

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA**

APPEAL No. 82/2022

(Criminal Jurisdiction)

BETWEEN:

FREDRICK NSOFWA

AND

THE PEOPLE



APPELLANT

RESPONDENT

Mchenga DJP, Majula and Muzenga JJA
On 17th January 2023 and 21st February 2023

For the Appellant: Mr. M. Makinka - Senior Legal Aid Counsel

For the Respondent: Mr. B. Mwewa - Senior State Advocate, NPA

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. Haonga and Others vs The People (1976) ZR 200 (SC)
2. Donald Fumbelo vs The People (SCZ Appeal No 476/2013)
3. Muvuma Kambanja Situna vs The People (1982) ZR 115 (SC)
4. Bwalya vs The People (1975) ZR 227
5. Mbinga Nyambe vs The People (2011) ZR 246
6. Adam Berejena vs The People (1984) ZR 19 (SC)
7. Chimbini vs The People (1973) ZR 191
8. David Zulu vs The People (1977) ZR 151
9. Saidi Banda vs The People (SCZ Appeal No. 144 of 2015)

Legislation & Other authorities referred to:

The Penal Code, Chapter 87 of the laws of Zambia

Bryan A. Garner, Black's Law Dictionary, 8 edition, Thomson West, 2004

1.0 Introduction

1.1 This is a matter in which the appellant appeared at the Subordinate Court on a charge of stock theft, contrary to section 275(2) of the Penal Code. He was alleged to have stolen a bull that was owned by Mark Thomas Harvey of Shiwang'andu District in Muchinga Province.

1.2 Having been taken through a full trial, he was found guilty and convicted by the Subordinate Court. He was later sentenced to seven (7) years imprisonment with hard labour by Judge K. Limbani.

1.3 He has appealed against the conviction and the sentence.

2.0 Evidence in the trial Court

2.1 The facts of the case were that Mark Thomas Harvey was a proprietor of a Ranch which had, inter alia, 54 heads of cattle. On 29th September 2020, after conducting a head count during a dipping session for his cattle, he discovered that there was a bull that was missing. He described the particulars of the missing bull as having been grey and blown and was branded B49 and also had a green ear tag.

A search for the animal was then launched in the village by his workers under the charge of Peter Sikana, the Ranch Manager. When this did not yield any fruit, the matter was reported to the Zambia Police and the Community Crime Prevention Unit (CCPU).

- 2.2 Two weeks later, the appellant was spotted by Manivar Kafula (PW2) selling dried meat in Masasha area of Shiwang'andu District. She informed the CCPU members who went and confronted the appellant on where he had obtained the meat he was selling. The appellant failed to give a satisfactory explanation and was apprehended and handed over to the Zambia Police. They found the appellant with K80 and groundnuts in his pocket.
- 2.3 Sometime in October 2020, Damson Kabuswe (PW5) encountered a bad scent as he was walking around the bush picking wild fruits. The terrible scent led Damson Kabuswe to the discovery of a bull's skin, hooves and a bull's head which had a green ear tag. These items were buried in a shallow grave at a farm owned by the appellant's father. He initially invited the complainant to come and identify the recovered items but the complainant never went there.
- 2.4 When Detective Heros Masumba visited the place where the items were discovered, he found the said items were located 2 kilometers from where the appellant slaughtered and smoked

the animal he was found selling. The office further discovered that the appellant was found selling dried meat at a distance of between 60 to 70 km from Kapisha.

2.5 The recovered items were later exhumed by the police who also took pictures that were submitted as evidence.

2.6 The appellant was subsequently found with a case to answer and when put on his defence he gave sworn evidence and also called two witnesses. The appellant essentially denied stealing and slaughtering Mark Thomas Harvey's bull. His version of events was that on 1st October 2020, he slaughtered his father's cow without the latter's permission. He took it into the bush, smoked and dried it. On 4th October 2020, he went to sell the meat in Malikani village where he raised K80. It was there that he was confronted and apprehended by the CCPU officials in relation to the dried meat he was selling. He explained to the police that the dogs ate the skin while he ate the head and the hooves.

2.7 The trial Magistrate analysed the evidence that was laid before him and found that the prosecution's case was anchored on circumstantial evidence. He further found that Mark Thomas Harvey's cow went missing and a few days later the skin, hooves, head, and ear tag of the missing animal were recovered in the bush belonging to the appellant's father.

2.8 As regards the identity of the perpetrator, the trial court made an inference that it was the appellant since he was found selling beef although he claimed he had slaughtered his father's cow without his consent. The court rejected the explanation given by the appellant and consequently convicted him and referred him to the High Court where he was slapped with a 7 year sentence.

3.0 The Appeal

3.1 Dissatisfied with the conviction and sentence, the appellant has appealed to this court on the following grounds:

- "1. The learned trial Judge erred in law and fact by convicting the appellant solely on circumstantial evidence which was not cogent enough to permit an inference of guilt.*
- 2. The trial court was harsh in sentencing the appellant to a custodial term of seven (7) years in the absence of aggravating factors warranting a sentence above the minimum mandatory sentence."*

4.0 Appellants Arguments

4.1 In support of the first ground of appeal, Mr. Makinka submitted that the prosecution evidence as regards the identity of the purported bull stolen was full of contradictions and inconsistencies. He pointed out that PW1 told the trial court that the missing animal was cream white while PW3 said that the missing animal was marked B49 and was grey-brown. PW4 testified that the complainant reported a missing bull that was

black and whitish. It was Counsel's further submission that PW5 discovered a white-brown cattle skin buried in the appellant's father's farm.

- 4.2 He argued that in view of these inconsistencies, the inference of guilt is not the only one reasonably possible. Further Counsel submitted that no witness was able to tell the trial court if the buried animal skin was branded B49. As authority for his proposition, Mr. Makinka referred the court to the cases of **Haonga and Others vs The People**¹ and **Donald Fumbelo vs The People**².
- 4.3 Mr. Makinka stoutly argued that alternative inferences emerge since the appellant was never seen burying the items that were recovered. Further that the place where the items were found was accessible to other people such as PW5.
- 4.4 Counsel also asserted that there was no scientific evidence that the dried meat that was recovered was from the purported bull. That the trial court ought to have considered that the appellant could have been in possession of the said meat not as a result of theft. He called in aid the case of **Muvuma Kambanja Situna vs The People**³ it was held that the trial court must show that adequate consideration was given to all relevant material that was placed before it, otherwise an acquittal may result.
- 4.5 He stressed that the conviction of the appellant was based on the appellant's contradictory story. He submitted that a man

charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in the offence as stated in the case of **Bwalya vs The People**⁴.

- 4.6 In closing on ground one counsel cited the case of **Mbinga Nyambe vs The People**⁵ where it was held as follows:

“Where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence...”

- 4.7 In relation to ground two, the thrust of Mr. Makinka’s argument was that the custodial sentence of 7 years imposed on the appellant was too harsh in light of the fact that there were no aggravating circumstances. The case of **Adam Berejena vs The People**⁶ was cited to support his proposition. In the said case it was held that an appellate court may interfere with a lower court’s sentence when the sentence is wrong in law, fact or in principle or is manifestly excessive or so inadequate that it induces a sense of shock. We were called upon to interfere with the sentence and allow this ground of appeal.

5.0 Respondent’s argument

- 5.1 In response, Mr. Mwewa the learned Senior State Advocate filed his heads of argument on 17th January 2023. The gist of his submission was that the circumstantial evidence in this case only led to the inference that the appellant stole the bull in question. He pointed out that the circumstances in this matter were that the appellant was found selling meat around the time

of the disappearance of the stolen bull and the remains were found on his father's farm where he resides. The remains were discovered with an identity tag and his father was unaware of any cattle missing. Based on the foregoing, Mr. Mwewa urged the court to dismiss the appeal.

5.2 On the principles regarding circumstantial evidence, Mr. Mwewa referred the court to the cases of **Chimbini vs The People**⁷ and **David Zulu v The People**⁸.

6.0 Hearing of the appeal

6.1 At the hearing of the appeal on 17th January 2023, the parties relied on written submissions that were filed.

7.0 Determination

7.1 We have considered the record of appeal and the arguments advanced by the parties. Before we proceed to determine the appeal, we noted with dismay that the trial court did not correctly recast the essential elements of theft which is the predicate offence that the appellant was charged with. For ease of reference, the trial court itemized the elements of the offence on page 25 of the record as follows:

"They must establish that

- 1. Accused took the said animal*
- 2. It was a bull*
- 3. He took it fraudulently."*

7.2 Stealing is defined by the Black's Law Dictionary, 8th edition as:

"To take (personal property) illegally with the intent to keep it unlawfully"

The essential elements and definition of theft are set out in **Section 265** of the Penal Code which enacts that:

"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

7.3 Thus from the section, it can be deduced that the essential elements in a charge of stock theft are that the accused must have:

1. *taken an animal fraudulently;*
2. *without a claim of right;*
3. *with the intention to permanently deprive the owner.*

7.4 We, therefore, hold that the elements that were listed by the trial court were wrong at law. That notwithstanding we shall proceed to determine the appeal.

7.5 It is not in dispute that the appellant was found selling dried meat in Malikana village two weeks after Mark Thomas Harvey lost a bull at his farm. The prosecution argued that the only inference that could be drawn from the circumstantial evidence was that the appellant was the one who stole and slaughtered

the missing bull. In his defence, the appellant rendered an explanation to the effect that the bull he slaughtered was owned by the father. However, the father declined having authorized the appellant to slaughter a bull.

- 7.6 It is common cause that the conviction by the trial court was entirely based on circumstantial evidence. To rely on circumstantial evidence, a trial court must be satisfied that the evidence is cogent and compelling such that no other rational hypothesis could be made other than the fact that the appellant is guilty of the crime. In the case of **Saidi Banda vs The People**⁹ the court stated that:

“the circumstances from which the inference of guilt is sought to be drawn must be cogent and firmly established.”

- 7.7 In the instant case the circumstantial evidence that was led by the prosecution was that Mark Thomas Harvey lost a bull. There were indeed contradictory statements as regards the colour of the missing bull from the prosecution witnesses. Peter Sikana described the bull as having been cream-white while Mark Thomas Harvey said that the missing animal was grey-brown. Heroes Masumba received a report that there was a black whitish bull that had been stolen from Mark Thomas Harvey. The semi-decomposed skin of a bull that was found by Damson Kabuswe on the appellant's father's farm was white and brown.
- 7.8 The burning question that arises is, whether an inference that the appellant is the one who stole the bull from Mark Thomas

Harvey is the only one that could be made from these circumstances? In the case of ***Mbinga Nyambe v The People***⁵ the Supreme Court held that:

“Where a conclusion is based purely on inference, that inference may, be drawn only if it is the only reasonable inference on the evidence ”

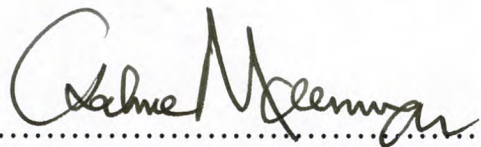
- 7.9 Having critically analysed the evidence that was led in the court below, it is clear to us that the circumstantial evidence was very weak. Firstly, the evidence regarding the identification of the animal was fraught with contradictions and inconsistencies as alluded to by counsel for the appellant. There were various descriptions of the colour of the animal and the green tag, that ought to have been a critical piece of evidence, was not identified by the owner. There was also no evidence of the number on the ear tag.
- 7.10 Another flaw in the prosecution evidence was that the appellant is not the one who led the police to the recovery of the skin, hooves, head and ear tag. It was the evidence of Damson Kabuswe that he followed a bad odor which led him to the decomposed skin. Upon contacting the complainant Mark Thomas Harvey to come and identify, he declined the invitation. When the police finally came they are the ones who exhumed the skin, hooves, head and tag.
- 7.11 So the recovery of the said items was done at a distance of about 3 km from where the animal had been slaughtered. Our

considered view is that the evidence led was not cogent enough to permit only an inference of the appellant's guilt.

7.12 The upshot of the above is that the inconsistencies and deficiencies in the prosecution's case weakened the circumstantial evidence that was led by the prosecution in this matter. The net result is that a conclusion could not be drawn that the appellant, as opposed to any other person, stole the bull that Mark Thomas Harvey lost.

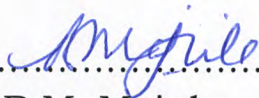
7.13 Having set aside the conviction, we find it otiose to consider the appeal against sentence.

7.14 Therefore, the appeal succeeds. The conviction is quashed and the sentence that was imposed by the lower Court is hereby set aside. We order that the appellant be released forthwith.



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C.F.R. Mchenga

DEPUTY JUDGE PRESIDENT



.....
B.M. Majula

COURT OF APPEAL JUDGE



.....
K. Muzenga

COURT OF APPEAL JUDGE