

OSTEN MACHINGAMBI  
versus  
THE STATE

APPELLANT DIVISION OF THE  
HIGH COURT OF ZIMBABWE  
KAMOCHA and GOWORA JJ  
HARARE, 29 June and 1 July 2004

*B. Chikowero*, for the appellant  
*V. Shava*, for the respondent

### **Criminal Appeal**

KAMOCHA J: The appellant pleaded guilty to one count of theft of stock and was accordingly found guilty as charged. He was then sentenced to undergo 36 months imprisonment of which 12 months imprisonment was suspended for a period of 3 years on the customary conditions of future good behaviour. Aggrieved by this sentence he appealed to this court.

The appellant's grounds of appeal were presented like heads of argument. From my understanding they seem to be as follows:-

That the trial magistrate misdirected himself in over-emphasizing the gravity of the offence of theft of stock *per se* and its prevalence resulting in him according insufficient weight to the circumstances leading to the commission of the offence. The appellant complained that the magistrate erred and misdirected himself in not taking into account that at 31 years appellant was a young, first offender who pleaded guilty and could still be deterred and rehabilitated out of prison. That appellant was a family man looking after an 8 month pregnant wife and 3 children attending grades one, three and seven respectively. He also complained that the magistrate misdirected himself by not utilizing the option of a fine provided by the Act or not considering community service as the effective sentence he imposed did not exceed 24 months. His final complaint was that the court *a quo* erred and misdirected itself in not treating imprisonment as a rigorous and severe form of punishment which must only be imposed as a last resort.

The circumstances giving rise to the commission of this offence are these. The complainant bought 15 heifers from Constancia Estates, Chivhu on 17 July 2001. He took them to his plot in village 19 Central Estate, Mvuma. Because the animals were not familiar with their new home they strayed into other villages in the neighbourhood. Complainant, however, managed to recover 12 of them. Two of them were found ensnared and dead in the bush. One of them strayed to the appellant's village. He kept it from July 2001 to October 2003.

For quite sometime appellant did not tamper with the complainant's brand marks and ear tags. He did not enter the heifer in his stock card. He, however, did so at a later stage and branded it with his own brand mark and removed the ear tags. He was arrested on 3 October 2003 following a tip off and the animal was recovered.

The trial court was criticized for observing that the crime of stock theft was serious and was regrettably very prevalent in the area. There is no justification, in my view, for the attack. The court was in fact correct in its observations. I would go so far and state that the crime has now become so rampant country wide that the legislature is considering introducing a maximum mandatory sentence of 9 years for the offence.

Since the offence is very prevalent in the area there was every justification for the court to impose an appropriate deterrent sentence. The trial court, in my view, was correct in holding that imposing a non-custodial sentence would be trivializing the crime which is very prevalent albeit that the sentence it finally imposed was unduly harsh in the particular circumstances of this case.

The fact that the beast strayed into the appellant's village and he did not alter its identity for sometime is indeed a point in the appellant's favour. But too much wait should not be attached to it to the extent of warranting the imposition of a non-custodial sentence because as against that there is a fact that appellant did not report the stray animal to the police. He could have even reported it to all his neighbours, the kraal head, headman or

chief in the area if he was an honest man. A report could also have been made to a WARD CO or VIDCO in the area.

The appellant cannot be said to be a young offender when he is 31 years, married with 3 children.

Counsel for the State conceded that a lesser custodial sentence should be imposed in the light of the fact that the appellant did not go out to steal the best. He relied on the case of *R v Mawadze* 1967(2) SA 21. The concession, in my view, was properly made. It is correct, as already observed, that there are special circumstances which led to the commission of the crime and further that the animal was recovered. In the light of the special circumstances the court ought to have imposed a lesser sentence than the one it did which in my view is excessive and cannot be allowed to stand.

In the circumstances the appeal succeeds to the extent that the sentence imposed by the trial court is hereby set aside. In its place I would substitute the following:

8 months imprisonment of which 4 months imprisonment is suspended for a period of 5 years on condition that he is not convicted of any offence of which theft or dishonesty forms an element committed within that period for which accused is sentenced to imprisonment without the option of paying a fine.

KAMOCHA J:.....

GOWORA J agrees:.....

*Gutu and Chikowero*, appellant's legal practitioners

*Attorney-General's Office*, respondent's legal practitioners