

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

Appeal No.145,146/2020

(Criminal Jurisdiction)

BETWEEN:

HABWELA HIMABILO

1ST APPELLANT

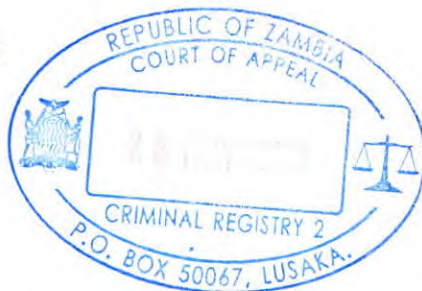
BRIAN MULAMBO

2ND APPELLANT

VS

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Majula and Muzenga JJA
On 18th, 20th May 2021 and 28th May 2021

For the Appellant : Mrs. L.T. Tindi, Legal Aid Counsel — Legal Aid Board

For the Respondent: Ms. P. Nyangu, Senior State Advocate—National Prosecution Authority

JUDGMENT

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Chisha vs The People* (1968) ZR 26 (HC)
2. *Lazarous Kantukomwe vs The People* (1981) Z.R. 125 (S.C.)
3. *David Zulu vs The People* (1977) ZR 151 (S.C.)
4. *Mwewa Muroso vs The People* (2004) ZR. 207 (SC)
5. *Saluwema vs The People* (1965) ZR 4 (CA)
6. *Chabala vs The People* (1976) ZR 14

Legislation:

The Penal Code, Chapter 87 of the Laws of Zambia

1.0 INTRODUCTION

- 1.1 The appellants, Habwela Himabilo and Brian Mulambo, were convicted for the offence of stock theft contrary to section 275 (2) (a) and 272 of the Penal Code. The particulars of the offence were that on unknown dates but in the month of April 2018 at Namwala, whilst acting together they stole 10 cattle valued at K50,000 the property of Noto Milimo.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 The case against the appellants was anchored on 4 prosecution witnesses. Their evidence was to the effect that Jimmy Shakapobo (PW2) on 14th March, 2019 on his way from Muchila in Namwala area found a person with a cow branded 7Y7L 35 which was tempered with and rebranded N3M5 35. Jimmy Shakapobo was a member of the anti-stock theft unit in Namwala. When Jimmy asked the herd boy as to who the owner of the animal was, the boy told him it was for the 2nd appellant.
- 2.2 The matter was immediately reported to Niko Police Post. In the company of community crime prevention unit (CCPU), they went to the 2nd Appellant's house to verify the assertion that

he was the owner of the cow that was suspected to have been stolen.

- 2.3 At the Police, the 2nd appellant informed the Police that the cow was bought from the 1st appellant.

3.0 DEFENCE

- 3.1 The 1st appellant in his defence told the court that on 15th March, 2019 around 08.00 hours he was informed by the 2nd appellant's son that his father (headman Brian Mulambo) had been arrested for the theft of a cow that he (the 1st appellant) had sold to the headman. It was his evidence that at the Police he admitted selling the animal and that he had stolen it from Noto Milimo (PW1). He also admitted having tempered with the brand name.
- 3.2 For his part headman Brian Mulambo of Katambo village testified in his defence that the 1st appellant offered to exchange a cow for maize. He however offered cash. He then bought the cow in issue which was branded GKT4 at K3,200. He then sold the cow to an individual called Rice. On 15th March, 2019, Rice called him and explained that Jimmy Shakapobo had identified the animal as belonging to Noto Milimo.
- 3.3 He further stated that he did not realize that the brand mark for the stolen animal was tempered with at the time of purchasing. He also explained that it was news to him that

one needs Police clearance or village headman clearance when selling a cow. He mentioned that the 1st appellant was from Headman Hatebi while he is Headman Katambo.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

- 4.1 The Magistrate analysed the evidence and found that the 2nd appellant tempered with the brand mark for the stolen cow and rebranded it as R5R5 when he knew that the 1st appellant did not have any cow.
- 4.2 The lower court further found that as headman he knew or ought to have known that before transacting in cattle, a person needs clearance from the area headman. From the circumstantial evidence, the trial court drew the inference that both appellants were guilty as charged.
- 4.3 They were subsequently convicted and sentenced to 7 years imprisonment with hard labour by the High Court presided over by Mr. Justice K. Mulife.

5.0 GROUND OF APPEAL

- 5.1 We pause to mention at this juncture, that, at the hearing of the appeal, the 1st appellant wholly abandoned his appeal. We accordingly dismissed it and directed that he serves the 7 year sentence imposed by the lower court. This appeal is, therefore, by the 2nd appellant who has approached us inspired by the following ground of appeal:

“The learned trial court erred in law and fact when the court convicted the 2nd appellant for the offence of stock theft in the absence of evidence proving the elements of the offence.”

6.0 APPELLANT’S ARGUMENTS

- 6.1 In support of the ground of appeal, Mrs. Tindi submitted that the only evidence linking the appellant to the offence is that the he bought a stolen cow from Habwela Himabilo. It was contended that the appellant should not be punished for the offence of another simply because he purchased a stolen cow.
- 6.2 Regarding the finding that the appellant ought to have known that the cow was stolen because the procedures of purchasing a cow were not followed, Mrs. Tindi argued that this alone did not prove that the appellant participated in the commission of the offence. The case of ***Chisha vs The People***¹ was cited were it was held as follows:

“In a charge of theft, a showing by the prosecution that the accused was in possession of stolen property shortly after its theft does not shift the burden of proof to the defence to make a satisfactory explanation of the possession; the burden of proving all the elements of theft remains on the prosecution.”

6.3 She pointed out that the prosecution did not prove that the appellant fraudulently took the cow with the intention to deprive the owner.

6.4 On the basis of the foregoing submissions, we were called upon by counsel to quash the conviction and set the appellant at liberty.

7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the State, the learned Senior State Advocate, Ms P. Nyangu supported the conviction and sentence. In her written submissions she argued that the 2nd appellant falls in the category of persons that are deemed to have taken part in the commission of the offence. To buttress her argument, she referred us to the provisions of section 21(1) of the Penal Code.

7.2 In the alternative, Ms. Nyangu submitted that should this court be of the view that the appellant was not properly convicted, he should instead be found guilty of the lesser offence of receiving stolen property contrary to section 318(1) of the Penal Code.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

8.1 Both counsel placed full reliance on the documents filed. Mrs. Tindi further emphasized that there was no evidence linking the appellant to the offence of stock theft. She contended that the appellant ought to have been acquitted. With regard to the

State's argument that the appellant should have been found guilty of receiving stolen property contrary to section 318(1) of the Penal Code, Mrs. Tindi submitted that this should equally fail for the reason that none of the elements for that offence were proved. To support her submission, Mrs. Tindi referred us to the case of ***Lazarous Kantukomwe vs The People***².

- 8.2 She concluded that the offence of receiving stolen property cannot hold as the appellant did not have any knowledge that the cow was stolen. She implored the court to allow the appeal and quash the conviction and sentence.

9.0 CONSIDERATION AND DECISION OF THE COURT

- 9.1 We have scrutinized the evidence on record and the opposing arguments by the parties.
- 9.2 The evidence is that the appellant was found in possession of one cow which bore the brand mark 7Y7L35. This brand mark was tempered with and subsequently rebranded N3M5 35. Noto Milimo identified the animal as having been stolen from him. When the 1st appellant was confronted he indicated that he had sold this particular cow to the headman, 2nd appellant in this case. The 2nd appellant reported himself to Niko Police Post and told the Police he had bought the cow from Habwela Himabilo, the 1st appellant.
- 9.3 On the record it is clear, that Habwela Himabilo admitted having stolen 1 brown cow and that it was subsequently sold

to the 2nd appellant. The trial magistrate convicted both appellants. The basis for convicting the 2nd appellant as stated by the learned trial Magistrate was as follows:

“The headman A1 went on to brand his brand mark R5 R5 when he knew A1 had no cattle, the fact which A1 testified that A2 knew that he had no cattle and that he was just a herdsman for PW3. He is a Headman for PW3. He is a headman in authority who clearly knows that one needs clearance from the area headman and clearance from the Police who certify that the cow is not stolen. There is Anti- Stock Theft committees in the villages who work hand in hand with the headman who are authorized to check that cattle for sale had proper documentation from the Headman and the Police.”

9.4 Magistrate Mweemba placed reliance on the case of **David Zulu vs The People**³ in drawing an inference that the appellants were guilty of stock theft.

9.5 We are of the considered view that the offence of stock theft was not proved to the requisite standard of proof beyond reasonable doubt for reasons we shall give shortly.

9.6 In the case of **Mwewa Muroso vs The People**⁴ the Supreme Court stated that:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and

consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt."

9.7 The 2nd appellant admits being found with the brown cow, however, he does tender an explanation of how he came to be in possession of it. From our stand point the explanation could reasonably be true. The law is clear where there is an explanation which can reasonably be true then guilt is not the only inference.

9.8 In the celebrated case of ***Saluwema vs The People***⁵ the Supreme Court said that:

"If the accused's explanation is reasonably possible, although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof"

9.9 In yet another insightful case of ***Chabala vs The People***⁶, the apex court had occasion to pronounce itself on accused's explanations when they stated thus:

"If the explanation is given because guilt is a matter of inference, there cannot be a conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give a satisfactory explanation."
(underlining for emphasis)

9.10 In light of the foregoing, we hold the view that the explanation given by the 2nd appellant could reasonably be true. In the

light of what the appellant said, which excluded him, there is no evidence that he stole. But the fact that he made no effort to verify ownership, the trial Magistrate was correct to find that it was not true that he did not know that the animal was stolen thus receiving stolen property under section 318(1) of the Penal code.

9.11 Section 318(1) of Penal Code enacts as follows:

318. (1) Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been feloniously stolen, taken, extorted, obtained or disposed of, is guilty of a felony and is liable to imprisonment for seven years.

9.12 We accordingly find merit in the sole ground of appeal and quash the conviction for stock theft and in its place find the appellant guilty of receiving stolen property contrary to section 318(1) of the Penal Code.

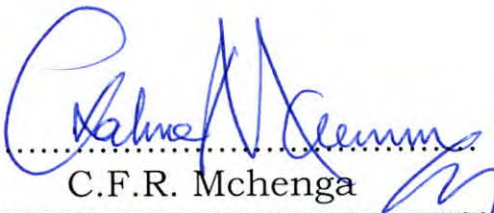
9.13 Before we conclude we wish to comment on the manner in which the conviction was pronounced by the trial Magistrate. He stated as follows:

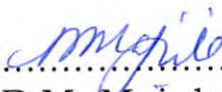
"Therefore, I find that the prosecution has discharged the burden of proof and I find the accused persons guilty of the offence of Stock Theft contrary to section 275(2)(a) and Section 272 of the Penal Code Cap 87 of the Laws of Zambia and I CONVICT them accordingly."

9.14 Our discomfort is that when a person is charged it is not sufficient to simply say "*I CONVICT them accordingly*" In this particular case the evidence showed that what was proved was that the 1st appellant stole one cow and not the ten cattle specified on the charge sheet.

9.15 This is significant because, the sentencing Judge imposed 7 years on the basis of the value of the animals stolen. Had he addressed his mind to what was actually proven and what the trial Magistrate had convicted them, on he perhaps may have come up with a lower sentence, such as the minimum mandatory provided by law.

9.16 That said, we conclude by setting aside the conviction and sentence of the 2nd appellant and substitute it with receiving stolen property contrary to section 318(1) of the Penal Code and sentence him to three (3) years IHL with effect from 21st March, 2019.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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B.M. Majula
COURT OF APPEAL JUDGE


.....
K. Muzenga
COURT OF APPEAL JUDGE