

CHOMWENJE MAKUVAZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 14 FEBRUARY AND 3 MARCH 2011

M Ndlovu for appellant
T Makoni for respondent

Criminal Appeal

KAMOCHA J: The appellant was charged with theft of stock as defined in section 114 of the Criminal Law (Codification and Reform Act Chapter 9:25) (“the Act”). It being alleged that he stole 4 donkeys belonging to Charles Shumba on 15 September 2006. He pleaded not guilty but was found guilty of theft of two donkeys despite his protestation. He was sentenced to undergo 9 years imprisonment as the trial court believed that the appellant was liable to the minimum mandatory sentence for a period of not less than nine years or more than twenty-five years imprisonment as stipulated by section 114 (2)(e) of the said Act.

The appellant had initially appealed against both the conviction and sentence but later abandoned the appeal against conviction. In his sole ground of appeal against sentence he complained that the trial court erred by imposing on him a sentence which was meant for theft of a horse or bovine when he was convicted of theft of two donkeys.

The advice to abandon the appeal against conviction was proper, therefore nothing turns on the conviction.

What needs to be considered is whether or not a donkey is an equine animal. The Stock Theft Act [Chapter 9:18] defined “stock” in section 2 as follows:-

“Stock” means –

(a) Any horse, mule, ass, bovine, sheep, goat, pig, poultry, pigeon or chinchilla; or”

The Stock Theft Act was amended by the Stock Theft Amendment Act 6 of 2004 which inserted a new section to the principal Act. That section set out special sentences for offences in respect of certain stock and it reads as follows:-

“12 **Special sentences for offences in respect of certain stock**

(1) Any person who is convicted of the theft or attempted theft of any equine or bovine animal or receiving knowing it to have been stolen, or inciting or conspiring with any other person to commit any offence shall, if there are no special circumstances on the particular case as provided in subsection (2) be liable to imprisonment for a period of not less than nine years or more than twenty-five years.”

The above section was repealed by section 282 of Act 23 of 2004 which we now know as the Criminal Law (Codification and Reform Act [Chapter 9:23]. This Act defines, in section 114 (1) “livestock” to mean;

- (a) Any sheep, goat, pig, poultry, ostrich, pigeon, rabbit or bovine or equine animal; or
- (b) Any domesticated game; or”

Unlike the Stock Theft Protection Act the above section does not include an ass or donkey as livestock. Could the legislature have regarded a donkey as an equine animal? Is it an equine animal?

The word equine is defined in the Chambers 21st Century Dictionary as belonging or relating to, or like, a horse or horses. From *equinus*; from equus horse. A horse in Latin is known as *equus*. But the word *equus* in zoology means the genus of ungulates including, horses, asses and zebra.

See the Collins English Dictionary which defines equine as pertaining to a horse when used as an adjective. When used as a noun it also means a horse.

As can be seen from the above definitions the word equine does not include an ass or donkey. It only relates to a horse or horses. A donkey is not an equine animal.

There is need for the legislature to amend section 114 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] so that it includes an ass like the Stock Theft Protection Act [Chapter 9:18].

In the case of *S v Ndlovu & Anor* 2006 (2) 19 this court arrived at the same conclusion. It was therefore not proper *in casu* to impose the minimum mandatory sentence of 9 years imprisonment meant for those convicted of theft of a bovine or equine animal.

In the result the appeal succeeds and the sentence of 9 years imprisonment is hereby set aside. This court is therefore at liberty to pass a sentence it deems appropriate in the circumstances.

The accused is a first offender who was aged 35 years at the time he committed the offence. He is now 40 years old. He is married with 5 children. The 8 days he served before he was released on bail have been taken into account.

The donkeys he stole were fortuitously recovered, therefore, not much weight can be attached to that. Instead what is clear is that he is a greedy man because he himself owns 4 donkeys. The theft of the complainant's donkeys was out of sheer greed. He stole for sale not because he was a poor man. He has 9 cattle. If he was desperately in need of money he could have sold one of his beasts or one of his donkeys to raise money. Instead he sold the donkeys he stole. This was a mean theft indeed. Depriving a rural dweller of two donkeys is a serious matter since donkeys mean a lot to rural dwellers. They use them for ploughing their lands and as a means of transport.

The aggravating features far outweigh the mitigating ones. No other form of punishment other than a custodial sentence is appropriate in the circumstances. I shall however suspend a portion of the sentence on condition of future good behavior. In the result, the appellant is sentenced as follows:-

“15 months imprisonment of which 6 months imprisonment is suspended for 3 years on condition that he is not convicted of any offence of which theft or dishonesty forms an element committed within that period for which he is sentenced to imprisonment without the option of paying a fine.

Effective: 9 months imprisonment”

Mathonsi J I agree

H Tafa & Associates, c/o Mlweli Ndlovu & Associates, applicant's legal practitioners
Criminal Division of the Attorney General's Office, respondent's legal practitioners