

DENFORD MURANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGUJ
HARARE, 12 and 18 February 2015

Application For Bail Pending Appeal

L T Nyama, for applicant
F Kachidza, for respondent

TAGUJ: This is an application for bail pending appeal against both conviction and sentence. The applicant pleaded guilty to, and was duly convicted, of Stock Theft as defined in s 114 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*]. He was sentenced to 12 years imprisonment of which 3 years imprisonment were suspended for 5 years on condition of future good behaviour. He remained with an effective sentence of 9 years.

The undisputed facts were that the applicant proceeded to the cattle pen of the complainant at night around 2300 hours and removed one brown ox. He drove the ox to Macheke Business centre and tied the beast with a rope to a tree. He then began to look for buyers. He unfortunately, approached on Farai Maimba the owner of T C Butchery who, instead of buying the ox, tipped the police. The applicant was arrested and the stolen ox valued at \$ 650.00 was recovered.

In his notice of appeal the applicant attacked the conviction and sentence of the court *a quo* on the basis that the trial court failed to take into account the employer and employee relationship that existed between the applicant and the complainant. He claimed that he had worked for the complainant who had not paid him for 8 months. When asked for special circumstances his explanation was as follows-

“The complainant did not pay me as he promised and I ended up taking his beast unlawfully. That is all.”

The applicant, in fact, raised a defence of claim of right which was dismissed by the trial court as not constituting special circumstances.

The application is opposed by the respondent.

The guiding principles in an application of this nature were clearly outlined in *S v Dzawo* 1998 (1) ZLR 536 as follows-

- (a) Whether there are prospects of success on appeal
- (b) The risk of abscondment
- (c) The right of an individual to liberty taking into account the delay that may be encountered in finalising appeals.”

Mrs *F Kachidza* on behalf of the respondent submitted that the applicant was properly convicted and dismissed the defence of claim of right. She contended that the claim of right would not succeed in term of s 122 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*], in that the applicant had taken possession of the ox, not intending to hold the property as a pledge or security pending the satisfaction of a debt owed by the complainant. He intended to deprive the complainant permanently, hence he sought a buyer.

Section 122 which could be applicable to the defence raised by the applicant reads as follows-

“122 Pledge – taking cases

- (1) Where a person takes possession or control of property capable of being stolen which is owned, possessed or controlled by another person, intending to hold the property as a pledge or security pending the satisfaction of a debt owed by that other person, he or she shall not be chargeable with theft of the property or stock theft unless he or she intended to deprive the other person permanently of his or her ownership, possession or control of the property, but he or she may be charged with unauthorised borrowing or use of the property.
- (2) A person who takes property capable of being stolen, intending to deprive the owner permanently of his or her ownership, contrary to the terms on which the person received possession or control of it from the owner as a pledge or security pending the satisfaction of a debt owed to him or her, shall be chargeable with theft or stock theft, as the case may be.”

In casu, the applicant went to the cattle pen of the owner at night. He took the property without the knowledge or permission of the owner. He was arrested in the process of selling the ox to a Butcher. He therefore, intended to deprive the owner permanently. He cannot raise a defence of claim of right. His chances of success on appeal against conviction are nil.

He was sentenced to an effective term of 9 years imprisonment. This is the minimum mandatory sentence in terms of the Act. His chances of success on appeal against sentence are therefore, nil. He is therefore, not a good candidate for bail pending appeal.

In the result, it is ordered that-

The application for bail pending appeal is dismissed.

Kamusasa & Musendo, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners