

ANDREW MUCHENA

Versus

THE STATE

HIGH COURT OF ZIMBABWE

MAWADZE J & ZISENGWE J

MASVINGO, 27 October & 24 November, 2021

*Mr J. Chipangura*, for the appellant

*Mr B. E. Mathose*, for the respondent

### **Criminal Appeal**

MAWADZE J: This is an appeal against conviction only.

The appellant was convicted, after a full trial, by the senior magistrate sitting at Gutu magistrates' court on the charge of stock theft as defined in Section 114 (2) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

The court *a quo* made a finding that there were special circumstances in this case warranting the deviation from imposing the mandatory minimum sentence of 9 years imprisonment. Instead the appellant was sentenced to 5 years imprisonment of which 1 year was suspended on condition that he restitutes the complainant in the sum of \$13 000 through the clerk of court Gutu on or before 30 March 2021. We shall revert to this finding on special circumstances later.

The charge is that on a date unknown to the prosecutor but between 13 October 2020 at Nhomboka Village, Chief Gutu Masvingo the appellant stole two bovines being one greyish cow and one heifer with white spots on the face belonging to Simba Mavhudzi.

The appellant resides in Mugadza Village, Chief Gutu. The 60 year old complainant resides in Nhomboka Village Chief Gutu. The appellant's age remains unclear. As per the charge sheet and the state outline the appellant's age is stated as 56 years. In mitigation the appellant states his age as 65 years. The court *a quo* apparently did not probe this issue.

The alleged facts are that between the said dates the appellant proceeded to the grazing where he drove away the complainant's one greyish cow and one heifer with white spots on the face to his homestead. It is said the appellant slaughtered the greyish cow and sold the meat to local villagers including one Vengesai Bothwell. The heifer was taken to one Maria's homestead where it was subsequently recovered after appellant had used the heifer to pay lobola. The recovered heifer is valued at \$12 000. The greyish cow not recovered is valued at \$ 13 000.

The appellant's defence outline is given in very general and unhelpful terms. It does not speak to the specific and material allegations made against the appellant which by all standards are very simple, clear and straight forward. All the appellant said in the defence outline is that his homestead is very far from where it is said he stole the beast hence he could not have driven the said cattle for such a distance moreso without being detected. The appellant does not attempt to give even a rough estimate of the distance he alludes to. In precise terms the appellant denied proceeding to the complainant's area and stealing the bovines. He said he is surprised by the allegations made against him. The appellant said all what he knows is that the recovered heifer is not reddish in colour. Again one wonders where the appellant gets all this as the state simply said the recovered heifer has white spots on the face. Thus in his defence outline the appellant made no effort to comment on the ownership of the said recovered heifer or the slaughtered cow at his home and the meat sold to Vengesai Bothwell amongst other villagers.

The grounds of appeal are drafted argumentative manner. They are not precise and at times are repetitive. There are three in number. I understand them to mean the following;

- (a) that the appellant puts the ownership of both the recovered heifer and the slaughtered cow in issue and by inference allege that they belonged to the appellant

- (b) that there was no evidence led dealing with the proper identification of the said heifer and the cow in relation to their ownership. The examples given are brand mark or any other documentation
- (c) that the appellant showed during the trial that the said heifer and cow belong to him and that the complainant's claim of ownership of the said beasts is false.

This appeal when one considers the grounds of appeal is just a fishing expedition to say the least. The grounds of appeal bear very little if any relevance or resemblance to the accused's defence.

The state led evidence from four witnesses. Other than the complainant the appellant agrees with the evidence of the three witnesses as he did not dispute it or indicated that it was indeed correct.

The complainant is Simba Mavhudze. He resides in Mukaro area of Gutu. On 31 October 2020 his eleven cattle went missing from the grazing area. Later the other returned but a greyish cow and heifer remained missing. On 1 November he received word that two cattle which matched the description of his missing cow and heifer had been seen at dip Tank 26 in Mukaro.

At Makonde business centre he got information that the greyish cow with one horn had been taken and slaughtered by the appellant. He was also advised that the heifer with white spots on the face had been ferried in a scotch cart by the appellant to one Shereni's homestead who are appellant's in laws. The complainant proceeded to Shereni's homestead and recovered the heifer. It was confirmed appellant had brought it. The complainant advised the police and appellant was arrested. The greyish cow had been slaughtered and nothing was recovered in relation to it except a bell.

When the appellant cross examined the complainant, he avoided the material issues. The complainant said he even went to the appellant 's homestead with the police where appellant's daughter Alleter confirmed the appellant had brought some cattle which the appellant released but remained with only two, one which had a bell and was slaughtered. The bell was recovered by the complainant.

All the appellant said in cross examination is that he knew nothing about the said cattle. However the complainant dismissed this as false pointing out that the appellant slaughtered a

greyish cow and sold its head with one horn in Mhingiro Village. The complainant said this slaughtered greyish cow other than having one horn had a healed boil on its jaw. The appellant said he did not slaughter any beast.

It is difficult to appreciate why the appellant says the complainant failed to establish ownership of the beasts. The thrust of the appellant's cross examination was not in relation to the ownership of the said two cattle. Instead the appellant was saying he knows nothing about the said two cattle. He even said he did not slaughter any cow.

It is therefore foolhardy and dishonest for the appellant to allege in the grounds of appeal that he, the appellant, consistently claimed ownership of the said cow and heifer. To the complainant he laid no claim to the ownership of the two beasts. It is mind boggling as to why in the grounds of appeal the appellant now demand proof of brand marks and other documents whatever that means. The complainant's two beasts indeed went missing. If not why would the complainant move all over the place searching for beasts which never went missing? The complainant gave sufficient description of the cow and the heifer.

Plaxedes Shereni is the appellant's mother in law and resides in Mhingiro Village, Nerupiri, Gutu. The appellant is married to her daughter and they have 6 children. The appellant did not dispute her evidence.

Plaxedes Shereni said the appellant came to her homestead with a scotch cart. Tied to the scotch cart was a heifer which the appellant gave her as payment for lobola (mombe yeumai). She described the heifer (or calf) as brahman type, brownish in colour with white spots on the face. Later the complainant came and identified the heifer as his and took it. Plaxedes Shereni said she was not surprised because this was not appellant's first time to bring cattle to her homestead which were later claimed by other people.

As I said the appellant had nothing meaningful to ask Plaxedes Shereni. All he said is that the state has taken all his cattle but Plaxedes Shereni said it is the complainants or owners who took their cattle.

Maria Chaminuka a sister in law to the appellant gave similar evidence to Plaxedes Shereni. She confirmed appellant brought a brown heifer with white spots on the face tied on a scotch cart as payment for lobola. It had been injured by being tied to the scotch cart. In addition to this Maria

Chaminuka demanded proof from appellant that the heifer was his as appellant had brought beasts to them in the past which were later claimed by their owners. She confirmed that the appellant had no proof of ownership of the heifer and gave various excuses pleading that they should accept it as lobola payment. They gave in but later the complainant came with the police to collect the heifer after identifying it amongst their cattle at the grazing area.

The appellant had no single question to put to Maria Chaminuka. He never claimed that the heifer in issue was his or that he provided to Maria Chaminuka evidence of such ownership.

Bothwell Vengesia of Mutuketsa Village, Makonde, Gutu is appellant's neighbour. The appellant hired him to thatch his hut. Payment was made in kind in the form of a head of a beast appellant had slaughtered. He described the head as grey in colour, with broken left horn and a visible scar of a healed boil on the left side of its face.

Again appellant had nothing to ask Bothwell Vengesia. All appellant sought to do was to mislead Bothwell Vengesia that the complainant had described his missing cow as white in colour.

The appellant is simply being insincere. He was advised of the specific allegations that he had slaughtered a cow and gave Bothwell Vengesia its head as described. In his defence he said he knew nothing about this. In court he concedes to Bothwell Vengesia's damning evidence.

The appellant's evidence changes its colour like a chameleon. In his defence case the appellant now claimed ownership of the heifer. He had no explanation as to why the complainant identified the bell from the slaughtered cow. The bottom line is that the appellant seemed to build his case as the trial progressed. Where necessary he sought to misrepresent the complainant's evidence.

As the saying goes it is wise at times to let sleeping dogs lie. This appeal totally lacks merit. The grounds of appeal are devoid from the totality of the evidence on record. The evidence against the appellant is overwhelming.

It is unfortunate the court *a quo* believed this case is based on circumstantial evidence. It is not. The complainant gave direct evidence. Plaxedes Shereni's evidence just like Maria Chaminuka and Bothwell Vengesia also gave direct evidence. The court *a quo* despite taking the wrong route nonetheless arrived at the proper destination as it were.

The appellant was properly convicted and there is no misdirection at all.

I note in passing that the appellant should pray to his gods for having managed to get away with a manifestly lenient and apparently wrong sentence. The appellant should count his stars that he did not appeal against sentence. If he had done so I have no doubt that the provisions of section 38 (2) of the High Court Act [*Chapter 7:06*] are relevant as there is apparent miscarriage of justice *via-a-vis* the sentence imposed. If the appeal was also in respect of sentence, I would have invoked the provisions of section 38 (2) of the High Court Act [*Chapter 7:06*] and impose the minimum mandatory sentence of 9 years imprisonment. This is the sentence appellant deserves.

I am fortified in this view because a proper assessment of all the evidence shows that there are no special circumstances in this case. The trial magistrate completely misdirected herself on this aspect.

The special circumstances referred to in a case of this nature are found in section 114 (3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They are peculiar to the case. See *State v Manase 2015 (1) ZLR 160 (H)*; *State v Advance Advocate Mhungu HMA 9/16*.

In my respectful view the reasons the appellant gave even if they are taken cumulatively can not by any stretch of imagination amount of special circumstances peculiar to the case. All the appellant said is that he is diabetic, suffers from tuberculosis and a painful leg. He has hearing problems and that he is the sole custodian of his 5 year old child. These are just ordinary mitigatory factors and are peculiar to the appellant.

The appellant's age suddenly changes from 56 years to 65 years. The court *a quo* failed to probe this. I am shocked that the trial magistrate believes that stealing cattle in order to pay lobola amounts to special circumstances! Worse still the appellant despite being treated as a first offender is a self-confessed stock thief (see page 13 of the record) as he told the court *a quo* that he was previously convicted of stock theft.

As I said if the appeal was in respect of sentence, I would not have hesitated to impose the minimum mandatory sentence of 9 years imprisonment. My hands are tightly tied as I can not exercise my powers of review as envisaged in section 41 of the High Court Act [*Chapter 7:06*] by increasing the sentence in the interest of justice. I however note that there was indeed a miscarriage

of justice in relation to sentence as there are no special circumstances and the appellant is a self-confessed recidivist.

In the result I make the following order;

1. The appeal in respect of conviction be and is hereby dismissed for lack of merit.
2. That there was no good cause as to why the mandatory minimum sentence of 9 years imprisonment was not imposed.
3. That the sentence imposed by the court *a quo* can however not be competently corrected.

MAWADZE J.....

ZISENGWE J agrees.....

*Mutendi, Mudisi & Shumba*, counsel for the appellant  
*National Prosecuting Authority*, counsel for the respondent