

**NSUTHU DUBE**

**And**

**SAMSON SIBANDA**

**And**

**OSCAR VUNDLA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 30 DECEMBER 2022 & 19 JANUARY 2023

**Bail pending appeal**

*S. Mlambo* for the applicant  
*K. M. Goveya* for the respondent

**MAKONESE J:** The applicants were arraigned before a magistrate sitting at Kezi on a charge of stock theft as defined in section 114 (2) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:28). Applicants pleaded not guilty to the charge but were convicted at the conclusion of a full trial. On 27<sup>th</sup> October 2022 applicants filed a notice of appeal against both conviction and sentence. The applicants now seek their release from custody pending the hearing of their appeal. The application is opposed by the state.

**Background facts**

It was the state case that sometime between October 2021 and 20<sup>th</sup> June 2022, 1<sup>st</sup> applicant acting in connivance with 2<sup>nd</sup> and 3<sup>rd</sup> applicants stole 9 beasts belonging to different complainants from Simukwe grazing area, Kezi. The state alleged that 3 of the beasts were recovered while being driven by the applicants. Subsequent follow ups by the complainants led to the recovery of 2 more beasts belonging to one of the complainants from 1<sup>st</sup> applicant's homestead in the Hobodo area, Kezi. In their defence, applicants denied the allegations of stock theft. 1<sup>st</sup> applicant contended that there existed an agreement between him and one Lizwe Moyo of Sinayi Village, in terms of which Lizwe exchanged a bull and 2 heifers with

1<sup>st</sup> applicant for 4 oxen. In or around June 2022, in order to fulfill his part of the contract, 1<sup>st</sup> applicant hired 2<sup>nd</sup> and 3<sup>rd</sup> applicant to take his 2 oxen to Lizwe Moyo's homestead. In order to minimize the risk of the 2 beasts running away 1<sup>st</sup> applicant instructed 2<sup>nd</sup> and 3<sup>rd</sup> applicants to take 4 beasts belonging to a neighbor to be used as escort. In simple terms the neighbour's beasts were used to make it easy for the applicants to drive the cattle to their intended destination. Applicants state that at no time did they intend to steal the complainant's cattle.

### **Submissions by the applicants**

Applicants submit that the court *a quo* erred and misdirected itself in concluding that the state had proved its case beyond reasonable doubt. Further, applicants argue that the court *a quo* erred and mis-directed itself in concluding that the applicants had worked in common purpose in the alleged commission of the stock theft when there was no factual basis for that conclusion. Applicants contend that the court *a quo* erred when it convicted 2<sup>nd</sup> and 3<sup>rd</sup> applicants in terms of section 114 (2) (b) of the Criminal Code when they had not been charged for contravening that particular section. Applicants argued that there are bright prospects of success on appeal and that there would be no danger to the due administration of justice as there is no risk of abscondment. Applicants argue that without proof of direct evidence, the state sought to rely on circumstantial evidence. The court *a quo* concluded that because 2<sup>nd</sup> and 3<sup>rd</sup> applicants were seen driving the 4 beasts in the Muzola area, Kezi an inference should be drawn that they indeed stole the beasts in question. Applicants argue that all the essential elements of the charge were not established beyond reasonable doubt. For that reason applicants submit that they have a fighting chance on appeal.

### **Submissions by the respondent**

The state submits that there are no reasonable prospects of success on appeal. Further, the state avers that the presumption of innocence no longer operates in favour of the applicants as they have since been convicted. It was contended on behalf of the respondent that the record of proceedings indicates that the applicant connived to commit the offence. The respondent vehemently argued that the court *a quo* properly assessed the evidence presented before finding applicants guilty of the offence.

### **Application of the law**

Section 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07) empowers the court to admit a convicted person to bail pending the determination of his appeal by the High Court. Section 115 (2) (b) of the Criminal Procedure and Evidence Act provides that where an accused who is in custody in respect of an offence applies to be admitted to bail after having been convicted of an offence, he shall bear the burden of showing on a balance of probabilities that it is in the interests of justice for him to be released on bail. In this matter, applicants are required to show that there are reasonable prospects of success on appeal. Applicants are expected to show that there is a realistic chance that the appeal might succeed. The granting of bail pending appeal turns on interrelated factors. The prospects of success and the risk of abscondment if applicants are released on bail pending appeal must be carefully considered. See *S v Dzawo* 1998 (1) ZLR 536 (S) and *Aitken & Anor v AG* 1992 (1) ZLR 24 (S).

### **Disposition**

It is my considered view that a perusal of the record reflects that the applicants have reasonable prospects of success on appeal. Applicants' defence to the charge was not entirely discredited and found to be false. It is important to underscore the fact that the state carries the burden to prove all the essential elements of the charge in any criminal matter. Where reasonable doubt exists, the court must acquit the accused person. The appeal is in my view, not entirely hopeless and is not devoid of merit. In the circumstances, the application for bail pending appeal is granted in terms of the draft order.

*Majoko & Majoko* applicants' legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners