

Judgment No. S.C. 77/98
Crim. Appeal No. 753/97

KERESIA CHIDZIWO v THE STATE

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, MAY 7 & JUNE 1, 1998

M Hogwe, for the appellant

J Matimbe, for the respondent

MUCHECHETERE JA: The appellant, together with one Killion Kuyangara (“Kuyangara”), was on 15 August 1997 convicted of stock theft. The appellant was sentenced to twenty-four months' imprisonment with labour of which six months' imprisonment with labour was suspended for five years on the usual conditions of good behaviour and another six months' imprisonment with labour was suspended on condition of restitution of the sum of \$1 000,00 to the complainant. She now appeals against both conviction and sentence. Kuyangara, who was sentenced more heavily, has not appealed against either conviction or sentence.

It was alleged by the State that some time in January 1997 the appellant and Kuyangara had stolen one black ox with loose horns facing downwards belonging to one Enock Kadziyanike and sold it to Cutprice Butchery at Mukonori Business Centre in Hurungwe.

The complainant's evidence that his ox was stolen was not disputed. After discovering that it had been stolen he followed a spoor leading from his cattle pen but eventually lost it. Thereafter he reported the matter to the police and he, together with the police, went looking for the ox at three local butcheries. Later he was called to identify the hide of the missing ox by the police at Magunje Police Station. He also identified the horns of the ox. These had been recovered by the police from a local butchery. He valued his ox at \$2 000,00.

The sole issue to resolve in this matter is whether the appellant acted in concert and common purpose with Kunyangara in the theft of the ox. In this connection there was evidence from one Gift Sabadza ("Sabadza"), the owner of Cutprice Butchery, to the effect that on 5 January 1997 the appellant came to his butchery in the afternoon and offered to sell him her ox. She told him that the selling price was \$1 500,00. On the same day he went to her home where she showed him a black ox, whose horns were pointing upwards. They finally agreed on the price of \$1 200,00. He paid her \$1 000,00 as a down payment and the remaining \$200,00 was to be paid later. He recorded the transaction in his notebook and a receipt to that effect was issued. After three days Sabadza sent his employees, Emmanuel, Abraham and Happimore, to collect the ox from the appellant's home. They did as instructed and later slaughtered the ox at his butchery in his absence. Sabadza later discovered that the appellant had given his employees a different ox from the one she had shown him. The ox she gave them was black in colour but had small horns which were pointing downwards, that is, the one identified by the complainant as belonging to him. According to Sabadza, Kunyangara was not at all involved in the transaction.

Under cross-examination, Sabadza was adamant that he dealt only with the appellant in the transaction. He denied that it was Kunyangara who had sold him the ox and that he had given \$1 000,00 to him in the presence of the appellant. Sabadza was not shaken under cross-examination.

Sabadza's account was largely corroborated by Happimore Muchengi's ("Happimore") evidence. Happimore worked as a meat seller at Cutprice Butchery. He confirmed that the appellant came to the butchery in January 1997 and that she and Sabadza negotiated the sale of an ox to the latter. He, however, does not know when and how much money was exchanged. Later he, together with Emmanuel and Abraham, were sent to collect the ox from the appellant. They found her home and she showed him the stock card and he noted the particulars in the butchery's stock register. The appellant signed as the seller of the ox and her son Gift as witness. The stock register and stock card were produced as exhibits. Happimore also did not know anything about Kunyangara's involvement in the matter. The ox they were shown and took to the butchery for slaughter was black and had small horns pointing downwards.

Under cross-examination Happimore maintained the above. He denied that Kunyangara ever sold any cattle to him. He also denied that he had got details of the appellant's stock card from the previous sale of cattle by her to the butchery. And he maintained that the appellant did sign the butchery's stock register. Happimore was also not shaken under cross-examination.

The other relevant evidence is that it was a well known fact that Kunyangara had no cattle pen nor any known cattle of his own. On this issue Gift Chidziwo was asked during cross-examination:-

“Q. When this case arose did accused 1 (Kunyangara) have any cattle?
A. No.

Q. Would you know whether these cattle existed and were being kept elsewhere? A. I do not know.”

Sabadza said the following during cross-examination:-

“Q. Accused 1 has cattle? A. No, as his home is deserted.”

The appellant said the following in her evidence-in-chief:-

“He (Kunyangara) had told me the beast was his which was being kept elsewhere. I believed him. Accused 1 had no cattle of his own at the material time. That is all.”

And under cross-examination she stated the following:-

“Q. Accused 1 had no cattle of his own at (the) material time? A. Correct.

Q. Are you sure? A. Yes. But he used to tell me he had his cattle somewhere.”

Kunyangara stated the following under cross-examination:-

“Q. Have you ever owned any cattle? A. I had six head of cattle which I sold off in 1992.

Q. Are you sure? A. Yes I am. I sold off five head of cattle in 1992 and one of these (the other one) had been stolen.

Q. At the time this case arose you had no cattle? A. Correct.”

Further, as already indicated above, the evidence adduced indicates that the appellant's stock card was used in the sale of the stolen ox. Attempts by the appellant to show that details of her stock card were obtained from a previous transaction were strongly denied and were unsatisfactory because those details differ from what was recorded in the previous transaction.

The appellant's account was to the effect that she and Kunyangara were not blood relations but because they were neighbours he became an uncle to her family. She used to give him oxen as draught power. And he used to take her cattle for grazing. On the day in question he took the cattle, which were twenty in number, for grazing. He brought back twenty-one cattle and one of them did not belong to her. He told her that the beast was his and he asked her to keep it in her pen for the night.

The following day Kunyangara asked the appellant to give the ox to Sabadza. At the time he was with Sabadza at her home and Sabadza gave him \$1 000,00 for the ox. Kunyangara accepted the money and gave it to the appellant for safekeeping. He later used the money to marry a certain woman.

The appellant denied she sold the ox in question to Sabadza but admitted having sold one in 1996. She also stated that she never suspected that the ox in question had been stolen because she trusted Kunyangara.

The appellant's account is not properly corroborated. Her two witnesses, who were her children, had an interest to protect and they supported her

account in a general and vague way. The account was also not properly put to either Sabadza or Kunyangara or the other State witnesses. The appellant could not give a proper explanation as to why she allowed Kunyangara to sell the beast at her home. No explanation was given as to why she would readily believe Kunyangara's story that the beast in question belonged to him when all along he depended on her cattle for draught power. Clearly the appellant's evidence was not reliable.

From the above it is clear that the State's evidence, which was properly corroborated and accorded with the probabilities, is reliable. It is improbable that Kunyangara could have sold the beast without a stock card. He did not have one. For Sabadza to record the transaction in his stock register a stock card would have been required. The probability is that the appellant allowed her stock card to be used in the transaction.

I therefore consider that the conviction of the appellant is unassailable.

On sentence, I agree with the concession by Mr *Matimbe*. In his view, the sentence was severe for the following reasons: The appellant was an elderly female first offender and is of poor health. She was acting under the influence of Kunyangara, who was said to be a spirit medium and had a relevant previous conviction. She was willing to pay restitution. See *Gambaya v S S-46-95* where in similar circumstances the term of imprisonment imposed on the appellant was suspended on condition the appellant paid restitution.

In the result, the appeal against conviction is dismissed. The sentence imposed in the court *a quo* is set aside and the following is substituted instead:

“Twelve months' imprisonment with labour, of which six months' imprisonment with labour is suspended for the period of five years on the condition that the accused does not within that period commit any offence involving dishonesty for which upon conviction she is sentenced to imprisonment without the option of a fine. The remaining six months' imprisonment with labour is suspended on condition that the accused pays restitution to the complainant in the amount of \$1 000,00 through the clerk of court, Karoi, on or before 30 June 1998.”

EBRAHIM JA: I agree.

SANDURA JA: I agree.