

THE STATE

Versus

PETER SIWELA

IN THE HIGH COURT OF ZIMBABWE
NDOU & MATHONSI JJ
BULAWAYO 24 JANUARY 2011 & 3 FEBRUARY 2011

R. Ndlovu for the appellant
T. Makoni for the respondent

JUDGMENT

MATHONSI J: At the end of the hearing of this appeal we upheld the appeal, set aside the conviction of the appellant and quashed the sentence. We indicated that the reasons for that decision would follow. These are the reasons.

The Appellant was convicted of stock theft by the regional magistrate, Bulawayo on 28 August 2006 and sentenced to 9 years imprisonment. He appealed to this court against conviction only on the following grounds:

"GROUNDS OF APPEAL PREJUDICE

1. From the onset the learned trial magistrate erred by allowing himself to be influenced by the fact that the court had dealt with a number of cases of stock theft involving complainant, that is apparent from the judgment. This appellant was greatly prejudiced by this in his defence.
2. The appellant had his bail revoked midway in the trial without having breached any of the conditions.

DELIVERY OF THE BEASTS

3. The learned trial magistrate erred in failing to make a full inquiry to his satisfaction as to how appellant was alleged to have taken delivery of the purchased beasts. Complainant had no corroboration whatsoever in as far as delivery of the purchased beasts was concerned.
4. The learned trial magistrate also erred in dismissing the testimonies of 3 defence witnesses who stated that as of September 2005 appellant still had not yet collected his beasts from complainant.
5. The learned trial magistrate further erred in dismissing appellant's explanation that after purchasing the 3 beasts from complainant in 2003 he had to wait until they had calves before collecting them. The magistrate dismissed this as strange while in actual fact that is the traditional (sic) among rural villagers.
6. The learned magistrate also erred in holding that the absence of appellant's son to testify, whom the cattle had been bought on his behalf (sic) was fatal to appellant's defence and meant that the son got the cattle and went away.

THE ALLEGED THEFT

7. The learned magistrate erred in failing to put sufficient weight to the fact that the appellant collected 3 beasts from complainant's herd, but only 2 are alleged to have been stolen.

8. The learned magistrate failed to appreciate that the appellant's defence was the claim of right and the state had the onus of disproving it and this was not done.

DESCRIPTION OF BEASTS

9. The learned magistrate also erred in accepting complainant's strong testimony that all the 3 beasts sold to appellant had no ears."

It is common cause that sometime in 2003 the appellant through his wife Elizabeth Siwela, purchased 3 cows from the complainant and was issued with a receipt dated 22 January 2003 which contained the transaction and also reflected that the final payment of the purchase price was made on 28 July 2003. The description of the cattle bought by the appellant was given as "2 redish heifers and one brindle red heifer with blackish stripes."

In 2005 the complainant who told the court that he had about 800 cattle at his farm, was at the dip tank when he saw a cow which had his ear mark and brand mark, now bearing the appellant's brand and among the appellant's cattle. He later saw a 2nd one and reported the matter to the police who were accompanying him alleging that appellant had stolen his cattle.

The description of the cattle recovered from the appellant and allegedly stolen from the complainant as given by the state witness Brighton Tshuma is that one cow was "like an impala in colour - redish." State witness Stanford Bereke, the investigating officer described the 2 cows that he recovered from the appellant as "one cow had impala colour-red. The other was brindle with 7C and below was PSW."

It must be noted that the complainant only pointed 2 cows as having been stolen from him and their description clearly matches that of the beasts bought by the appellant from him 2 years earlier. When confronted with this fact under cross examination, the complainant could only say that those that he sold to the appellant had no ears after all their ears had been eaten away by ticks. It is difficult to understand why the appellant would have bought such deformed cattle. We found that story unbelievable anywhere.

The trial magistrate did not concern himself with an inquiry into the issue of whether the cattle allegedly stolen were not the same that were sold to the appellant. It is important to note that when the appellant collected and branded the cattle he did so openly having invited the local anti theft committee members who testified in court that the cattle were collected in broad daylight from complainant's employees.

In light of the foregoing it is strange that the court *a quo* still concluded that the state had proved theft beyond a reasonable doubt. Mr Makoni for the Respondent conceded that the appellant's guilt had not been proved beyond a reasonable doubt especially as the court *a quo* not only failed to clarify whether the beasts allegedly stolen were not the same as those that had been sold to the

appellant but also that the learned trial magistrate appeared to place the onus of proof on the appellant instead of the state. The trial magistrate wanted the appellant to call his "boys or sons--- who drove the 3 cattle" to be called to confirm that issue.

We are of the view that the concession by the state is proper. Clearly there remains a possibility that the complainant was laying a claim to cattle which he had already sold.

In the result it is ordered as follows: that

1. The appeal succeeds with the result that the conviction of the appellant of stock theft is set aside.
2. The sentence imposed is also accordingly quashed.

Ndou J I agree.

R. Ndlovu, Appellant's legal Practitioners
Criminal Division, Attorney General's Office, Respondent's Legal Practitioners