BRIGHTON CHIRISA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA JJ
MUTARE, 22 May and 6 June 2019

Criminal Appeal

C Chibaya, for the appellant
J Chingwinyiso, for the state

MUZENDA: On 17 October 2018 the appellant was arraigned before the Provincial Magistrate sitting at Rusape facing stock theft as defined in s 14 (2) (a) (i) and (ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that on a date unknown to the prosecutor but between 2017 and September 2018 and at Marowa Village Chief Makoni Rusape, Takudzwa Mufandaedza and the appellant one or both of them unlawfully and knowing that Innocent Mufandaedza is entitiled to own, possess or control 31 cattle or their produce or realising that there was a real risk or possibility that Innocent Mufandaedza may be so entitled and with intent to deprive Innocent Mufandaendza permanently of his ownership or control took the said property. On 21 December 2018 he was convicted and sentenced to the mandatory 9 year. On 27 December 2018 appellant filed a Notice of Appel against conviction only. He outlined the grounds of appeal as follows:

1. the court *a quo* erred at law in convicting the appellant when the state had failed to prove its case beyond reasonable doubt.
2. the court *a quo* misdirected itself in finding that the appellant stole one heard of cattle that was exchanged with Maxwell Chidimu's when evidence of appellant's stealing it was never put before the court.
3. the court *a quo* fell into error in holding that appellant stole complainant's one herd of cattle and exchanged it with Maxwell Chidimu's when that heifer was never described in court neither were its photos brought for the court to see. It creates doubt whether that heifer was complainants or not.

4. the court *a quo* fell into error in not summoning the witnesses involved in exchange of cattle between Maxwell Chidimu and Emmanuel Muketiwa so as to ascertain the exact involvement of the appellant before convicting him.

From facts before the court *a quo*, appellant is not a stranger to the complainant, appellant is an uncle to the complainant. Appellant was assigned by the complainant to take charge of 55 herd of cattle whilst complainant was abroad in the United States of America. Appellant and complainant's son Takudzwa Mufandaedza (who was has since been convicted as well) stole a total of 31 cattle belonging to complainant and sold them. Incidentally when complainant returned to Zimbabwe, he was informed by Takudzwa that 20 cattle had died. On 10 September 2018 complainant directed appellant and his son to assemble all his cattle for stock count, his son went out into the grazing area, drove neighbours' cattle and lied to the complainant that they belonged to complainant. The appellant well knowing that the gathered bovine beasts did not belong to complainant, proceeded to brand and ear tagged them. Appellant did not dispute this damning evidence during the proceedings. It is only after the complainant was informed that the cattle appellant and the complainant's son branded and tagged did not belong to him. It is also not in dispute that even though the appellant was charged for stealing 31 cattle, he was convicted of stealing one heifer. The record of proceedings also shows that the appellant was acquainted with the heifer in question. The question for determination is whether the learned magistrate misdirected himself in concluding that appellant stole complainant's heifer.

Appellant's accomplice Takudzwa Mufandaedza pleaded guilty to the charge and was called as a witness against the appellant and among other crucial aspects of evidence adduced by the state from the convicted accomplice was the following:

(a) the appellant was tasked by the complainant to purchase cattle on behalf of the complainant
(b) the appellant was the custodian of the stock card of all the complainant's cattle, he was to keep record of all new acquisitions, disposals and death inclusive of progeny borne out of the herd.
(c) appellant purchased and kept all vaccines used in treating and dipping the complainant's cattle.
(d) appellant was responsible for paying complainant's workers.

(e) appellant participated in the driving of the heifer to Muketiwa's homestead and also personally admitted during the proceedings that that heifer was recovered, and is now at the complainant's cattle pen.

(f) the appellant fraudulently gathered complainant's neighbours cattle and branded and ear tagged them well knowing that they wanted to account for the complainant's missing 31 herd of cattle.

The appellant obviously denies any wrong doing, he distanced himself from the offence and piled blame on Takudzwa, the complainant's son. During cross-examination of the convict it is clear that Takudzwa gave very clear evidence on the participation of the appellant in the whole matter and insisted even under cross-examination that he stole complainant's cattle, sold them to various players and shared the proceeds with the appellant. The evidence of the investigating officer, Frank Badza was direct as against the appellant, that he, the appellant had sold a beast to Muketiwa and that beast is the heifer which was subsequently recovered and restored to the complainant. The appellant did not dispute this evidence and actually confirmed this version under cross-examination by the state's representative. The defence did not put the identity of the heifer in question during trial, hence the identity of the heifer was an issue of common cause. The appellant gave a guarantee to Muketiwa about the heifer, so there was no need in this court's view, why Muketiwa had to be called. In any case as the learned Provincial Magistrate remarked in his judgment that if the evidence of Muketiwa was to be relevant the appellant ought to have called him to testify. The court *a quo* continuously zeroed in on the heifer where the appellant was directly involved. On all the six issues outlined hereinabove as those of common cause, the appellant scantly attacked them during the proceedings and in his heads of argument, those were the issues relied upon by the court *a quo* and a careful analysis of these issues shows that the trial court did not misdirect itself. The appellant should have exonerated himself by producing the stock register to show that he kept an accurate updated stock of the cattle. In other words he should not have participated during the branding and ear tagging of stranger's cattle if he was innocent it should have been that day appellant should have at least informed the complainant about the disappearing cattle. He did not, it corroborates and tallies with Takudzwa's evidence that the two colluded in stealing complainant's cattle. I would not have had problems if the appellant could have been found guilty of theft of other 30 cattle given his conduct in this case. He was lucky to be found guilty of only one heifer. The

conviction of the appellant by the court *a quo* is unassailable and the appeal in our view has no merit, it ought to fail.

The concession made by the state in impugning appellant's conviction was not proper in our view. There is overwhelming evidence against the appellant and answers given by the appellant during the proceedings placed him squarely on the heifer, he knew about the heifer and dipped it. He drove it to the buyer and guarantees the purchaser about the heifer. The heifer was stolen and recovered. This is the heifer appellant stole and disposed of. The issue of identity of the heifer is misplaced and common cause.

Accordingly the following order is returned:

The appeal is dismissed.

MWAYERA J agrees _____

Bvuma & Associates, appellant's legal practitioners
National Prosecuting Authority, State's legal practitioners