Their Lordships erred in failing to find out that Appellant in his heads of argument did not state the court *a quo* has misdirected himself during sentencing.
3. Their Lordships erred in failing to find out that the court *a quo* has failed to consider the following:
 - 3.1 Appellant compensated the complainant.
 - 3.2 Appellant pleaded guilty and showed remorse.
 - 3.3 Appellant turned a state witness against his co-accused to assist the State for possible prosecution.
4. Furthermore that Appellant didn't state that the sentence of five (5) years imprisonment is unreasonable, Appellant only appealed for a fine coupled with suspended sentences.
5. Their Lordships erred in failing to mention in their appeal judgment law reports Appellant quoted in his argument to support his application for alternative imprisonment.
6. Their Lordships erred in failing to remind themselves that first, second or third offenders are given a chance due to their substantial heads of argument and personal circumstances, see *S v Ludick* 1987 (4) SA 197 (NC).'

[4] As stated in this court's appeal judgment on this matter the above are mitigatory factors and not 'grounds of appeal' as contemplated in section 316 (2) of the Criminal Procedure Act 51 of 1977 which provides as follows:

'Every application for leave to appeal shall set forth clearly and specifically the Grounds upon which the accused desires to appeal ...'

[5] In *S v Swanepoel* 1978 (2) SA 410 at 410H: the Court said the following:

'Leave to appeal to the Appellate Division against a conviction and sentence in a Supreme Court must only be granted by the trial Judge if in the Judge's own opinion the applicant has a reasonable prospect of succeeding on appeal.'

[6] In this court's view the appeal is such that it has no reasonable prospects in persuading the Supreme Court to arrive at a different conclusion.

[7] In the result, the application for leave to appeal is dismissed.

A M SIBOLEKA
Judge

G N NDAUENDAPO
Judge

APPEARANCES

APPELLANT:

In Person

RESPONDENT:

Mr Eixab
Office of the Prosecutor-General, Windhoek