



**IN THE SUPREME COURT OF ESWATINI**  
**JUDGMENT**

Criminal Case No. 19/2018

**HELD AT MBABANE**

In the matter between:

**CHARLES ACE JELE**

**Appellant**

and

**THE KING**

**1<sup>st</sup> Respondent**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**2<sup>nd</sup> Respondent**

**Neutral Citation:** *Charles Ace Jele vs The King and Another* (19/2018)  
[2020] SZSC 14 (28/05/2020)

**Coram:** **M.C.B. MAPHALALA CJ,**  
**DR. B.J. ODOKI JA,**  
**R. J. CLOETE JA.**

**Heard:** 20<sup>th</sup> May, 2020.

**Delivered:** 28<sup>th</sup> May, 2020.

**SUMMARY** : *Criminal law – Appeal against severity of sentence – Agreed facts reveal an error in calculation of sum stolen – corrected – Appellant in position of trust – betrayed trust of employer – Court will not readily interfere with sentence of High Court – satisfied Judge in Court a quo took all circumstances into consideration and applied her mind to the matter properly and exercised valid and appropriate judicial discretion – sentence appropriate – Appeal dismissed.*

---

## **JUDGMENT**

---

**CLOETE – JA**

### **BACKGROUND**

[1] The Appellant was employed as the General Manager of Swaziland Royal National Airways Corporation (now Eswatini Royal National Airways Corporation) (“complainant”) and on 30 July 2018 he was indicted on the following criminal charges:

#### **“Count 1**

**The Accused is charged with the crime of theft, in that, the said accused person was employed as the General Manager of Swaziland Royal National Airways Corporation and was as such a servant or an agent of the Swaziland Royal National Airways**

Corporation and was entrusted, *inter-alia*, with the custody and care of money belonging to his said employer, the said accused did on or about the 16<sup>th</sup> May 2009 and at or near Matsapha area in the Manzini Region, unlawfully and intentionally steal the sum of US\$4,000.00 an equivalent of E34,080.00 and (Thirty four thousand and eighty Emalangeni) thereby creating a general deficiency of US\$4,000.00 (Four thousand US\$) an equivalent of E34,080.00 and thus did thereby commit the said offence.

#### Count 2

The Accused is charged with the crime of theft in that, the said accused person was employed as the General Manager of Swaziland Royal National Airways and was as such a servant or an agent of the said Swaziland Royal National Airways Corporation and was entrusted, *inter alia*, with the custody and care of money belonging to his said employer, the said Accused did on or about November 2009 and at or near Matsapha area in the Manzini Region, unlawfully and intentionally steal the sum of E45,000.00 (Forty five thousand Emalangeni) thereby creating a general deficiency of E45,000.00 (Forty five thousand Emalangeni); and thus did thereby commit the said offence.

### **Count 3**

**The Accused is charged of the crime of theft in that, whereas at all relevant times, the said accused person was employed as the General Manager of Swaziland Royal National Airways Corporation and was as such a servant or an agent of the said Swaziland Royal National Corporation and was entrusted, *inter-alia*, with the custody and care of money belonging to his said employer, the said Accused did on or about the 10<sup>th</sup> December 2009 and at or near Matsapha area in the Manzini Region, did unlawfully and intentionally steal the sum of E13,736.74 (Thirteen thousand seven hundred and thirty six Emalangeni seventy four cents) thereby creating a general deficiency of E13,736.74 (Thirteen thousand seven hundred and thirty six Emalangeni seventy four cents); and thus did thereby commit the said offence.**

### **Count 4**

**The Accused is charged of the crime of Theft, in that, the said accused person was employed as the General Manager of Swaziland Royal National Airways Corporation and was as such**

a servant or an agent of the said Swaziland Royal National Airways Corporation and was entrusted, *inter alia*, with the custody and care of money belonging to his said employer, the said Accused did on or about September 2006 and at or near Matsapha area in the Manzini Region, unlawfully and intentionally steal the sum of US41 920.00 (Forty one thousand nine hundred and twenty US\$) an equivalent of E314,400.00 (Three hundred and fourteen thousand four hundred Emalangeni) and E7,565.10 (Seven thousand five hundred and sixty five Emalangeni ten cents) thereby creating a total general deficiency of E321,965.10 (Three hundred and twenty one thousand nine hundred and sixty five Emalangeni ten cents); and thus did thereby commit the said offence.”

[2] On 11 September 2018 the Appellant, after having pleaded guilty and having been found guilty of the four charges of theft was sentenced by the High Court by **Mabuza PJ** as follows:

“(a) Five (5) years imprisonment without an option of a fine; two (2) years of which are suspended for two (2) years on condition that accused repays the sum of Four Hundred

**and Fourteen Thousand Seven Hundred and Eighty One Emalangi Eighty Four Cents (E414,781.84) to the complainant through the Registrar of the High Court.**

**(b) Should he fail to repay the aforesaid money by the 12<sup>th</sup> September 2021, he is to be arrested and placed in custody in order to serve the suspended two (2) years. If by that time he has not repaid this amount in full, but has repaid a portion of it, that portion of the suspended sentence which the accused will serve will be in proportion to the amount that the accused has actually paid.**

**(c) The bail money is ordered to be released to him.”**

[3] On 9 November 2018 the Appellant filed a Notice of Appeal which was out of time in terms of the Rules of this Court and as such simultaneously filed an application for condonation of the late filing of the Notice of Appeal.

[4] In the interim the Appellant had brought an application to the Court *a quo* for bail pending the hearing and finalisation of the Appeal. It is not necessary to deal with that process in any great detail except to say that after

the Court *a quo* had refused the application, an appeal was lodged before this Court, which on 8 August 2019, granted the Appellant bail on the following terms:

**“1. The Applicant is released on bail pending appeal on the same conditions as was granted by the Court a quo on the 8<sup>th</sup> August, 2018 to the wit:**

**a. To deposit with the Treasury the sum of E30,000.00 which has already been paid;**

**b. To surrender his passport or other valid international travel document to the investigating officer herein at the Mankayane Police Station and not to apply for a new passport/travel document;**

**c. To report monthly following his release on bail in person at the charge office Mankayane Police Station between the hours of 0800 hrs and 1600 hrs, first such report the Friday after his release and thereafter, every last Friday of the month;**





**“KINDLY TAKE NOTICE that the Appellant, who was the accused in the Court *a quo*, being dissatisfied with the harsh sentence imposed by the Court *a quo* hereby appeals against the harsh sentence only to the above Honourable Court.**

**WHEREAS, the Appellant was charged in the Court *a quo* with the offence of theft in that he stole the sum of E414,7811.84 (Four Hundred and Fourteen Thousand Seven Hundred and Eight One Emalangenzi Eighty Four Cents) from his erstwhile employer.**

**WHEREAS the Appellant was charged by his then employer and dismissed subsequently. The Appellant’s pension was then withheld by the employer.**

**WHEREAS the Appellant admitted to the commission of the offence even to the Police when they arrested him in the form of a written statement.**

**WHEREAS, the Appellant pleaded guilty to the offence when the charges were put to him in the Court *a quo* and; and**

**WHEREAS, the Court a quo sentenced the Appellant to 5 (five) years imprisonment without an option of a fine, two of which were suspended on condition he repays the sum of E414,781.84 (Four Hundred and Fourteen Thousand Seven Hundred and Eighty One Emalangeneni Eighty Four Cents) to his former employer.**

**The grounds of appeal, are, *inter alia*, that:**

- 1. The Court *a quo* erred both in fact and in law by failing to consider that the Appellant's pension had already been withheld by his former employer as repayments of the monies misappropriated. To further order the Appellant to compensate the Complainant in the full amount of E414,781.84 (Four Hundred and Fourteen Thousand Seven Hundred and Eighty One Emalangeneni Eighty Four Cents) was a clear misdirection by the Court *a quo*;**
- 2. The Court *a quo* erred in law and in fact in not considering the suggestion of the Crown that the Appellant be sentenced in**

accordance with the case of *Mpofu v R* 1985 (4) SA 322 in which the sentence was wholly suspended;

3. The Court *a quo* erred both in law and in fact by failing to consider the triad when coming to the sentencing of the Appellant except by paying lip service to it. The Court *a quo* never considered the personal circumstances of the Appellant in its judgment and that appears *ex facie* the judgment itself. The Court *a quo* only concerned itself with the two competing aspects of the triad only; being the crime and interests of society;
4. The sentence of the Appellant by the Court *a quo* was in the circumstances of this case very harsh and induces a sense of shock.

WHEREFORE, the Appellant will seek an order that the appeal against sentence be upheld and the sentence be reduced accordingly.”

[6] Various further documents were filed including the Record of Proceedings, Heads of Argument and Bundles of Authority and various applications for Condonation for the late filing of various documents by both parties.

[7] On the 19 July 2019 the Appellant filed an 'Amended Notice of Appeal' without leave of Court as required by the Rules of this Court.

[8] It must be stated here that from the Record of Proceedings, it is clear that there was some confusion relating to the conversion rate used by the Court *a quo* on the US Dollar related amounts referred to Counts 1 and 4 of the Indictment.

[9] At the commencement of the Appeal, the Court granted the following orders:

1. The application by the Appellant for condonation of the late filing of the Notice of Appeal is granted.
2. The applications of both parties for the condonation of the late filing of their Heads of Argument and Bundles of Authorities are granted.

3. The Statement of Agreed Facts signed by Counsel of both parties is admitted into the record of proceedings.
4. The document headed “Amended Notice of Appeal” filed by the Appellant would not be heard as the provisions of Rule 12 had not been complied with in that the leave of this Court had not been sought and obtained for such amendment.
5. The appeal would be heard only on sentence in terms of the Notice of Appeal lodged on 9 November 2019.

[10] It is to be recorded that the Statement of Agreed Facts can best be summarised as follows:

1. The exchange rates applied by the Court *a quo* relating to the amounts of foreign currency stolen in Counts 1 and 4 were wrong.
2. The correct foreign exchange rates agreed between the parties resulted in the total amount stolen by the Appellant from his employer to be E333,968.74 (Three hundred and thirty three thousand nine hundred and sixty eight Emalangeneni and seventy four cents) and not the sum of

E414,781.74(Four hundred and fourteen thousand seven hundred and eighty one Emalangeneni and seventy four cents) as used by the Court *a quo*.

3. That the complainant withheld the sum of E228,771.80 (Two hundred and twenty eight thousand seven hundred and seventy one Emalangeneni and eighty cents) being the gratuity sum accruing to Appellant as a result of his employment with the complainant.
4. That accordingly the sum of E105,196.94 (One hundred and five thousand one hundred and ninety six Emalangeneni and ninety four cents) remains owing to the complainant in terms of the restitution order made by the Court *a quo*.

[11] Mr. Jele, on behalf of the Appellant indicated that he wished to raise the following legal points:

1. He requested that the bail paid by the Appellant in the sum of E30,000.00 (Thirty thousand Emalangeneni) be forfeited direct to the complainant and thus reducing the sum owing to be E75,196.94 (Seventy

five thousand one hundred and ninety six Emalangeni and ninety four cents).

2. By reference to Section 321(1) of the Criminal Procedure Act 67 of 1938, the imposition of a compensation order was in itself a sentence and in addition to the three year incarceration was inappropriate.
3. The Appellant had co-operated with the Police in making a statement, had written to the complainant offering repayment, had pleaded guilty and had spent nearly a year in prison.

[12] The actual import of Section 321 of the Act provides the following:

**1. Section 321(1) reads:**

**If any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon an application made by or on behalf of the injured party, forthwith award him compensation for such injury, damage or loss:**

**Provided that the amount so awarded shall not exceed the civil jurisdiction of such court.**

2. Section 321(4) reads:

**If a court has made any award of compensation, costs or expenses under this section and such award has been accepted by the person whose favour it has been made, such award shall have the effect of a civil judgment of such court.**

(My underlining)

[13] So with respect, it is clear that such compensation order has the effect of a civil Judgment and by no stretch of the imagination could it be said to be a sentence on its own as suggested by Mr Jele.

[14] In addition, Mr. Jele referred the Court to the unreported matter of **NKOSANA GARETH VAVEKI vs THE STATE** heard in the Western Cape High Court in 2010 to bolster his argument. The accused was an attorney practising for his own account who had stolen a very large amount of funds from his Trust Account. The Magistrate stated as follows:

**“.....this court is of the view that what is important in this instance is that the monies that you have removed from the trust account and which then has been funded by the attorneys fidelity fund, need to be repaid by you...this court is going to give you the**



**opportunity to stay out of jail because you have the means to earn sufficient to repay these monies and that is the only reason that you are being allowed to stay out of prison, but conditions are going to be imposed that will ensure you make the payment, because if you fail to do it, then the alternative is a term in prison.....This court is giving you the opportunity to stay out of jail and you need....to take this opportunity with both hands....”**

[15] The Judge hearing the Appeal stated as follows:

**“.....It also must be emphasized that it would be disingenuous of any practitioner in the future to use the sentence I am going to impose on Appellant as a precedent for similar offences. Any reliance on this judgment must take cognisance of the full judgment....”**

[16] In my view that Judgment does not assist the Appellant in any way. The balance of the factors raised by Mr. Jele in his Heads relating to values and exchange rates have been cured by the Statement of Agreed Facts.

[17] Mr. Jele, correctly, at Paragraph 4 of his Heads makes the following statement which, with respect, accurately sets out the position of our law:

**“4. Although it is trite law that a trial Court has a discretion to impose a sentence, a Court of Appeal is entitled to vary the sentence imposed if the trial Court was misdirected or if the sentence was disproportionate. A Court of Appeal will only interfere with the sentence imposed by the trial Court where such sentence is vitiated by some irregularity or misdirection or, having regard to the circumstances, it is disturbingly inappropriate.”** (My underlining)

Refer to **THANTAZA N. SILOLO VS REX APPEAL 30/2016.**

[18] On the other hand Mr. Dlamini, for the Crown raised the following legal submissions:

1. That the Appellant was employed by his employer in the senior position of General Manager.
2. As such he was in a position of trust and that he betrayed that trust.

3. That the theft was not a once off event and had been perpetrated over a period of 3 years.
4. That the Appellant only owned up when he was caught.
5. That the sentence of actual imprisonment period of 3 years by no means could be said to induce a sense of shock nor was it excessive or harsh.
6. That the period of imprisonment should not be tampered with but the suspended portion could be reduced.

[19] As set out in paragraph 17 above and in the judgment of **SILOLO** supra, this Court will not readily interfere with the sentence imposed by the Court *a quo*.

[20] If one looks at the Judgment on sentence of the Court *a quo* (Pages 38 of record onwards) one finds the following recorded:

1. The Appellant pleaded guilty.
2. The Appellant was a first offender.

3. The Appellant was sixty years old, married with a minor child of two years, that he is diabetic and that he was unlikely to be employed again as his dishonesty was widely published, that he was self -employed with an income of E200,000 ( Two hundred thousand Emalangeneni) per annum.
4. The Judge carefully analysed the judgment in **Rex vs Makhubu and Others** High Court case 381/2012.
5. That the Appellant abused his position of trust with the complainant repeatedly which was an aggravating factor and referred to **COLISILE MKHONTA HIGH COURT APPEAL CASE NO.86/2011 WHERE HLOPHE J, citing Reynolds in MPOFU 1985(4) SA 322:**  
  
**“...Positions of trust are not normally given to individuals unless they have unblemished references, and so the offence may be seen as a betrayal of those very characteristics. Society operates in certain spheres largely on the basis of trust, and one of the burdens of a position of trust is an undertaking of incorruptibility. The individual who puts himself forward as trustworthy, is trusted by the others and if he then takes advantage of this power for his own**

personal ends, he can be said to offend in two ways; not only does he commit the crime charged, (be it theft, false accounting or sexual offence), but in addition he breaches the trust placed in him by society and the victims of the particular offence.” In my respectful opinion this passage sums up the position most aptly and contains the essential reason why the courts will normally feel bound to pass a sentence of imprisonment and in some cases very long sentences of imprisonment.” (My underlining)

6. The interest of Society expects protection from the Courts against criminals.
7. As regards the sentence the Judge carefully compared other similar matters including:

(a) **R v Thembela Simelane**, criminal case no. 01/2010. He stole the sum of E600,000.00 (Six hundred thousand Emalangi) (trust money). He was sentenced to an effective term of 5(Five) years imprisonment. On appeal the sentence was increased to a further fine of E50,000.00 (Fifty thousand Emalangi) or 12(Twelve) months imprisonment because the Supreme Court considered that the

sentence of 5(Five) years imprisonment was inadequate. (My underlining)

(b) In **R v Charles Myeza**, the amount involved was the sum of E661,043.13 (Six hundred and sixty one thousand and forty three Emalangi and thirteen cents) and he was sentenced to 5(Five) years imprisonment.

(c) In **R v Polycarp Dlamini**, he was sentenced to 9(Nine) years imprisonment, (in respect of Counts 1 – 9 which were taken as one for the purposes of sentence), 3 (Three) years of which were suspended for a period of 3 (Three) years.

[21] Taking all these factors into consideration and with **SILOLO** ringing in my ears, I cannot find that the Court *a quo* misdirected itself in any way and that as such the arguments of the Appellant have no merit. In fact I am of the view that given the sentence meted out in the **THEMBELA SIMELANE** matter, the Appellant is extremely fortunate to have been treated lightly. He did indeed betray the trust of the complainant over a period of time and that he only came clean when he was actually caught. I

must also point out that in the **Mpofu** matter referred to by Mr Jele, contrary to the allegation by Mr Jele, the whole sentence was not suspended. 5 (Five) of the 9 (Nine) years imprisonment were in fact suspended on specific conditions of reparation.

[22] Given the circumstances of the matter relating to the date when the Appeal was actually heard and the date given by the Court *a quo* for repayment, I am granting an extended period within which the sum has to be repaid taking into account the period spent in jail by the Appellant.

[23] Accordingly I order as follows:

1. The appeal against sentence is dismissed.
2. The bail granted to the Appellant on 8<sup>th</sup> August 2019 is hereby revoked.
3. The Order of the Court *a quo* is set aside and substituted with the following:
  - a) The Accused is sentenced to 5(Five) years imprisonment without the option of a fine, 2(Two) years of which are suspended for 2(Two) years on condition that he repays the sum of E105,196.94 (One hundred and five thousand one hundred and ninety six Emalangeni

and ninety four cents) to the Complainant through the Registrar of the High Court.

- b) That the bail monies in the sum of E30,000.00 (Thirty thousand Emalangeni) paid by the Appellant be released by the Registrar of the High Court to the Complainant immediately upon the Appellant recommencing the prison sentence.
- c) That should the Appellant fail to pay the balance of E75,196.94 (Seventy five thousand one hundred and ninety six Emalangeni and ninety four cents) by the 12 September 2023 he is to be arrested and placed in custody in order to serve the suspended 2(Two) years. If by that time he has not paid this amount in full, but has repaid a portion of it, that portion of the suspended sentence which the accused will serve will be in proportion to the amount that the accused has actually paid.
- d) The time already spent in custody by the appellant shall be taken into account when computing the sentence.



---

**R. J. CLOETE**  
**JUSTICE OF APPEAL**

I agree

---

**M.C.B. MAPHALALA**  
**CHIEF JUSTICE**

I agree

---

**DR. B.J. ODOKI**  
**JUSTICE OF APPEAL**

**For the Appellant:** N.D. JELE  
**For the Respondents:** T. DLAMINI