

FRANCIS MASANGA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE & BERE JJ  
HARARE, 23 January & 26 November 2014

### **Criminal Appeal**

*T. Marume*, for the appellant  
*F Kachidza*, for the respondent

HUNGWE J: The appellant was convicted of theft of stock as defined in s 114 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (“the Act”). He was sentenced to 11 years of which 2 years imprisonment was suspended for 5 years on the usual conditions. He appeals against both his conviction and sentence.

The appellant advanced three grounds of appeal against conviction.

The first ground of appeal against conviction is that the learned trial magistrate grossly misdirected himself on the facts and the law by rejecting his defence since it was corroborated by credible witnesses.

The second ground advanced against the appellant’s conviction is that the learned magistrate erred at law in concluding that the appellant committed theft when there was no evidence to support such a conclusion.

The final ground of appeal is that the learned magistrate grossly misdirected himself on the facts as he failed to realize that the evidence pointed to Mukombwe as the one who masqueraded as the owner of the bovine in issue.

As against sentence, the basis of the appeal is that the learned magistrate erred in failing to find that there were special circumstances in the matter which entitled the appellant to some other punishment than the minimum mandatory penalty set by the Act.

I will consider the grounds in seriatim.

The first ground of appeal is clearly based on a fundamental lack of appreciation of the reasoning of the learned trial magistrate. He identified the evidence led by the defence which was aimed at establishing as fact that a police officer one Mukombwe was the owner of the stolen bovine. However the appellant had in his own defence outline claimed that he had been given the beast by one Biggie Chitsau. There was therefore conflicting evidence tendered by the appellant regarding the issue of the origins of the beast or how the appellant came into possession of the beast. He reconciled this apparent contradiction by concluding, as he was entitled to, that both Biggie Chitsau and the police officer were accomplices in the theft of the beast. In any event he rejected appellant's explanation of innocent possession as false and therefore by inference concluded, properly in my view that the appellant and these other two were part of a racket involved in the theft of this particular bovine. This conclusion was buttressed by the involvement of the police officer in alerting the appellant about how the investigations were progressing thereby keeping the appellant beyond the reach of the law for quite a considerable time. In the event there can be no justifiable reasons for the criticism levelled against the finding by the learned trial magistrate regarding the appellant's guilt.

There was sufficient evidence upon which to convict in my view. For example, when the appellant sold the same beast which he acknowledged had been identified as belonging to the complainant, he gave himself out as the owner and signed as such the papers reflecting the sale to one Jagada. How can a person of his experience as a butchery operator fail to have realised the possibility that there was a real risk that the bovine may have been stolen? The court takes judicial notice that stock theft has been one of the most well-known crimes in the rural areas. As such most people of average intelligence would not venture to sell a bovine whose origins are clearly dubious such as the particular beast the appellant sold. He did so at his own risk. He knew that the beast may have been stolen and proceeded with selling it notwithstanding his special knowledge.

Section 114(2) of the Criminal Law Code provides that any person who takes possession of livestock knowing that it has been stolen or realizing that there is a real risk or possibility that it has been stolen shall be guilty of stock theft. The appellant had all the opportunity to satisfy himself as to the origins of the beast if he wanted to. He was well known to a police officer. He had been in the butchery business for quite some time. He therefore was aware of the

procedure taken in connection with the disposal of cattle. Rather than corroboration of the appellant's defence by credible witnesses, there were irreconcilable contradictions which the court correctly resolved against the appellant. The first ground of appeal therefore fails.

As for the second ground, it amounts to saying the appellant is not guilty because he is not guilty. The analysis given by the magistrate as demonstrated above applies to this ground. Nothing further needs to be said of this ground. It is dismissed.

The third ground merely repeats the same factual issues which I have discussed above. The magistrate had ample grounds to disbelieve the explanation tendered by the appellant. Appellant had no reasonable explanation regarding how he came into possession of the bovine which he sold to Jagada from whom it was recovered. He found it tied to a pole in a built-up area in Murambinda. The person who he claims gave him the right to drive it away has no cattle pen in the area where he resided then. The fact of the matter was that there was no such a pen in the vicinity from where it could have reasonably held to have strayed. The fact that a police officer and a known cattle rustler were involved or linked to this particular bovine did nothing to exculpate the appellant. Instead, he ought to have realised that there was real risk or possibility that the bovine may have been stolen and kept away from involving himself. He did not. Instead, he claimed it as his when he sold it to Jagada.

As for the finding that special circumstances ought to have been found to exist, I am unable to agree with the appellant's contention that being an accomplice to theft of stock amounts to special circumstances. An accomplice is just as guilty as the principal offender. In the present case the appellant was clearly as guilty as his fellow accomplices. He sold the bovine when he had no basis to believe that it was not stolen. There are therefore no special circumstances existing in the commission of this crime. In the result therefore the appeal is dismissed in its entirety.

BERE J agrees.

*Matsikidze & Mucheche*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners