

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

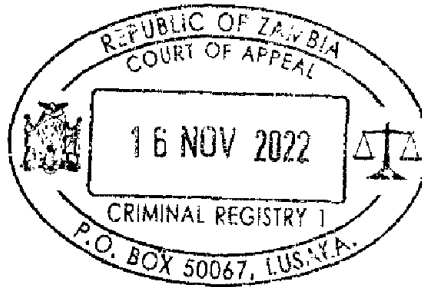
APP. No. 28/2022

BETWEEN:

KELVIN MUNKWISHI

AND

THE PEOPLE



APPELLANT

RESPONDENT

**CORAM : Mchenga DJP, Chishimba and Muzenga JJAs
On 20th September, 2022 and 16th November, 2021**

For the Appellant : Mr. C. Siatwinda, Senior Legal Aid Counsel
Messrs Legal Aid Board.

For the Respondent : Mr. S. Mainza, State Advocate – National
Prosecution Authority.

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASE AUTHORITIES CITED:

1. Emmanuel Phiri And Others v The People (1978) Z.R. 79
2. William Muzala Chipango & Others v The People (1978) Z.R. 304
3. Christopher Nonde Lushinga v The People (2011) 2 ZR
4. Butembo v The People (1976) Z.R. 193
5. Anthony Mwaba Mpundu v The People SCZ Appeal No. 149 of 2016
6. Muvuma Kambanja Situna v The People (1982) Z.R. 115

LEGISLATION CITED:

1. The Penal Code Chapter 87 of the Laws of Zambia.
2. The Court of Appeal Act No. 7 of 2016.

1.0 INTRODUCTION

- 1.1 The appellant stood charged with the offence of stock theft contrary to section 275(2) and 272 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars alleged that Kelvin Munkwishi and Susan Choongo, on 26th January, 2021, at Namwala in the Namwala District of the Southern Province of the Republic of Zambia, did steal four cattle valued at K13, 000.00 the property of Lawrence Kawelila.
- 1.2 At the end of the trial Susan Choongo was acquitted while the appellant was convicted.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 The summary of the evidence on record is that on 22nd January, 2019, Susan Choongo (A2) bought five herds of cattle from the appellant at the total price of K12, 500.00 and left the animals in his care. The cattle were all branded with the mark "R5 7J R5". Two years later in January 2021, Choongo obtained a cattle permit and asked the appellant to drive the five herds of

cattle to Star Beef abattoir in Namwala where she intended to sell them.

2.2 On the 26th January, 2021, the appellant and other persons delivered the said cattle to star beef abattoir at around 22:30 hours in the company of Choongo and left them there for safe custody. On the same night, PW1, Lawrence Kawilila discovered that four of his cattle namely two oxen and two cows branded with the mark "FKK" were missing from the rest of the herd. He went on a search that led him to the abattoir where he found and identified the missing cattle. The guard at the abattoir informed him that four people had brought the said cattle and that they would return in the morning.

2.3 PW1 remained at the abattoir until around 08:00 hours when Choongo and PW3 arrived. It was then discovered that the brand marks on the cattle were different from those that Choongo had obtained a permit for. Further, only four cattle were delivered instead of five. The said Choongo was at the difference in brand marks for the cattle delivered and the ones she purchased from the appellant. A2 stated that the delivered

cattle were not hers. Thereafter, the matter was reported to the police.

2.4 In his defence, the appellant conceded that he sold the cattle to Choongo (A2) but denied delivering them to the abattoir at star beef.

3.0 DECISION OF THE LOWER COURT

3.1 The learned Magistrate found as a fact that PW1 lost four herds of cattle branded "FKK" on 26th January, 2021 and that the same cattle was recovered at Star Beef Abattoir after being driven there by the appellant. The court found that the second accused person had made arrangements with the appellant to deliver five herds of cattle branded "R5-7J-R5" that she had bought from the appellant in January 2019.

3.2 The Magistrate accepted as a reasonable explanation that the second accused could not check the brand marks when the cattle arrived as it was at night and her mind was to simply secure the cattle. The learned Magistrate acquitted Susan Choongo (A2) having been satisfied that she tendered a reasonable explanation and that there was no evidence to

negate it. The court below held that A2 was simply an innocent buyer who had been tricked by the appellant.

3.3 The trial magistrate, in respect of the appellant, found that the prosecution had discharged the burden of proof and convicted him of the offence of stock theft having delivered the stolen cattle to Star Beef Abattoir and admitting that he sold cattle to A2.

3.4 Upon convicting the appellant, the record was remitted to the High Court for sentencing. In the High Court, Justice Sinyangwe being satisfied with the propriety of the conviction, proceeded to sentence the appellant. In his mitigation the appellant submitted that he is a first offender, married with 6 Children and was remorseful. The High Court took into account the fact that the appellant is a first officer entitled to lenience and sentence him to six years imprisonment with hard labour.

4.0 **GROUND OF APPEAL**

4.1 Being dissatisfied with the conviction, the appellant appealed advancing two grounds as follows:

- 1) The trial court erred in law and fact by failing to warn itself as to the dangers of convicting on uncorroborated evidence of a co-accused, A2;*

- 2) *The court below erred in both law and fact by convicting the appellant on the suspect evidence of a co-accused, A2, without any corroborative evidence linking the appellant to the commission of the offence.*

5.0 **ARGUMENTS BY THE APPELLANT**

5.1 The appellant relied on heads of arguments dated 15th August 2022. The grounds of appeal were argued together. It was submitted that the lower court neither warned itself nor directed its mind to the dangers of convicting on the uncorroborated evidence of a co-accused, Susan Choongo, A2. The lower court readily accepted the evidence of A2, without looking for corroboration or something more.

5.2 Reference was made to the case of **Emmanuel Phiri And Others v The People** ⁽¹⁾ where the court guided that:

- (i) *A Judge (or magistrate) sitting alone or with assessors must direct himself and the assessors, if any, as to the dangers of convicting on the uncorroborated evidence of an accomplice with the same care as he would direct a jury and his judgment must show that he has done so. No particular form of words is necessary for such a direction. What is necessary is that the judgment show that the judge has applied his mind to the particular dangers raised by the*

on the uncorroborated evidence of A2, and apply its mind to the particular dangers raised by the nature and facts of the case.

5.4 Counsel contended that while the trial court found that there is overwhelming evidence connecting the appellant to the offence, other than the evidence of A2, there was no independent evidence linking the appellant to the commission of the offence. On the contrary, it was submitted that there is overwhelming evidence connecting A2 to the offence in that:

- i) A2 was the one who went to clear the cattle at the police station;
- ii) A2 was in possession of the stock movement permit from police whose details did not match with the four cattle that were subsequently delivered;
- iii) PW2 said A2 was the one who presented herself as the owner of the cattle;
- iv) PW3 said A2 was in constant communication with him and presented herself as the owner of the cattle; and
- v) A2 was the only one both PW2 and PW3 dealt with in relation to the cattle in question.

5.5 Counsel submitted that these circumstances place A2 in a highly suspicious category of a witness with a possible interest of their own to serve, in addition to her being a co-accused. The case of **William Muzala Chipango & Others v The People** ⁽²⁾ was cited as authority on the requirement for corroboration with regard to the evidence of a co-accused or suspect witness.

5.6 In conclusion, it was submitted that without the evidence of A2, in so far as it implicates the appellant, a conviction is unsafe and unsatisfactory. In accordance with **section 16(1) of the Court of Appeal Act No. 7 of 2016**, we were urged to set aside the conviction on the basis that in all the circumstances of the case, it is unsafe or unsatisfactory and allow the appeal and acquit the appellant.

6.0 **ARGUMENTS BY THE RESPONDENT**

6.1 The respondent filed heads of arguments with leave of court dated 20th September 2022. The state opposed the appeal and dealt with each ground of appeal separately. In ground one, we were referred to the case of **Christopher Nonde Lushinga v The People** ⁽³⁾ where the court held that:

“The trial magistrate did not specifically use the word “corroboration”. There is no magical meaning in the word “corroboration”. It simply means evidence which confirms the commission of the offence and the identity of the perpetrator of that offence. Put differently, corroboration means supporting or confirming evidence.”

6.2 Counsel submitted that the appellant is asserting that the court below convicted him on uncorroborated evidence. On the contrary, there was direct evidence from PW2, the guard at the abattoir that he saw the appellant bring the four herds of cattle at 22:30 hours. He was able to see the appellant because there are electric bulbs at the abattoir. This witness went on to identify the appellant to PW3 and PW4 in the morning.

6.3 In ground two, it was contended that the evidence of A2 that she bought the cattle from the appellant was corroborated by the evidence of PW2 and PW3 who confirmed that the appellant brought the cattle to the abattoir. We were thus urged to dismiss the appeal.

7.0 ORAL ARGUMENTS BY COUNSEL

7.1 At the hearing of the appeal, Mr. Mainza, the State Advocate reiterated the argument that there was direct evidence of identification with respect to the appellant by PW2 who received the cattle at night. Further that PW2 was able to see the appellant as there was light from the electric bulbs.

7.2 On the other hand, Mr. Siatwiinda, Senior Legal Aid Counsel, argued that the evidence of PW2 is unreliable because he was uncertain in his identification of the appellant. Further, there was no evidence of how long PW2 observed the appellant in the night. PW3 also told the court that he only met the appellant in the morning thereby casting doubt on the evidence of PW2. Counsel further submitted that the evidence by A2 cannot corroborate that of PW2.

7.3 In respect of the herd of cattle, Mr. Siatwiinda submitted that though the appellant admitted selling cattle to A2 in 2019, the four cattle delivered to the abattoir at Star Beef were not sold by him.

8.0 **DECISION OF THE COURT**

8.1 We have considered the appeal, the authorities cited and the arguments advanced by the Learned Advocates for both Parties. We propose to deal with both grounds of appeal simultaneously as they both raise the issue of whether the evidence of the co-accused was corroborated.

8.2 The appellant is challenging the conviction of the appellant on the basis that the trial Magistrate did not warn himself of the dangers of convicting on the uncorroborated evidence of an accomplice or co-accused. A perusal of the judgment of the trial court shows that the learned trial Magistrate did not warn himself on the dangers of convicting on the uncorroborated evidence of a co-accused, in this case, Susan Choongo.

8.3 However, we are guided by the decision of the Supreme Court in **Butembo v The People** ⁽⁴⁾ that:

- (i) In a proper case, notwithstanding that no warning as to corroboration has been given when it should have been given, a conviction may be upheld. Certain language in R v Trigg [1] criticised.*
- (ii) The test is: does there exist corroboration of such manifest cogency that the conclusion is not to be*

resisted that the court properly directed would certainly have arrived at the same conclusion.

8.4 Further, in **Anthony Mwaba Mpundu v The People** ⁽⁵⁾ at page J10, the court gave additional guidance as follows:

“..., in cases requiring corroboration, the court first looks for corroborative evidence, whether in terms of testimony of other witnesses, or in terms of the real evidence produced; and that when that is lacking, the court may now look to any special and compelling grounds which will satisfy it that the danger of false implication has been excluded. ...”

8.5 We are of the view that though the court did not warn itself, there was sufficient corroboration on the identity of the appellant as the offender coming from PW2, the security guard. PW2 stated that the cattle were brought by four persons: two women and two men. He identified Choonga as one of the two women and the appellant as one of the two men that brought the cattle to the abattoir.

8.6 In cross-examination, this witness maintained that the appellant brought the cattle and that he was able to see him in the night because there are electric bulbs at the abattoir.

8.7 This evidence placed the appellant at the abattoir and supported the evidence of Susan Choongo to the effect that the appellant delivered the cattle to the abattoir. Therefore, we find that there was sufficient corroboration of the evidence of the co-accused that the appellant is the person that delivered the cattle to the abattoir that turned out to have been stolen from PW1.

8.8 Mr. Siatwiinda further argued that the identification evidence of PW2 is unreliable as it was at night; he was uncertain and that PW3 and Choongo contradicted PW2 when he said the appellant came in the morning.

8.9 In **Muvuma Kambanja Situna v The People** ⁽⁶⁾, the Supreme Court considered identification evidence and guided that:

“The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognise the accused.”

8.10 We accept that neither PW3 nor Choongo testified that the appellant came back in the morning. We are of the view that a

perusal of the evidence adduced by PW2 appearing at pages 7 to 8 of the record of appeal does not reveal any uncertainties or doubts in his testimony. PW2 was clear about who he saw in the night and explained what aided him to identify the appellant in the night.

8.11 When cross-examined, PW2 maintained that the appellant brought the cattle and that he was able to see him in the night because there are electric bulbs at the abattoir. This evidence was not disputed by the appellant.

8.12 Further, considering that the appellant and Choongo brought cattle to the abattoir and left them for safe keeping, we are of the view that this was not a simple task to be done in a very short period of time. We take the view that it took long enough to enable PW2 see the appellant and all the other persons that were there.

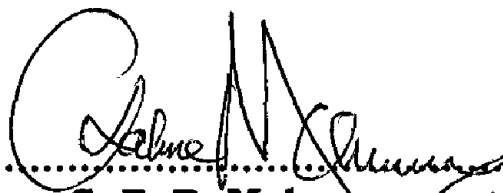
8.13 As regards the sale of the cattle to Choongo by the appellant, we find that this was not in dispute. In his defence, the appellant did mention and accepted having sold cattle to Choongo. This confirmed Choongo's story that she bought five animals branded "R5-7J-R5" from the appellant as per P3, the letter of


sale. These are the animals that Choongo asked the appellant to deliver to the abattoir but he instead delivered four cattle branded "FKK".

8.14 The evidence by Choongo was neither challenged nor discredited in cross-examination by the appellant who opted not to cross-examine. Therefore, the appellant cannot be heard to say that he did not sale any cattle to Choongo or that the cattle he delivered to the abattoir are not the ones that he sold to her.

9.0 CONCLUSION

9.1 We therefore cannot fault the court below in convicting the appellant of the offence stock theft, the prosecution having proved beyond reasonable doubt. We accordingly dismiss the appeal, uphold the conviction and sentence imposed on the appellant.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT


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F. M. Chishimba
COURT OF APPEAL JUDGE


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K. Muzenga
COURT OF APPEAL JUDGE