

JUSTICE CHIDAWAYA  
and  
ALECK CHIKONEKA  
and  
GODKNOWS MHONDAMAPANGO  
and  
FORGIVENESS MHEMBERE  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
FOROMA & KWENDA JJ  
HARARE, 13 January 2022

### **Criminal Appeal**

*N Maboyi*, for the appellants  
*T Kangai*, for the respondent

**KWENDA J:** The four appellants appeared before the Magistrate at Marondera charged with the crime of stock theft as defined in s 114 (2) (a) (ii) of the Criminal law (Codification and Reform) Act [*Chapter 9 :23*] (the Criminal Code). In terms of s 114 (2) (a) (ii) of the Criminal Code, a person is guilty of stock theft if he or she takes livestock or its produce 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, intending to deprive that 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. They were charged with another person who was the third accused person and has not appealed. The first and second appellants were the first and second accused persons. The third and fourth appellants were the fourth and fifth accused persons. All the accused persons were alleged to have stolen an ox from one Learnmore Chirara at Plot 26 Botherrust Farm on 30 August 2019. They all denied the charge and the matter went to trial. The first appellant said he had bought

the beast from the second appellant for USD 1 800.00 and in turn sold the ox to his customer. It was common cause that the customer referred to is the third appellant. The first appellant slaughtered the beast at his sister's residence with his customer who collected the carcass. It is common cause that the third appellant was the customer. The second appellant denied selling the ox to the first appellant. He therefore denied any involvement. He said he was complainant's neighbor and when the theft occurred he was in the company when they followed a spoor of footprints which they all concluded were those of the first appellant. He said he was not in the village when the beast was stolen. The third accused, who was not before said that he passed through the second appellant's residence on 30 August 2019. He was going to sink a well at the complainant's residence. The following day, the complainant told him that his ox had been stolen. The third appellant, who was the fourth accused person at the trial, said the first appellant rang him and told him that he had a beast for sale. The first appellant brought the beast which he sold to him and they slaughtered the beast together. He then paid the price after weighing the meat. The fourth appellant said he accompanied the third appellant to take the beast. They later took the meat to the fourth appellant's butchery.

At the end of the trial, the appellants were all found guilty as charged. The fourth appellant (who was the fifth accused person at the trial) was convicted of contravening s 114 (2) (b) of the Criminal Code. He was, essentially, also convicted of stock theft but under different circumstances, because in terms of s 114 (2) (b) of the Criminal Code, any person who takes possession of stolen livestock or its produce knowing that it has been stolen or realising that there is a real risk or possibility that it has been stolen is guilty of stock theft.

The trial court did not find any special circumstances with respect to the first, second and third appellants who were sentenced to the minimum mandatory sentence of nine (9) years. The court found special circumstances justifying the imposition of a sentence below the minimum with respect to the fourth appellant and sentenced him to imprisonment for 36 months of which six months were suspended for 5 years on conditions of good behaviour.

The appellants appealed to this court against both the conviction and sentence. As against conviction they relied on six grounds of appeal. Grounds 1 to 3 all raise the same issue to do with the sufficiency of evidence. They alleged that there was no direct evidence of an eye witness which proved that they physically took the ox from the complainant. They said their conviction was based on circumstantial evidence. They further argued that, the

court erred in convicting them because some of the proven facts were consistent with their defences. They said their defences which were reasonably possibly true showed that they were innocent. In ground four, they said that the trial court erroneously placed the onus on them to prove their innocence. In the fifth ground they said that the trial court erred in failing to realise that they had not assisted the thieves and that they had paid a lot of money to buy the ox or its meat. In the sixth ground they claimed the trial court erred in failing to realise that they had each, acquired or received the ox into their possession from another person. They said the trial court should have acquitted them because they had all discharged the burden on them to prove reasonable cause, the proof whereof was on each of them, for believing at the time of acquiring or receiving such livestock it was the property of the person from whom he or she acquired or received it or that such person was duly authorised by the owner thereof to deal with it or dispose of it, as contemplated in s 114 (2) (d) of the Criminal Code. In other words, they contended that their defences were plausible and had not been disproved by the State. At the hearing scheduled for 10 January 2022, the appellants were not in attendance. We postponed the hearing to 13 January 2022 because we required them to be in attendance. The majority of prisoners admitted to bail pending appeal do not even bother to take their bail orders to the Police and most immediately change residence and phone lines.

On 13 January 2022, Ms Maboyi advised the court that she had failed to locate the first, second and fourth appellants. They were not contactable at the last known addresses, their telephone lines were unreachable and they had not reported to the Police after being admitted to bail. She was of the view that they had absconded, thereby abandoning their appeals. We therefore dismissed their appeals.

Only the third appellant was present. We heard argument in his appeal on the merits. The appeal was not opposed by the State. The State was of the view that the third appellant was not guilty of stock theft because he had bought the ox from another person. He was in the business of buying cattle and there was no legal requirement for him to get Police clearance. He was of the view that the State had not shown that the appellant subjectively foresaw the risk that the ox had been stolen.

We rejected the concession made in terms of s 35 of the High Court Act [*Chapter 7:06*]. The third appellant is a butcher. He is therefore aware of the stringent requirements of

the law in terms of the Stock Theft Prevention Act [*Chapter 9:18*] which places the onerous duty on butchers to keep record of the names and addresses of people from whom he buys cattle and /or hides. If indeed the third appellant had bought the ox from the first appellant innocently he would have kept record of the transaction in his books. There was none. He did not slaughter the ox at the first accused person's residence or at the farm which he said he believed to be the source. He slaughtered the beast at a place which had no connection with the village from where the beast was stolen or the farm from which he claimed the beast had come from. He therefore did not deal with the ox in a manner expected of a butcher. It is common practice for butchers to require Police clearance and proof of ownership of the beast before buying. This is consistent with the requirements of s 4 of the Stock Theft Prevention Act, which makes all butchers accountable to the Police. While giving evidence in the defence case, he believed the ox had come from Cornway farm. There was no evidence that he had done anything to verify whether the ox had been lawfully obtained from the farm. His conduct holistically looked at was not consistent with an innocent mind. He did not sell the meat at his butchery but at the fourth appellant's butchery. We therefore found that his defence was correctly rejected. He did take possession of the ox which he slaughtered. In evidence, the first appellant said he sold the ox to the third appellant who hired the fourth appellant to skin it. In taking the beast, he did not do anything to verify its source or that the first appellant was the owner. In the circumstances, he subjectively realised the real possibility that the ox was stolen.

We therefore dismissed his appeal.

**FOROMA J:** agrees.....

*Maboyi and Associates*, appellants' legal practitioners.

*National Prosecuting Authority*, respondent's legal practitioners.

