

PHILLIP BRIAN MUCHEDZI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 19 February 2020

Criminal Appeal (Reasons for Judgment)

W Mangwende, for the Appellant
M Musarurwa, for the Respondent

MUZENDA J: On 18 October 2019 the appellant was convicted for stock theft as defined in s 114 (2) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and was sentenced to 9 years imprisonment

He appealed against conviction and set out the grounds as follows:-

“GROUNDS OF APPEAL

1. The trial court erred by placing a duty on the appellant to prove his innocence by sufficing that the circumstantial evidence before the court proved the appellant guilty beyond a reasonable doubt thereby convicting the appellant.
2. The trial court erred in concluding that the totality of the evidence could ensure a conviction without hearing evidence from a material state witness Zvikomborero Ndedzo.
3. The trial court erred in convicting the appellant whilst the identity of the perpetrators had not been established by the state witnesses who bought the carcass.
4. The trial court erred in linking the pliers found at the crime to the appellant when there was no evidence that the appellant was ever in possession or in control of the pliers at the material time or at any time.
5. The trial court erred by placing value on hearsay evidence from one Antonio Mutoniya that the appellant was communicating with Zvikomborero Ndedzo. No evidence was led to show that indeed the appellant was communicating with Ndedzo or the nature of such communication if it existed.
6. The trial court misdirected itself in concluding that the witness Antonio Mutoniya made a police report and thus concluding that he was a credible state witness when in fact he never gave evidence that he made the police report.
7. The trial court erred by failing to treat the evidence of Antonio Mutoniya with caution as he was a potential accomplice taking into account that he had not had the beast cleared by the police, he bought the meat at night and that he had no record of the persons who sold the meat to him.
8. The trial court erred by dismissing the appellant’s alibi even though the state had not managed to disprove or refute it.
9. The trial court erred by failing to give due weight to the fact that indications by the police were forced, biased and also full of fabrications and that they were also allegedly made after the police had visited the scene and that it is at variance with the complainant’s evidence”

The appellant prayed that the conviction and sentence imposed by the court *a quo* be set aside and that he be found not guilty and acquitted.

FACTS

The state alleged that on 27 April 2019, and at plot No. 84, St Faith, Rusape, Malven Muchedzi and the appellant, both and each or one or the other of them unlawfully took a black cow owned by Tafara Chitsike intending to deprive him permanently. On the same date appellant contacted Zvikomborero Ndedzo on his mobile phone informing him that he was selling a cow which had suffered a broken leg. Zvikomborero Ndedzo advised Peter Antonio Mutoniya through his mobile phone who agreed to buy the cow. On the same day at around 2000 hours, the appellant and his accomplice proceeded to the complainant's cattle pen where appellant co-accused opened the kraal, entered and drove out a black cow whilst the appellant remained at the entrance. The appellant then closed the kraal and the two then drove the cow to Mutseriwa's farm. Upon arrival at the farm, appellant's co-accused cut a barbed wire which surrounds the farm with a pair of pliers to gain entry into the farm. The two tied the cow to a tree and slaughtered it, skinned it and hid the hide between some rocks and carried the meat to a roadside leaving the pliers at the scene. Zvikomborero Ndedzo and Peter Antonio Mutoniya later arrived at the scene and met the two accused. Appellant and his co-accused charged \$700-00 for the meat and loaded it into the motor vehicle they were paid \$400-00 on 28 April 2019. Peter Antonio Mutoniya deposited \$60-00 into the appellant's ecocash account. On 28 April 2019 in the morning complainant discovered that his cow was missing. He followed spoor which led him to the scene and recovered a plier. He later met Ananias Muchedzi who identified the pliers as belonging to him. The total value is \$500-00

The appellant in his defence outline denied stealing complainant's cow. On 28 April 2019 he was never near complainant's kraal, and was actually in Harare buying paprika. He denied knowing Peter Antonio Mutoniya and the \$60-00 he was paid through ecocash from Zvikomborero Ndedzo was a payment for his debt, the extra \$10-00 was for charges and a pint of beer for *gratis*.

It is important to summarise the evidence that was relied by trial court to convict the appellant.

Complainant Tafara Chitsike's vital evidence is to the effect that when he discovered that his cow was missing from the kraal, he detected a spoor composed of human feet trail and hooves from his kraal, he got to where the fencing wire had been cut and discovered the hide, he also picked the pliers. His neighbours came including Ananias Muchedzi who identified

the pliers as belonging to him. Ananias Muchedzi is appellant's father. He had been missing the pliers before complainant proceeded to the police. Liberty arrived at complainant's homestead saying he could not find his axe. Ananias Muchedzi informed complainant that he suspected Malven and appellant over the complainant's missing black beast. Complainant told the court *a quo* that appellant admitted at the police stealing complainant's cow and also promised complainant that he could give him the money he received from the buyer. Complainant under cross-examination added that when the appellant was at complainant's home, he told complainant's wife how they have stolen the cow. Both appellant and Malven asked for forgiveness.

Peter Antonio Mutoniya's critical evidence is to the effect that he did not know the appellant but on the date in question, when he was with Zvikomborero where he loaded the meat appellant and Malvern Muchedzi's names were identified as the owners of the meat. He paid a down payment of \$400-00 and retained \$300-00 to enable him to get an invoices from the owner of the meat. He deposited \$60 through ecocash through appellant's mobile phone as part payment of the balance of \$300-00. He was then told that appellant and Malven were wanted by the police.

The police detail, Jephther Zivedza told the trial court that at first appellant denied the theft but later admitted and promised complainant that he will retribute him. He also told the court that it was the appellant who led police to where the hide was concealed. During cross examination by defence counsel, the police detail reiterated that at first both appellant and Malven admitted stealing the cow and vowed to the complainant that they will compensate him

The grounds of appeal are long, repetitive and meandering what we perceive at the centre of the appeal against conviction is that the court *a quo* should not have convicted the appellant.

The appellant submitted that he had a defence of an alibi and stated that on the day in question he had sojourned to Harare to buy paprika and returned around 9.00pm. during hearing of the appeal, appellant's counsel admitted that the appellant raised the alibi defence belatedly on the day of trial and during cross- examination of the appellant. The defence outline also shows that the appellant did not raise it specifically though he alluded to the paprika business. A defence of an alibi must be raised by an accused right from the outset, at the time an accused is informed of his or her own charges, he or she should immediately inform the police about his or her whereabouts at the time the alleged crime was committed. This information would assist the police to verify the alibi through interviewing witnesses. Invariably if the alibi is

confirmed police will not logically insist with prosecuting the accused. And accused must not wait for the day in court and mischievously introduce the defence. The court may require the accused to call the witnesses to confirm such an alibi it will not be shifting an onus, it will be expecting an accused to authenticate his side of the story moreso where the state would have proved evidence which places the accused at the scene of the crime. The appellant in this case did not tell the police about the alibi he eluded to it during trial. The court *a quo* did not err nor misdirect itself in dismissing appellants alibi.

The evidence of the pliers, the mentioning of the names to the buyer of the meat, the indications and recovery of the hide, the promise to pay compensation to the complainant, the payment of \$60-00 ecocash to the appellant, cumulatively puts credence to the inference reached by the court a quo. A close trail of the events deduced from the evidence led by the state established that appellant and his accomplice stole the plier and collected an axe, used the implements in clearing the fence and slaughtering the beast. They sold the meat to Antonio Mutoniya who paid \$400-00 and later on paid \$60-00 to appellant for transport to go and collect the balance leaving an invoice to the buyer. The evaluation of the evidence by the court in its judgement calls for no interference, its well-reasoned and the criticism by the appellant is unfounded and has no merit. The appellant failed to prove allegations of compulsion where he made indications as well admitting to the complainant that he stole the cow. All the nine supposed grounds of appeal have no merit and the appeal against conviction is dismissed.

MWAYERA J agrees _____

Chiwanza & Partners, appellants' legal practitioners
National Prosecuting Authority, for the respondent