

THE STATE
versus
PEPUKAI KAPONDORO
and
KUDAKWASHE KAPONDORO
and
TIMOTHY MAKOTOTSA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 23 June 2022

Review Judgment

MUNANGATI-MANONGWA J: Judicial officers deal with serious offences which often call for mandatory sentences upon conviction. It is therefore imperative that they be conscientious in handling a trial. A faulty conviction can be so prejudicial as to adversely impact upon an accused's livelihood. Often no compensation for wrongful incarceration is sought due to lack of knowledge and resources.

This case is one of several where diligence and proper evaluation of evidence should have resulted in the acquittal of first and second accused persons in counts 1 and 3.

The three accused persons faced three (3) counts of contravening s 114(2) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] "stock theft."

All the three accused persons pleaded not guilty. After a full trial the first and second accused persons were found guilty of counts 1 and 3 and were acquitted on count 2. The third accused person was found guilty of all three counts.

I hasten to state that accused 3's conviction is solid and proper as there was overwhelming evidence against him. In that regard the conviction of accused 3 is found to be in accordance with real and substantial justice hence it is confirmed. It is the conviction of first accused and second accused on counts 1 and 3 which is problematic.

The evidence led shows that the three (3) complainants' beasts were stolen from their cattle pen. The cattle were all recovered from persons who had either bought the stolen beasts or exchanged their cattle with the stolen beasts.

In count 1, the first, second and third accused are alleged to have stolen one black heifer from the cattle pen of Maria Magwara. The facts alleged are that after the theft, accused 3 sought a buyer for the heifer in November 2021. One, Although Simon who is in the business

of buying and selling cattle bought the heifer and sold it to Chipo Jongwe. The said Chipo Jongwe gave the heifer to one Shiella Kamanura as payment for lobaba. It is from the said Shiella Kamanura that the heifer was recovered. Accused 1 and 2 denied the charges.

The evidence of Maria Magwara the owner of the heifer did not implicate the first and second accused persons. On being asked by both accused as to whether she had evidence against the accused persons her answer was simply; “You came to my cattle pen with police.” Nothing more. Equally nothing came out of the second witness Shieller Kanamura from where the beast was ultimately recovered. Her evidence was simply that all the accused did was to come and take the beast with the police. Understandably because she had gotten the beast from one Chipo, the second person in the chain who had gotten the beast from one Although Simon. No evidence implicated the accused. Equally one Chipo Jongwe’s evidence simply pointed to Although Simon and she did not know the accused.

Although Simon gave evidence that he had no knowledge of accused 1 and accused 2. He only knew accused 3 whom he saw when he came with the Police. He had exchanged his heifer with Never Muchavenyoka who gave him the stolen heifer.

The said Never Mucheyenyoka’s evidence was too general. He said he knew the accused persons as they came to his home with the beast to exchange. On being asked “Who among the three did you give the beast and the goat?” his answer was “Accused 3!

During cross-examination by both accused 1 and accused 2, evidence shows that this witness was particularly speaking to accused 3 when the heifer was brought to his homestead. Equally he indicated that he was called by accused 3 to come and see the heifer and he told him to come to the witness’ homestead.

No concrete evidence was led to implicate accused 1 and 2. There is absolutely no evidence which meets the degree of proof which has to be beyond reasonable doubt. It is trite that where a reasonable person would still entertain a reasonable doubt as to whether the accused is guilty, the accused is entitled to an acquittal. The finding that all the accused persons were positively linked to the commission of the offence is without basis.

As regards count 3 there is absolutely no *aorta* of evidence linking accused 1 and 2 to the commission of the offence. It is a mystery how the court could convict in such circumstances. One Tryphire Nyikayaramba was clear that accused 3 approached her and she unknowingly exchanged her beast with the stolen beast. She dealt with accused 3. She did not implicate accused 1 or 2. She indicated that accused 3 claimed the beast to be his. She even entered into a written agreement with accused 3. The only witness who gave evidence

mentioning accused 1 and accused 2 is Leticia Mutare. Her evidence that the accused persons mentioned the accused persons 1 and 2 was simply that “They are the ones who led police to my homestead and went to my cattle pen”

On being asked why she said that accused 1 and 2 stole her beast she maintained it was because the two led police and made indications. Accused 2’s follow up question is pertinent. He asked –

Q: Was I a free man or I was an accused

A: You were under arrest of course but I don’t know if you were free.

Of note is the fact that complainant also drove with the Police to her homestead. No Police Officer gave evidence on the purported indications. Thus, there is no corroboration of this evidence. Apart from the fact that first and second accused persons are purported to have gone for indications the record of which was not produced, nothing links them to the third count. In any case accused 3 is the one who alone exchanged the beast, he went alone, concluded his agreement alone and never mentioned that he was with first and second accused person. Neither is there mention that the beast in count 3 emanated from first or second accused. The person from which the beast was recovered clearly stated that she got the beast from accused 3.

In the absence of evidence linking first and second accused to the commission of the offence to the extent of the degree required, proof beyond reasonable doubt, accused 1 and 2 are entitled to an acquittal.

Justice demands that benefit of doubt be given to an accused person where the evidence falls short in sufficiency and weight. It is not for the court to convict at all costs. The assessment of evidential value is key in determining the guilty or otherwise of an accused. Time lost in incarceration can never be replaced hence a judicial officer has to bring his faculties together and exercise diligence in evaluating evidence before pronouncing a guilty verdict. No reasonable doubt should remain as to the guilt of the accused person.

Given the foregoing accused 1 and accused 2 are found not guilty in counts 1 and 3 and are hereby acquitted. The accused are entitled to immediate release as they had been discharged in count 2.

MUNANGATI-MANONGWA J:.....

ZHOU J: Agrees.....