

KENEDDY MUCHARWEI

Versus

THE STATE

HIGH COURT OF ZIMBABWE

**BACHI-MZAWAZI J**

CHINHOYI, 4 JULY 2023

### **Criminal Review**

**BACHI-MZAWAZI J:** In this automatic review matter the accused was charged and convicted of stock theft as defined in of s114 of the Criminal Law Reform and Codification Act, Chapter 9:23 after a contested trial. He was sentenced to 14 years imprisonment of which 2 years were suspended for 5 years on related conditions. One year imprisonment was suspended on condition of restitution of the sum of US\$3859.00. He is serving an effective 11 year jail term.

The facts are that at one point in time, the complainant tasked the accused to look after his farm and an unspecified herd of cattle. A power of attorney giving rights to the accused to sell the cattle as and when required to do so by the complainant was signed and given to the accused. Evidence was placed on record from various witnesses who testified in the trial court that indeed the accused sold some bovines after consultations between the buyers and the complainant over the phone. In all those transactions the accused posed as an agent or mediator whilst the price negotiations where done by the actual seller and the then would be buyers as indicated above.

Undisputed evidence was also placed before the trial court that most of the bovines under the care of the accused were lost due to the widespread outbreak of cattle disease during that period. The cause of the dispute then arose when the complainant learnt of a considerable reduction in the number of beasts yet from his own relative who testified in court, the number of the total beasts on the farm should have been around 18.

It was also a common fact that each animal is represented by or must be documented on a stock card. What was produced before the court of first instance was only a stock card of the accused's own herd of cattle but none for the complainant. It was also common cause that the accused was allowed to keep his own livestock alongside that of the complainant.

A report of stolen beasts was subsequently made by the complainant resulting in the arrest of the accused. The remains of a calf were excavated but the accused person in his defence said the calf had succumbed to the known pandemic together with most of the complainant's herd. The accused told the trial court that each time the cattle would exhibit signs of sickness he would inform the complainant who at times would order the sale of the meat to the villagers or the disposal of the already dead cows.

In his defence the accused admitted to have been in custody of only 13 beasts which all perished as detailed above. He maintained that he acted within the scope of his mandate and in consultation with the complainant at all material times. The accused attested that even though the complainant testified that he had withdrawn the power of attorney a few months before causing his arrest, that withdrawal was never brought to his attention.

In light of the above the court *aquo* conceded that the complainant failed to prove the actual figure of animals he left with the accused and rejected the figure eighteen adduced from his relative. The court however, reasoned that, since the accused was admitting to being handed over the thirteen beasts which he could not account for when asked to do so, was guilty of the theft of those thirteen cows. The trial court made a finding that the State had proved its case beyond a reasonable doubt and proceeded to convict the accused. The court also made a finding that if at all the accused sold the cattle, he had no mandate as the power of attorney had been revoked.

In terms of s29(2) of the High Court Act [Chapter 7:06] upon receipt of a review record brought in terms of s57 or 58(3) of the Magistrates Court Act [Chapter 7:10] the court is enjoined to interrogate and determine whether the proceedings of that subordinate court were in accordance with real and substantial justice.

Real and substantial justice denotes fairness, justice and a synthesized judicial decision based on the facts and evidence against the underpinnings of the law. It is also a test, standard or the criteria to determine whether or not a decision of a judicial functionary has been exercised judiciously. Prof. Geoff Feltoe, **Magistrates Hand Book**, pages 462, defines the term real and substantial justice to mean the considerable judicious exercise of judicial authority by the trial court encapsulating the main essentials of the law and procedure.

Broadly speaking the proceedings as a whole should be in sync with the requirements of justice. In that assessment several factors are taken abode some of them being, the assessment of evidence that is the analysis of the law against the facts and the evidence, the correctness of the conviction, the justifiability of the sentence amongst other procedural factors or irregularities. See, *Magistrates Hand book supra*.

In *casu*, the question to ponder is that, did the State prove its case beyond a reasonable doubt? This can only be answered by the evidence that was placed before the court of origin. To begin with, no evidence was placed on record as to the actual number of cattle that was left with accused. Even if accepting the court's conclusion that the figure the accused himself confirmed should be taken as the actual number of beast left in his possession, the accused's defense that the sales were at the behest, instruction and involvement of the complainant remain solid. So was his evidence of the pandemic that attacked most of the complainant's livestock which was not rebutted. In actual fact, there is uncontroverted witness testimony that there were sales that were finalized with the involvement of the complainant himself thereby solidifying the accused's defence.

Further, there was no supporting evidence that indeed the withdrawal of the power of attorney was communicated to the accused and that all the sales that went towards the complainant's welfare where not sanctioned. It was more of a unilateral act if indeed such a withdrawal letter was in existence, which clearly is not supported by evidence. To further dent the State case, no stock card supporting the existence of complainant's cattle was in existence. Moreover, it is a legal requirement that every beast should have a stock card for accountability and avoidance of theft.

It is evident that the accused's defence was not only probable but supported by evidence thereby shaking the State's case. The law is very clear in such instances. In criminal matters the State is obligated to prove its case beyond a reasonable doubt to avoid the danger of sending innocent persons to jail. It bears the burden of proof which is discharged by rebuttal evidence to the accused's defence. Several case authorities have highlighted the importance of the doctrine of proof beyond reasonable doubt.

In *S v Makanyanga* 1996 (2) ZLR 231 at 236 it was noted that: "Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint still, the fact that such credence is given to testimony for the State does not mean that conviction must necessarily ensue. This follows irresistibly from the truth that the mere failure of an accused person to win the faith of the Bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed, and the accused disbelieved. It demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence." See, *Mungwira and Anor v Madembo* HH329/21, *S v Chikanga* H233/2022 and cases cited therein.

In *S v van der Meyden* 1999 (1) SACR 447 (W) at 448f-g thus: "The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if it is reasonably possibly true that he might be innocent. (See *R v Difford* 1937 A.D. 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test from opposite perspectives. In order to convict,, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time, no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the corollary of the other."

As such, two essential ingredients of the offence of stock theft were not proved. These are the intention to steal and to deprive the owner of the beasts permanently. Neither was the theft itself proved beyond a reasonable doubt.

In addition, the court had convicted the accused of the theft of thirteen oxen but its sentence did not reflect whether the sentence was for all the thirteen counts or not, or whether they were to run concurrently. Such information should be easily discernible from the record of proceedings. It is also not clear as to how the court arrived at the total amount for restitution. Evidence should have been placed on record of the obtaining value per beast.

In light of the above observations the conviction was not safe. Accordingly, both the conviction and the sentence of the trial court are set aside and substituted with, the accused person is found not guilty and acquitted. A warrant of liberation should be forthwith issued.

Honourable Mrs. Justice Bachi-Mzawazi  
Honourable Mrs. Justice Muzofa – I Agree