

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-CAL-2017/00008

In the matter between:

HILKA MEGAMENO NEPEMBE

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Nepembe v S* (HC-NLD-CRI-APP-CAL-2017/00008) [2018] NAHCNLD 45 (15 May 2018)

Coram: TOMMASI, J and JANUARY, J

Heard: 13 March 2018

Delivered: 15 May 2018

Flynote: Criminal Procedure – Appeal – Sentence – 14 Charges of Fraud to the value of N\$17 800 – Cumulatively sentenced to 17 years effective imprisonment – Disparity on similar offenses – Startlingly inappropriate and induces a sense of shock – Sentence set aside and substituted.

Summary: The appellant in this matter was convicted on 14 charges of fraud. She committed the crimes over a period of time against different complainants with the same *modus operandi*. The appellant was sentenced to 17 years cumulative effective imprisonment. The appeal is against sentence. The sentence is found to be startlingly inappropriate, induces a sense of shock and there is a striking disparity between cases of a similar nature. The Sentence is set aside and the appellant is sentenced to 6 years imprisonment of which 3 year imprisonment is suspended on conditions.

ORDER

1. Condonation is granted;
 2. The appeal is upheld;
 3. All charges are taken together for the purpose of sentence;
 4. The appellant is sentenced to 5 year's imprisonment of which 3 years are suspended for 5 years on condition that the appellant is not convicted for fraud or theft committed during the period of suspension; and
 5. The sentence is ante-dated to 06 September 2017.
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JUDGMENT

JANUARY J, (TOMMASI, J concurring):

[1] The appellant in this matter was convicted of 14 (fourteen) charges of fraud. She was charged with 17 charges of fraud and pleaded not guilty to all charges. She was acquitted on 3 charges in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 (hereafter referred to as the CPA). The appellant was represented by Mr Tjiteere in the court *a quo* and he filed the application for condonation, notice of appeal and heads of argument in this court whereas Mr Aingura stood in for him in oral submissions. Mr Mudamburi is representing the respondent in this court.

[2] The appeal is against sentence. The grounds of appeal are:

'1. AD SENTENCE

...

The Learned Magistrate erred in law in the following manner:

1. The sentence imposed by the sentencing court and is way too severe in that:
 - 1.1 The sentence imposed induces a sense of shock and is grossly inappropriate;
 - 1.2 The court unduly puts emphasis on the punitive factors of sentence;
 - 1.3 The court erred in not considering the fact that the Appellant showed remorse in that;
 - 1.3.1 she apologised to the victims and the Court and vowed that she will not re-offend and she pleaded for a second chance;
 - 1.3.2 the Appellant also testified that she refunded all money she received from Complainants, but for those whose water was connected and/or received connecting materials from the Appellant;
 - 1.3.3 the Appellant assisted in speeding up the process of connecting water as the Ministry's process was taking unnecessarily long.
 - 1.4 The Court failed to exercise a certain measure of leniency towards the Appellant.
2. The Court failed to take into account the circumstances of the Appellant in that:
 - 2.1 The Appellant was 43 years old at the time of sentencing;
 - 2.2 The Appellant is a single mother of three (3) minor children;
 - 2.3 She was employed by the Ministry of Agriculture and Forestry;
 - 2.4 The Appellant was the sole bread-winner and further she was supporting her elderly mother who was 92 years at the time of sentencing."

[3] The appellant was convicted and sentenced as follows:

- Count 1 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 2 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment

- Count 4 Guilty of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 5 Guilty as charged of fraud to the value of N\$2 400, sentenced to 3 years' imprisonment
- Count 6 Guilty of fraud to the value of N\$1 000, sentenced to 2 years' imprisonment
- Count 7 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 8 Guilty of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 9 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 10 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 12 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 14 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 15 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 16 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment
- Count 17 Guilty as charged of fraud to the value of N\$1 200, sentenced to 2 years' imprisonment

The learned magistrate ordered the sentences on count 6, 7, 8, 9, and 10 to run concurrently with each other. Sentences on counts 14 and 15 are also to run concurrently with each other. Sentences on counts 1, 2, 4, 5, 12, 16, and 17 to run consecutively (or

cumulatively). Effectively the appellant will have to serve 17 years imprisonment for fraud of the amount of N\$17 800.

[4] The allegations in all charges were that the appellant on 17 different dates from November 2009 to May 2011 at different places defrauded different complainants to pay over amounts of money ranging between N\$1 200, N\$1 500, N\$2 400 and N\$3 600 by deceiving the complainants that water taps/meters will be installed at their homes while she well knew at all times that she was not authorized to collect money or install water connections. The appellant had the same *modus operandi* in committing the crimes. In her plea explanation she informed the court that the money was either refunded or water connections were eventually done and water meters were installed.

[5] The charges are as follows;

'Count 1-17

That the accused is guilty of the crime of FRAUD

In that upon or about dates shown in Column 1 of the attached schedule of offences and at or near places shown in (schedule 2) of the attached schedule of offences in the district of Outapi the accused did unlawfully and with intent to defraud, give out and pretend to people mentioned in column 3 of the attached schedule of offences that if paid amounts shown in column 4 of the attached schedule of offences by people mentioned in column 3, she would connect water tapes [(sic) 'taps'] and facilities to homes of people mentioned in column 3, and did then and there by means of the said false pretences induced the said people mentioned in column 3 to pay amounts of money in column 4 to the actual prejudice of amounts of money in column 4 and also to the actual prejudice of all people mentioned in column 3, whereas in truth and in fact when the said accused so gave out and pretended as aforesaid, she well knew that she was not responsible for water connections and thus the accused did commit the crime of FRAUD.

SCHEDULE OF OFFENCES

No	Column 1	Column 2	Column 3	Column 4
	Date/Period	Place Offence Committed	Complaints	Amounts
1.	November 2009	Opolyanda village	Ndilikemanya Kaulwa	N\$1200-00
2.	June 2010	Elondo Village	Helvi Ileka	N\$ 1200-00
3	September 2010	UUkwandongo village	Absalom Amunyela	N\$ 3600-00
4	September 2010	Oshilemba Village	Amukoshi Toini	N\$1500-00
5	October 2010	Oshihau Village	Salti Kandongo	N\$2400-00
6	November 2010	Oshitukathitua Village	Krispine Engombe	N\$1200-00
7	November 2010	Uuthimawomeya village	Hilya Festus	N\$1200-00
8	November 2010	Ohalumbele Village	Ismael Tangeni Nathingo	N\$ 1200-00
9	November 2010	Enoleu Village	Nghede Lahja	N\$ 1200-00
10	November 2010	Okagongo Village	Wilbard Shigwedha	N\$1200-00
11	November 2010	Elondo Village	Aina Amutenya	N\$ 1200-00
12	13 December 2010	Okagongo village	Helvi Niilya Shigwedha	N\$1200-00
13	13 December 2011	Omaenghuzi Village	Maria Fudeni Hangula	N\$ 1200-00
14	January 2011	Elondo East	Gotrieb Oiva	N\$ 1200-00
15	January 2011	Epangu Village	Lotenii Sakaria Nembumbulu	N\$1200-00
16	09 February 2011	OShikuku	Kosmos Mukwiilongo	N\$1200-00
17	5 May 2011	Epangu Village	Petrus Ileka	N\$1200-00
			TOTAL	N\$ 24400-00

[6] The trial commenced with the State calling witnesses. The fifth state witness finalized her evidence in chief. During her cross-examination, Mr Tjiteere applied to make admissions in terms of section 220 of the CPA after consultation with the appellant. There was no objection as he indicated to the court that the admission will expedite the proceedings. The court a quo granted the application and required Mr Tjiteere to put the section 220 admissions in writing. He did that and produced a document reflecting as follows:

'Exhibit "C" (4 pages) p212 record

CASE NO.

IN THE MAGISTRATE 'S COURT OF OUTAPI

In the matter between:

THE STATE

And

HILKA MEGAMENO NEPEMBE:

**ACCUSED'S ADMISSIONS IN TERMS SECTION 220 OF THE CRIMINAL PROCEDURE ACT
51 OF 1977**

I the undersigned **HILKA MEGAMENO NEPEMBE** hereby admit that:

1. upon or about November 2009 and at or near Opoliyanda village in the district of Outapi I unlawfully and with intent to defraud pretended to Ndilikemanya Kaulwa, that if she pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to her home of which Nilikemanya Kaulwa was then and there by means of the said false pretences induced to pay an amount of N\$1200.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I know well that I was not responsible for water connections and thus I did commit the crime of fraud;;
2. upon or about June 2010 and at or near Elondo village in the district of Outapi I unlawfully and with intent to defraud pretended to Helvi Illeka, that if she pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to her home of which Helvi Illeka was then and there by means of the said false pretences induced to pay an amount of N\$1200.00 to which she suffered actual or potential produced whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud.

3. upon or about September 2010 and at or near Oshilemba village in the district of Outapi unlawlly and with intent to defraud pretended to Amukoshi Toini, that if she pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to her home of which Amukoshi Toini was then and there by means of the said false pretences induced to pay an amount of N\$1200.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretend as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

4. upon or about October 2010 and at or near Oshihau village in the district of Outapi I unlawfully and with intent to defraud pretended to Salti Kandongo, that if she pay an amount of N42400.00 to me and which amount I received, I will connect water taps and facilities to her home of which Salti Kandongo was then and there by means of the said false pretenses induced to pay an amount of N\$2400.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

5. upon or about November 2010 and at or near village Oshitukathitua in the district of Outapi I unlawfully and with intent to defraud pretended to, that if she pay Krispine Engombe, an amount of N\$1000.00 to me and which amount I received, I will connect water taps and facilities to her home of which Krispine Engombe, was then and there by means of the said false pretenses induced to pay an amount of 1000.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that is was not responsible for water connections and thus I did commit the crime of fraud;

6. upon or about November 2010 and at or near village Uuthima –womeya in the district of Outapi I unlawfully and with intent to defraud pretended to Hilya Festus that if she pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to her home of which Hilya Festus, was then and there by means of the said false pretenses induced to pay an amount of N\$1200.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

7. upon or about November 2010 and at or near Ohalumbele Village in the district of Outapi I unlawfully and with intent to defraud pretended to Ismael Tangeni Nathingo , that he pays me an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to its home of which Ismael Tangeni Nathingo , was then and there by means of the said

false pretenses induced to pay an amount of N\$1200.00 to which he suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

8. upon or about November 2010 and at or near Enoleu village in the district of Outapi I unlawfully and with intent to defraud pretended to Nghede Lahya , that if she pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to his home of which Nghede Lahja , was then and there by means of the said false pretenses induced to pay an amount of N\$1200.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

9. upon or about November 2010 and at or near Okangongo village in the district of Outapi I unlawfully and with intent to defraud pretended to, that if he pay Wilbard Shigwedha , an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to his home of which Wilbard Shigwedha , was then and there by means of the said false pretenses induced to pay an amount of N\$1200.00 to which he suffered actual potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

10. upon or about 13 December 2010 and at or near Okangongo village in the district of Outapi I unlawfully and with intent to defraud pretended to Helvi Niilya Shigwedha , that if she pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to his home of which Helvi Nillya Shigwedha, was then and there by means of the said false pretenses induced to pay an amount of N\$1200.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

11. upon or about January 2011 and at or near Elondo East village in the district of Outapi I unlawfully and with intent to defraud pretended to Gotrieb Oiva , that if she pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to his home of which Gotrieb Oiva , was then and there by means of the said false pretenses induced to pay an amount of N\$1200.00 to which she suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

12. upon or about January 2011 and at or near Epangu village in the district of Outapi I unlawfully and with intent to defraud pretended to Loteni Sakaria Nembumbulu , that if he pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to his home of which Loteni Sakaria Nembumbulu , was then and there by means of the said false pretenses induced to pay an amount of N\$1200.00 to which he suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

13. upon or about 9th February 2011 and at or near Oshikuku village in the district of Outapi I unlawfully and with intent to defraud pretended to Kosmos Mukwiilongo , that if he pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to his home of which Kosmos Mukwiilongo , was then and there by means of the said false pretenses induced to pay an amount of N\$1200.00 to which he suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

14. upon or about November 2010 and at or near Epangu village in the district of Outapi I unlawfully and with intent to defraud pretended to Petrus Ileka , that if he pay an amount of N\$1200.00 to me and which amount I received, I will connect water taps and facilities to his home of which Petrus Ileka , was then and there by means of the said false pretences induced to pay an amount of N\$1200.00 to which he suffered actual or potential prejudice whereas in truth and in fact when I so gave out and pretended as aforesaid I knew well that I was not responsible for water connections and thus I did commit the crime of fraud;

Signed at Outapi on the 24th July 2017

SIGNED BY THE APPELLANT'

[7] Mr Mudamburi conceded that the sentence induces a sense of shock and that the learned magistrate did not exercise her discretion judiciously. He did not oppose an application for condonation and referred this court to cases as examples for submitting that there are striking disparities between sentences in those cases and the sentence imposed in this case. He correctly so, submitted that there are prospects of success in the appeal.

[8] In *S v Van Wyk* (SA 94/2011) [2012] NASC 23 (15 November 2012), the respondent had been sentenced to N\$20 000 or 3 years imprisonment plus a further 3 years imprisonment wholly suspended for 3 years after being convicted for 22 counts of fraud in the sum of N\$1 223 610.21 perpetrated over one and a half years. The sentence was set aside and substituted with a sentence of 10 years imprisonment of which 5 years imprisonment was suspended for 5 years.

In the *State and Emmanuel Kapumba Mununga* CC 08/2004 delivered on 05 October 2006 (unreported), the accused was convicted on his plea of guilty on 186 counts of fraud of N\$5.425 million. He was sentenced to 20 years imprisonment with an order of compensation to the complainant in the amount of N\$5.425 million.

In *Itai v S* (CA 27/2011) [2012] NAHC, delivered on 25 June 2012 the appellant was convicted on his plea of guilty on 10 counts of fraud to the value of N\$299 000. He was sentenced to 8 years imprisonment of which 3 years were suspended for 5 years. The sentence was set aside on appeal and substituted with a sentence of 7 years imprisonment of which 3 years were suspended for 5 years.

[9] I respectfully agree on what was stated in *The State v Gerry Wilson Munyama*, (SA 47/2011) [2011] NASC 13 delivered on 9 December 2011, stating thus:

'[12] Although it is trite that sentences should be individualised, our Courts generally strive for uniformity of sentences in cases where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances. (*S v Goldman*, 1990(1) SACR 1 (A) at 3E). In *S v Strauss* 1990 NR 71, O'Linn J catalogued nineteen similar crimes of theft of rough and uncut diamonds and stated, "clearly indicates the approach of the courts in the past. The Court must obviously attach great weight to this catalogue, while at the same time balancing it against the principle of individualisation. One must look at which circumstances, personal or otherwise, can be taken as distinguishing factors...which would justify a sentence which is out of line with the cases to which the Court has referred." The principle of consistency in sentencing has gained wide acceptance. Its significance lies in the fact that it strives to avert any wide divergence in the sentences imposed in similar cases and should thus appeal to any reasonable person's sense of fairness and justice. One advantage of consistency in sentencing is that it promotes legal certainty and consequently

improves respect for the judicial system. (*S v Skrywer*, 2005 NR 289 (HC); SS Terblanche, *The Guide to Sentencing in South Africa*, 1999 at 139).'

[10] The appellant at the time of sentencing was 43 years old, a single mother of 3 minor children, and the sole breadwinner of her children and 92 year old mother. She was on suspension from her employment at the Ministry of Agriculture and Forestry. She is a first offender and apologised to the victims and the court. She vowed not to again commit a crime. The appellant was arrested on 10 August 2011 and bail was granted on 24 August 2011. The bail was extended until her conviction on 05 September 2017 upon which bail was cancelled. She was sentenced on 06 September 2017 and is since then in custody now for about 8 months.

[11] I find that the sentence is startlingly inappropriate, induces a sense of shock and there is a significant disparity in the cumulative sentences imposed and the sentences this court would have imposed had it sat as a court of first instance.

[12] Mr Mudamburi suggested that all charges should be taken together for purposes of sentence. He submitted that a sentence of 6 years imprisonment of which 3 years are suspended on conditions will be appropriate. In my view a sentence of 5 years imprisonment of which 3 years are suspended on conditions is more appropriate.

[13] In the result:

1. Condonation is granted;
2. The appeal is upheld;
3. All charges are taken together for the purpose of sentence;
4. The appellant is sentenced to 5 year's imprisonment of which 3 years are suspended for 5 years on condition that the appellant is not convicted for fraud or theft committed during the period of suspension; and
5. The sentence is ante-dated to 06 September 2017.

H C January
Judge

I agree

M A Tommasi
Judge

Appearances:

For the Appellant: Mr Tjiteere
 Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva

For the Respondent: Mr Mudamburi
 Of Office of the Prosecutor-General, Oshakati