

GEORGE MASUNDA

AND

MELUSI SHEPHERD MUKWANANZI

AND

TAKESURE MATONZI

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 29 JUNE 2010 AND 1 JULY 2010

Mr. M. Makonese for applicant
Messrs T. Makoni and Hove for respondent

Judgment

MATHONSI J: The three applicants were convicted of 1 count of stocktheft as defined in section 114 of the Criminal Law Codification and Reform Act, [Chapter 9:23] by the Magistrates court in Kwekwe on the 18th May 2009. They were treated as first offenders for purposes of sentence and then sentenced to 14 years imprisonment of which 4 years imprisonment was suspended for 5 years on condition that they do not within that period commit any offence involving stocktheft for which they are sentenced to imprisonment without the option of a fine. A further 1 year imprisonment was suspended on condition that they make full restitution to the complainant in the sum of US\$235-00.

The case against the Applicants is that they stole two oxen and one cow, the property of

Sanders Mashoko around March 2009. The beasts were driven to Naseby Estate Farm Chicago for safekeeping. One ox was later sold to Lucky Mpunzi while still at that farm who arranged for it to be driven to Zimbeef Abattoirs for slaughter. It was intercepted by the police at the abattoir. The other two animals were removed from Naseby Estate Farm but were also intercepted by an employee of the owner as they were being driven towards Kwekwe River.

The first Applicant is a police sergeant who at the time of the alleged commission of the offence was based at Redcliff police station. He had been a police officer for 6 years. The second Applicant is a member of the neighbourhood watch force attached to Zimbabwe Republic Police Redcliff while the third Applicant is an unemployed friend of the other Applicants.

The evidence led in court clearly links all the three Applicants to the commission of the offence. State witness No. 4 Clennia Sibanda who is actually related to the second and third Applicants testified that all three Applicants brought the three beasts to her home at Naseby Estate Farm Chicago for safekeeping. She went on to say that after a while, all three Applicants returned to her place in the company of a buyer, one Lucky Mpunzi and negotiated a sale before one ox was driven away. On a later date, the third Applicant returned with someone else and drove the remaining beasts away.

The evidence also shows that the national identity card belonging to one Clayton Hutama Basera was used in clearing the ox that was sold to Lucky Mpunzi and, while the Applicants claimed in their defence that the said Basera was the owner of the animals, that

gentleman was traced to Gwanda where he was employed and testified in court that he did not know the Applicants, had no business with the cattle in question and that his identity card had been lost sometime in 2007 in Redcliff when he was a student at Midlands State University.

The evidence of Mhondiwa Chitima, a police officer who cleared the ox at Zimbabwe Republic Police, Kwekwe Central, although rejected by the trial magistrate owing to the inconsistencies therein, was, to a large extent corroborated in material respects by the first and second Applicants themselves. They admitted being directly involved in attending at the police station to clear the stolen ox on behalf, as they say, of Clayton Hutama Basera who disowned them.

An application for bail pending appeal is different from a bail application pending trial by reason that in the later situation the presumption of innocence favours the Applicant. In the former situation the applicant for bail having been convicted of the crime no longer enjoys the benefit of the presumption of innocence *S v Kilpin* 1978 RLR 282(A). *Mr. Makonese* who appeared for the applicant submitted that the state failed to adduce evidence to prove guilt beyond a reasonable doubt especially as the identification of the beasts was "dubious". He took the view that in light of that the Applicants had bright prospects of success on appeal. I do not agree with *Mr. Makonese* because there was strong evidence against the applicants.

Numerous cases have examined the criteria to be followed in considering a bail application pending appeal. The main determining factors are the Applicant's prospects of success on appeal and the interests of justice, that is to say, whether the release of the Applicant on bail will not jeopardise the administration of justice. Experience teaches that the

probability of abscondment is inversely proportional to diminished prospects of success on appeal. Equally so, in very serious cases as this one, bail should not be lightly granted even where there are reasonable prospects. *S v Benator* 1985(2) ZLR 205(H).

Thus, the courts have always taken into consideration the seriousness of the offence, the seriousness of the penalty imposed and the prospects of success in determining the possibility of prejudice to the administration of justice. In this case, the Applicants stand convicted of a serious crime of stocktheft which carries a mandatory minimum sentence of 9 years. They were sentenced to an effective 10 years and, as pointed out above, there is a very strong case against them.

I am not persuaded that any of the Applicants has prospects of success on appeal. If that is considered together with the lengthy term of incarceration which they are facing, it becomes clear that the motivation to abscond is very high.

It is also imperative to take judicial notice of the fact that the three Applicants and two others were also convicted of a similar offence of stocktheft on the 27th May 2009 by the Kwekwe Magistrates' Court and sentenced to the mandatory 9 years imprisonment after the court found no special circumstances. That matter came before my brother Judge as a bail application under case No. HCB 130/09.

In addition to that, the third Applicant, along with three others were convicted of stocktheft by the Kwekwe Magistrates Court on 14th August 2009. For his efforts in that matter he was given an effective 13 years imprisonment. This proliferation of convictions for stocktheft and the lengthy terms of imprisonment mean that the prospects of abscondment are

very high. The Applicants being a serious flight risk, the administration of justice will be jeopardised if they are admitted to bail.

In the circumstances the application by the three Applicants is hereby dismissed.

Mathonsi J.....

Makonese and Partners, applicants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners