

**THE STATE**

**Versus**

**JUSTINE MATINETSA**

**And**

**BUTHOLEZWE MATINETSA**

IN THE HIGH COURT OF ZIMBABWE  
BERE J  
BULAWAYO 26 OCTOBER 2017

**Review Judgment**

**BERE J:** After a trial the first accused person was convicted of the crime of stock theft in violation of section 114 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The learned magistrate then proceeded to sentence the accused as follows:

“Sentence: 18 years imprisonment. In addition 3 months are suspended on condition accused restitutes Maqhabe Nkomo \$600,00 through the Clerk of Court, Gweru by 4pm on 30 July 2016.”

The brief facts of this matter were that the two accused persons stole the complainant’s two beasts valued at \$1 200,00 and upon their arrest one beast valued at \$600 was recovered.

At the conclusion of the trial the second accused was acquitted hence the sentence only pertains to the first accused person.

Having correctly found out that there were no special circumstances as dictated by the relevant Act, the trial magistrate proceeded to pass the sentence as highlighted above.

I am concerned with the whole approach to sentence as demonstrated by the trial magistrate. I cannot help but conclude that the trial magistrate did not apply his mind to the issue of sentence. This is clear by his decision to impose two different sentences in respect of one count of stock theft. The trial magistrate initially imposed a sentence of 18 years

imprisonment. When he probably felt the sentence was not enough he decided to impose an additional 3 months but now suspended it on condition of compensation to the complainant.

The reasons for sentence given by the trial magistrate are too scant to justify a sentence of 18 years imprisonment for one count of stock theft. I suspect the magistrate was labouring under the mistaken view that since two beasts were stolen, each beast must attract a prison term of 9 years. If I am correct in my suspicion (which I believe I am), then the trial magistrate fell into a serious error.

It must be made very clear that the mandatory period of imprisonment spoken to by the penal provision of the code in stock theft matters refers to a single count in the absence of special circumstances and not to the number of cattle or beasts stolen.

I could not agree more with my brother MATHONSI J when he made a similar observation in the case of the *State vs Tatenda Takawira*<sup>1</sup> when he remarked as follows:

“Pruned down to the bare bones of the matter, the accused persons were convicted of one count of stock theft and the mandatory sentence for that is 9 years imprisonment in the absence of special circumstances. What appears to have played on the mind of the magistrate is the fact that 2 beasts were involved. He probably thought that each beast and not the count should be visited with its own 9 years imprisonment. Otherwise how else can one explain the sentence of 20 years?”

I come now to deal with the additional three months which the magistrate suspended on grounds of restitution to the complainant.

In a recent case of the *State vs Tapiwa Hove*<sup>2</sup> I commented on the impropriety of a trial magistrate imposing such a sentence in the absence of an enquiry to ensure that that condition is fulfilled. In a proper case where such a condition is imposed, the record of proceedings must

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<sup>1</sup> HH-75-15 at pp3-4 of the cyclostyled judgment

<sup>2</sup> HB-308-17

show that such an enquiry has been conducted. The absence of such an enquiry must amount to a serious misdirection.

In the same case, I also emphasized the point that when one decides to suspend a portion of a prison term on condition of restitution, for example, the suspended sentence must be sufficient to encourage or incentivize the payment of such restitution. To sentence an accused to 18 years imprisonment and then to go on to give an additional sentence of 3 months and suspend it on condition of restitution in the sum of \$600 is not only inappropriate but ludicrous. The accused is likely to ignore such a sentence because there is basically no sufficient incentive to pay such restitution.

However, on a more serious note, in my view the penal provision of stock theft is deterrent and quite a heavy penalty on its own. Once one imposes such a sentence there is no sensible reason why the magistrate in the instant case would have felt like adding an additional penalty of three months to it. If anything the suspended sentence should have been an integral part of the main sentence.

I am more than satisfied that the sentence imposed by the trial magistrate in this case was incompetent and that it must be set aside and substituted by the following sentence:

“The accused is sentenced to 11 years imprisonment of which 1 year imprisonment is suspended on condition the accused restitutes the complainant Maqhabe Nkomo in the sum of \$600,00 to be paid through the Clerk of Court, Gweru magistrates Court by 4pm on 30 November 2017.”

Mathonsi J ..... I agree