REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 40/2016

In the matter between

THE STATE

And

KAREL CHRISTOF MBAENDAVI

HIGH COURT MD REVIEW CASE NO 276/2016

Neutral citation: State v Mbaendavi (CR 40/2016) [2016] NAHCMD 141 (12 May 2016)

CORAM: **LIEBENBERG J *et* SHIVUTE J**

DELIVERED: 12 May 2016

Flynote: Criminal procedure – Sentence – *Crimen injuria* – Accused first offender, employed and has dependants – Fine of N$10 000 or 24 months' imprisonment shockingly inappropriate.

ORDER

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1. The conviction is confirmed.
2. The sentence imposed is set aside and substituted with the following: N$900 or 30 days' imprisonment.
3. The sentence is antedated to 26 January 2016.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTEJ)

[1] In this review matter the accused, at the end of the trial, was convicted of the offence of *crimen injuria,* read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. He was sentenced to a fine of N$10 000 or 24 months' imprisonment.

[2] The conviction is in order and will be confirmed on review; the sentence, however, is not in accordance with justice. Whereas the magistrate in the interim has resigned, and in light of prejudice to be suffered by the accused due to any further delay, there is no need to first obtain a statement from the presiding magistrate as provided for in s 304 (2) *(a)* of Act 51 of 1977.

[3] The accused is 35 years of age and the biological son of the complainant. On the day of the incident the accused was at his mother's home and during an altercation between the two of them over porridge, the accused swore once at his mother. According to the complainant the accused at the time was drunk, probably explaining his reprehensible conduct. A police officer later arrived and arrested the accused.

[4] At the end of a four page *ex tempore* judgement on sentence, which is a mere regurgitation of case law and principles (used in another case where there were two accused), and having little or no bearing on the case at hand, the magistrate found the above stated sentence, in the circumstances of the case, suitable. I strongly disagree; on the contrary, I find it shockingly inappropriate.

[5] Over the years the courts have laid down certain guidelines where the appeal or review Court is entitled to interfere with a sentence imposed by a lower court and one such instance is where 'the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal'.

[6] The accused is a first offender, not married and has four minor children in his custody. He is employed and informed the court that he would be able to pay a fine up to N$800. The fine ultimately imposed was clearly beyond the accused's means and inevitably resulted in him having to serve the period of two years' imprisonment,

imposed in the alternative. The only aggravating factor that could possibly have influenced the sentence is the fact that the offence was committed in a domestic setting, though the court made no mention thereof in sentencing. That the court did not apply its mind to the facts before it is evident from the first paragraph of the judgment on sentence where it is stated that 'two very serious and prevalent offences' were committed. This is a serious misdirection and the reasons for sentence furnished by the trial magistrate therefore should be ignored.

[7] The accused was sentenced on 26 January 2016 and had served over three months' imprisonment. In my view, that is sufficient punishment for the offence committed.

[8] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence imposed is set aside and substituted with the following: N$900 or 30 days' imprisonment.
3. The sentence is antedated to 26 January 2016.

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J C LIEBENBERG

JUDGE

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N N SHIVUTE

JUDGE