

MUSIWA MALEMANE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MABHIKWA JJ
BULAWAYO 16 JULY 2018

Criminal Appeal

MAKONESE J: In terms of section 114 (2)(a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23) any person who takes livestock or its produce knowing that another person is entitled to own, possess or control the livestock or its produce or realising that there is a real risk or possibility that another person may be so entitled; and intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility that he may so deprive the other person of his or her ownership possession or control, shall be guilty of stock theft.

In terms of section 233 of the Criminal Code, is a person does or omits to do anything which would be an essential element of a crime, if done or omitted, as the case may be, with any form of intention, knowledge or realization, the person shall have a complete defence to a charge of committing that crime, if, when he or she did or omitted to doing the thing, he or she was genuinely mistaken or ignorant as to an essential fact of the crime concerned.

The 62 year old appellant resides at Matshetsheni in Gwanda. In the year 2009 appellant's heifer went missing. In 2013 a stray heifer was located at Gonkwe, in Gwanda. The heifer fitted the description in some respects, the appellant's missing beast. Labouring under a mistaken fact the appellant claimed and took possession of the beast. It later transpired that the beast did not in fact belong to the appellant. The appellant appeared before a magistrate sitting at Gwanda on 28th April 2016 facing one count of stock theft. She denied the allegations but was

nonetheless convicted despite her plea of not guilty. She was sentenced to the mandatory 9 years imprisonment.

The appellant now appeals against both conviction and sentence. The state does not support the conviction. That concession was well taken. A perusal of the record indicates that no evidence was placed before the court to prove that appellant did have the intention to steal the beast in question. The appellant never acquired the beast in the strict sense of the word, and on the evidence placed before the court. The appellant had a claim that the strayed beast looked like hers which had gone missing some years back. The appellant was arrested when she had gone to the police station to have audience with the complainant. In spite of the appellant's insistence that the beast was hers, and that she never took actual possession of the beast, and did not possess the requisite intention to deprive the owner of her possession or ownership, appellant was convicted by the court *a quo*.

It is a notorious fact that in rural settings stray beasts may not be matched to their real owners, in some cases for several years. This is so because descriptions of beasts may in certain instances be similar if not identical unless they are clearly branded. The appellant's defence in the court *a quo* that she was mistaken that the beast was her was not controverted. It is clear that the essential elements of the offence were not sufficiently proven. In criminal cases it is trite that the guilt of the accused must be proved beyond reasonable doubt.

In the circumstances, and accordingly the appeal is upheld. The conviction and sentence of the court *a quo* is set aside.

Mabhikwa J I agree