

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

Appeal No. 218/2020

BETWEEN:

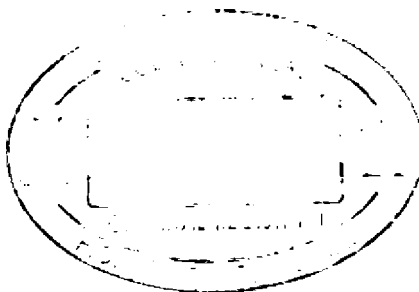
CLEVER MUNKOMBWE

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Majula and Muzenga JJA
On 25th August, 2021 and 16th November, 2021.

For the Appellant: Ms. A. Banda Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. F. M. Sikazwe Senior State Advocate, National
Prosecution Authority

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Mutale and Richard Phiri v The People (1997) ZR 51**
- 2. David Zulu v The People (1971) ZR 157**
- 3. Chileshe v The People (1977) ZR 176**
- 4. Kalunga v The People (1975) ZR 72 (SC)**
- 5. Saidi Banda v The People – Selected judgment No. 30 of 2015**

6. Joseph Mulenga and Another v The People – Appeal No. 128 of 2017

7. Dorothy Mutale and Richard Phiri v The People – SCZ judgment No. 11 of 1997

Legislation referred to:

1. The Penal Code Chapter 87 of the Laws of Zambia.

1.0 INTRODUCTION

1.1 The appellant, Clever Munkombwe and three others were convicted of the offence of stock theft contrary to **section 275(1)(a) of the Penal Code**¹. The particulars of the offence were that on unknown dates but in the month of November, 2019 at Mumbwa in the Mumbwa District of the Central Province of the Republic of Zambia jointly and whilst acting together did steal one bull valued at K27,000.00 the property of Kelvin Hambweza.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The case against the appellant was anchored on the evidence of seven prosecution witnesses. Their evidence was to the effect that Brian Serenje (PW2) a supervisor at Shamboze Ranch, on 11th November, 2019, released animals to graze in the plain and left the bull with

Sydney Munyumbwe. In the evening when he returned from herding the cattle, he inquired about the bull which was not in the kraal. He informed the ranch manager of the development and the following day he went and searched for the animal but to no avail.

2.2 Three weeks later, he passed by PW4's house to drink water. While there he noticed a fat of meat dropping from the roof. When he enquired as to the source of the said meat, he was told that the piece of meat had been given to them by A3's wife. Two days later, PW4's wife called him to inform him that they found A1 and A2 preparing a big brown bull and that she got the head from A3. After that he informed PW1 of the information he had gathered and PW1 asked him to investigate further. Later Winford Serenje (PW3) told him that he found Kingsley Masumo (A1) smoking meat with Halwinde Hapombwe (A2). PW2 then told PW1 to bring the police officers at Kingsley Masumo's house.

2.3 According to Simwale Charles, PW1, the manager at Shamoze Ranch, the animal in question went missing on 11th November, 2019. He was informed of the suspects by PW2. According to Winford Serenje (PW3) on 12th November, 2019, around 17:00 hours, he went to

Kingsley Masumo's house together with his friend Pacer to play. He told the court that around 18:00 hours, they were sent to go and get an ox-cart from A2's house which had some sacks of meat. They took the said ox-cart to the road where they found A1 and A2. The two wanted to transport the said meat to Lusaka.

- 2.4 According to PW4, on 17th November, 2019, PW2 came to her house to ask for water to drink. After giving him water, he made an enquiry on the droppings from the roof of her house. She told him that it was meat they had been given by Mrs. Munkombwe, wife to the appellant.
- 2.5 On 12th November, 2019 around 19:00 hours, PW5 went to visit his friend, the appellant, who asked him if he had relish at home at the time when he was about to leave. The appellant thereafter brought a big head of an animal which was brown and whitish in colour. Two days later, police officers came to his place asking him where he got the head which he had already eaten by then. He told them he got it from the appellant.
- 2.6 According to PW6, a police officer by the name of Manchishi Innocent, on 11th November, 2019 received a report of stock theft made by one Charles Mwale who complained on behalf of Shamboze Ranch. The

complaint was to the effect that one bull, light brown in colour had been stolen by unknown people. He testified that during the course of his investigation, it came to his attention that between 9th and 11th November, 2019, PW3 went to play at A1's house where he found A1 and A2 roasting meat which they later took to Lusaka. He later apprehended the suspects, and made up his mind to charge them with the offence of stock theft. PW7 was Detective Chief Inspector Feira Mtonga. His evidence was similar to that of PW6 and we shall not repeat the same.

3.0 DEFENCE

- 3.1 In his defence, the appellant informed the court that he knew nothing about the stolen animal. He testified that on 4th November, 2019, around 12:00 hours he found a head, offals and hooves at his house. When he inquired about the meat, he was told that the meat had been brought by A2. The following day, he received a visitor who happened to be PW5's wife. He gave her the head to go and cook for her family. Later he was apprehended by the police.
- 3.2 In cross examination he told the court that it was PW5 who he gave the head of the cow.

4.0 DECISION OF THE LOWER COURT

- 4.1 The Magistrate analysed the evidence and found that there was sufficient circumstantial evidence which had taken the case outside the realm of conjecture that it attained a degree of cogency which permitted an inference of guilty against the each of the accused persons.
- 4.2 The appellant and his co-accused persons were convicted and committed to the High Court for sentencing. The High Court, presided over by Mr. Justice K. Limbani, sentenced each of the convicts to 7 years imprisonment with hard labour by the High Court.

5.0 GROUNDS OF APPEAL

- 5.1 Disenchanted with the conviction and sentence, the appellant filed four grounds of appeal couched as follows:
- (i) **The learned trial court erred both in law and fact where there are two or more inferences in the case not to have drawn an inference which favours the appellant when he said he received the hooves and the head of a cow from DW2 as an innocent receiver without notice of defect.**
 - (ii) **The learned trial court misdirected itself in both law and fact to convict the appellant on weak circumstantial evidence.**

- (iii) The court erred in law to convict the appellant on the basis that he was in recent possession of the meat.**
- (iv) The learned trial court erred both in law and fact to sentence the appellant to seven years imprisonment when there were no aggravating circumstances and as a first offender.**

6.0 APPELLANT'S ARGUMENTS

6.1 In support of ground one of the appeal, it was submitted that from the facts on record, it is clear that the appellant had nothing to do with the offence he was convicted of. Counsel submitted that it is clear that when the appellant got to his house after work, he found a head, some hooves and offals which had been brought to his house by DW2. This evidence was confirmed by DW2. Further, it was submitted that there is evidence that the appellant was absent at the crime scene. The only reasons given by the court below for convicting the appellant was that he contradicted himself in his evidence.

6.2 Counsel submitted that it is trite law that when the court is faced with a situation where it is to draw an inference where two or more inferences exists, the court should always adopt the one that favours the appellant where there is nothing to exclude that inference. We

were referred to the case of **Mutale and Richard Phiri v The People**¹ where it was held that:

"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference."

- 6.3 Further it was submitted that the trial court misdirected itself when it drew an inference which was adverse to the appellant.
- 6.4 Ground two and three were argued together. It was submitted that the circumstantial evidence that graced the trial court's record was marred with lack of sufficient facts to move it out of the realm of conjecture from which the court could feel safe to settle for a guilty verdict as was guided in the case of **David Zulu v The People**². It was submitted that the evidence incriminating the appellant was insufficient. Further, it was counsel's submission that the doctrine of recent possession would only suffice if the appellant had no plausible explanation for the pieces of meat that he was found with. The appellant explained to the police and the trial court how the pieces of meat believed to have been stolen were found at his home and how

he gave some to PW4 or his wife. We were referred to the case of **Chileshe v The People**³ where the Supreme Court guided that:

"It is the duty of a trial court, in cases where recent possession of stolen property may lead to the conviction of the accused, to consider whether such recent possession may be the result of the receiving of stolen property as opposed to guilt of the major crime during the commission of which the stolen property was obtained."

- 6.5 It was further submitted that the appellant received pieces of meat without the knowledge that the same was stolen. He thought that the second accused owned or had the right to deal with the meat in question in any manner as he wished including giving it out. Counsel submitted that this was a case of mistake of fact which is a defence at law provided for under **Section 10 of the Penal Code**¹. All in all, it was submitted that the appellant, an innocent receiver of the pieces of meat, reasonably though mistakenly, is not criminally liable for stock theft in line with the provision of **Section 10 of the Penal Code**¹.
- 6.6 Ground four was argued in the alternative. It was submitted that the appellant is a first offender, youthful in age and showed remorse. That there were no aggravating circumstances to necessitate a heavier sentence. Further, it was submitted that the appellant was and is

deserving of lenience from the court given the set of circumstances surrounding the case.

- 6.7 It was submitted that it is trite that the courts will generally not interfere with the sentence of the trial court, unless the sentence is wrong in principle and comes to the court with a sense of shock. That the seven years sentence for a first offender who is youthful in age and where there are no aggravating circumstances comes to this court with a sense of shock. We were referred to the case of **Kalunga v The People**⁴ where it was held that:

"It is not proper to enhance a sentence simply because the appellate court, had it tried the case, would have imposed a somewhat greater sentence. Just as an appellate court will not interfere with a sentence as being too high unless that sentence comes to the court with a sense of shock, equally it will not interfere with a sentence as being too low unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence."

- 6.8 We were urged to allow the appeal and set the appellant at liberty.

7.0 RESPONDENT'S ARGUMENTS

- 7.1 The state supported the conviction and sentence. In their written submissions, Counsel argued the grounds of appeal together. It was submitted that the appellant was convicted of the subject offence

because there is overwhelming evidence which proved the case beyond reasonable doubt. It was submitted that from the facts on the record of appeal, this case is hinged solely on circumstantial evidence. We were referred to the case of **Saidi Banda v The People**⁵ where the Supreme Court guided that:

"Where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect, being called upon to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves, those facts cannot therefore prove the guilt of the accused person. The court should then infer or conclude from the combination of these established facts that a further fact or facts exist. The court must then be satisfied that those further facts implicate the accused in a manner that points to nothing else than his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion of guilt the court is entitled to draw on the weight of circumstantial evidence adduced before it."

- 7.2 It was contended that in this case there are basic facts which were established and when taken together implicates the appellant in such a manner that point to nothing less than his guilt. It was counsel's submission that the analysis by the trial court cannot be faulted as the

material evidence that implicated the appellant went unchallenged. The appellant did not raise the issue of receiving the pieces of meat without knowledge that the same was stolen with the prosecution witnesses. We were referred to the case of **Joseph Mulenga and Another v The People**⁶ where the Supreme Court guided that:

"When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed. Leaving assertions which are incriminating to go unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial."

- 7.3 It was submitted that the circumstantial evidence took the case out of the realm of conjecture such that it attained a degree of cogency which could only permit an inference of guilt. It was further submitted that the principles laid down in the case of **Dorothy Mutale and Richard Phiri v The People**⁷ already cited above cannot aid the appellant because this case is distinguishable. That in this case only one inference can be drawn and not two.
- 7.4 With regards to sentence, the state submitted that **Section 275 (2) of the Penal Code** provides for imprisonment of five years as a minimum sentence and fifteen years as a maximum sentence for a first

offender. That the appellant was sentenced to suffer seven years imprisonment with hard labour as a first offender, which sentence is well within the law. Therefore, the sentence cannot be wrong in principle or manifestly excessive so as to induce a sense of shock to warrant its interference.

- 7.5 We were urged to dismiss this appeal for it lacks merit given the overwhelming evidence which proved the offence of stock theft beyond reasonable doubt.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

- 8.1 At the hearing of the appeal, learned counsel for the appellant Ms. Banda and learned counsel for the respondent, Mr. Sikazwe, placed full reliance on the arguments filed. We are grateful for their submissions.

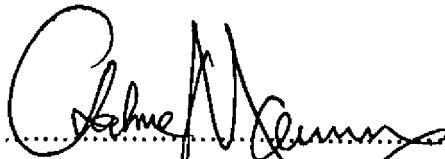
9.0 CONSIDERATION AND DECISION OF THE COURT

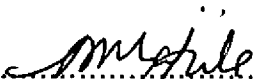
- 9.1 We have carefully scrutinized the evidence on the record, the arguments by both counsel and the judgment sought to be assailed by this appeal.
- 9.2 The issue as we see it is whether the circumstantial evidence is sufficient to warrant the appellant's conviction.


- 9.3 The evidence against the appellant is basically to the effect that he gave half of the head of an animal to PW5, whose wife gave a piece of fat meat to PW4.
- 9.4 To begin with, there was no evidence to the effect that the head which he gave to PW5 was a head of the bull which went missing at the complainant's farm. In fact according to PW5, he could not tell whether it was a head of a cow or bull. This is what basically formed the circumstantial evidence.
- 9.5 The learned trial court in finding the circumstantial evidence to be cogent relied on the inconsistency relating to who the appellant said he gave the head of the animal. He initially said he gave it to the wife to PW5 and later he said he gave it to PW5. This inconsistency, in our view, is inconsequential as it relates to who was handed over the head.
- 9.6 In fact, the learned trial court found and accepted that the appellant gave the head to PW5. This cannot materially affect the efficacy of the circumstantial evidence as the appellant does not in any way dispute having been in possession of the head and having given it away.

- 9.7 It is trite that a conviction can properly be anchored on purely circumstantial evidence. The only requirement is that it must be sufficient enough to permit only an inference of guilty. Further, if the explanation given by an accused person may reasonably be true, a conviction cannot ensue.
- 9.8 We have considered the circumstantial evidence against the appellant and we are of the view that an inference of guilt is not the only inference that can be drawn upon it.
- 9.9 As already noted above, there is no evidence linking the head which the appellant gave PW5 to the bull which went missing at the complainant's farm. This is a very weak link.
- 9.10 In any event, the explanation which the appellant gave as to how he came into possession of the head, offals and hooves was consistently explained.
- 9.11 If the trial court properly evaluated the circumstantial evidence herein, it would have found that it is insufficient and could not permit only an inference of guilty. We thus find that the learned trial court fell in grave error when it concluded that an inference that the appellant was guilty could be drawn on the evidence that was before the court.

9.12 We find merit in grounds 1, 2 and 3, we allow the appeal. We quash the conviction, set aside the sentence and set the appellant at liberty. Since ground 4 was argued in the alternative, we find it otiose to deal with it.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


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B. M. MAJULA
COURT OF APPEAL JUDGE


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K. MUZENGA
COURT OF APPEAL JUDGE