

ALLAN MASHIWA (MASIYIWA)
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 11 & 20 December 2019

Bail Pending Appeal

B. Kazembe, for the applicant
A. Muziwi, for the respondent

MUSITHU J: The applicant seeks bail pending appeal against conviction and sentence for contravening s114(2)(a)(i) & (ii) of the Criminal Law Codification and Reform Act¹, (the Act), also known as stock theft. Following his conviction, the appellant was sentenced to the minimum mandatory sentence of nine years. The applicant is appealing against both conviction and sentence.

The application arises from the following factual background. Sometime in September 2018, a cow belonging to Orillia Fusire (the complainant), went missing from the grazing lands at Dzimati Village under Chief Mangwende in Murewa. The complainant searched for the cow but to no avail. The cow had allegedly been stolen by the applicant who in turn sold it to one Talent Muzvidzwa in January 2019. Talent Muzvidzwa in turn exchanged the cow for an ox with one Wilson Nehanda who then kept the cow at his homestead.

The offence came to light when on 2 June 2019 a villager from the complainant's village saw the complainant's cow in the grazing lands at Wilson Nehanda's village. The complainant was informed and she positively identified her cow. On being asked where he got the cow from, Nehanda informed the complainant that he had exchanged it for an ox with Talent Muzvidzwa. A police report was made leading to the arrest of Muzvidzwa who in turn led the police to the applicant.

The applicant initially raised three grounds of appeal against conviction. At the hearing of the bail application, applicant's counsel abandoned the first two grounds which

¹ [Chapter 9:23]

were attacking the propriety of the conviction for alleged violations of the constitution. The remaining ground of appeal against conviction is couched as follows:

“3. More importantly, the court *aquo* grossly erred in convicting the accused person on the basis of weak circumstantial evidence that was untested and verified and cumulatively did not constitute evidence beyond reasonable doubt”

The grounds of appeal against sentence are expressed as follows:

“4. The court *aquo* grossly erred in failing to explain to the accused person, the Appellant herein, what constituted special circumstances for the purposes of Section 114 of the Criminal Law Codification & Reform Act [Chapter 9:23].

5. More importantly, the court *aquo* erred, in not recognising that Section 114(2)(e) of the Criminal Law Codification & Reform Act [Chapter 9:23] was unconstitutional, in particular a breach to the provisions of Section 69(1) of the Constitution, Sections 50 and 56 of the Constitution of Zimbabwe.

6. In other words, the court *aquo* ignored the fundamental issue that the mandatory sentence, defined in Section 114 of the Criminal Law Codification & Reform Act [Chapter 9:23], was inconsistent with the accused person’s constitutional rights, and was an insult to the independence of the judiciary and the doctrine of separation of powers”

On conviction, Mr *Kazembe* for the applicant submitted that the lower court erred in relying on circumstantial which was untested and verified and cumulatively did not constitute evidence beyond reasonable doubt. He argued that the applicant exchanged his bovine for the allegedly stolen cow with one Norest Chizema from his village. He then sold the cow to Talent Muzvidzwa. He further submitted that the State had only led evidence from the complainant and the alleged purchaser of the stolen cow, Talent Muzvidzwa. No evidence was led from anyone who saw the applicant stealing the cow. Mr *Kazembe* further submitted the State relied on circumstantial evidence which touched on the failure by the applicant to call Norest Chizema as a defence witness, and the absence of a stock card to confirm the applicant’s ownership of the stolen cow or the bovine he allegedly exchanged for the cow. It was also argued on behalf of the applicant that the applicant, the complainant and the person who purchased the cow all resided in the same village. It was therefore highly unlikely that a stock thief would dispose of the stolen cow in the same village where he was likely to be caught. It was further submitted that stock thieves normally operated territorially, in that they would steal a beast and travel hundreds of kilometres to sell it. Alternatively they would simply kill the beast and sell the meat to avoid detection.

For the respondent, it was submitted that the evidence led in the court *a quo* showed that the cow was positively identified by the complainant and investigations unravelled a chain of events which ended on the applicant's doorstep. Mr *Muziwi* for the respondent submitted that the applicant did not deny that the bovine was stolen, but instead he sought to implicate Norest Chizema as the person with whom he had exchanged his bovine for the stolen cow. At the trial and under cross examination by counsel for the State, the applicant was asked why he was not calling Norest Chizema as his key witness. The applicant's response was that Norest Chizema was not a key witness but was supposed to be the accused person.² The applicant did not consider it material to call Norest Chizema, despite having tendered in evidence an agreement between himself and Norest Chizema presumably recording the exchange of his bovine for the cow. Talent Muzvidzwa told the court *aquo* that he bought the bovine from the applicant who represented it as his and he had also appeared to be in a hurry to sell it.

The learned magistrate in the court *aquo* made the following observations in the judgment:

“The accused person tendered an agreement of sale which he authored and did not even produce even his stockcard as proof of purchase of the cow. This goes on to show that his claims that the transaction was legitimate cannot be believed. Even during cross examination by the State the Accused person sought to bring out that it was the State's responsibility to look for the person which he claims sold him the cow; which is misplaced considering that the legitimacy of the document is questionable.

If at all the Accused person's defence is to be believed, he did not even have a clearance letter from the police pertaining to the said sale which raises suspicion. Hence his defence cannot reasonably be believed against the background of the evidence before the court”³

In the heads of argument filed on behalf of the applicant, Mr *Kazembe* referred to the case of *S v Muyanga*⁴, where HUNGWE J (as he then was), expressed his views on circumstantial evidence as follows:

“The law regarding circumstantial evidence is well settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- a. The circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established;

² Page 51 paragraph 3 of the record of proceedings

³ Pages 12 and 13 of the record, being the typed judgment.

⁴ HH-79/13

- b. Those circumstances should be of a definite tendency unerringly towards guilty of the accused;
- c. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no-one else; and
- d. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence”

Applying the foregoing test to the circumstances of this case, and the findings of the learned magistrate, I find no reason to fault the conclusion of the lower court on conviction.

With regards to sentence, Mr *Kazembe* reaffirmed the applicant’s misgivings on the sentence as set out in the grounds of appeal against sentence. Mr *Muziwi* for the respondent submitted that the lower court gave lucid reasons as to why it opted to impose the mandatory sentence of nine years. An enquiry into special circumstances was carried out and the lower court found that none existed.⁵ Section 114 (2)(a)(i) and (ii) of the Act reads as follows

“114 Stock theft

(1)

(2) Any person who:

(a) takes livestock or its produce;

(i) knowing that another person is entitled to own, possess or control the livestock or its produce or realising that there is a real risk or possibility that another person may be so entitled; and

(ii) intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control; or

(b)

shall be guilty of stock theft and liable;

(e) if the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years” (underlining for emphasis)

Having considered the lower court’s reasons for sentence, and in the absence of special circumstances as to why the minimum mandatory sentence of nine years should not be imposed, I have no cause to find fault with the decision of the lower court on sentence. The remaining two grounds of appeal against sentence raised constitutional issues which were not placed before the lower court for its consideration. As rightly submitted on behalf of

⁵ Page 55 of the handwritten record of proceedings.

the respondent, the constitutionality of s 114 of the Act, ought to have been raised in the lower court in the first instance.

Having weighed the submissions by counsel for both parties, I am satisfied that the applicant has failed to show that his appeal against both conviction and sentence is free from predictable failure⁶.

The application for bail pending appeal is accordingly dismissed.

Tendai Biti Law, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

⁶ See *Peter Chikumba v State* HH-724/15 at pages 8-9.