



**CASE NO.: CR 32/2012**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**NDERIMOYE NAHASON NGUHENIMO  
TJIMBUAA ADEONESTUS MUGENDJE  
KAIKE KATIRE  
SAMUEL SHOOMBE  
KAMAIJANDA TJAUVERUA  
NGAVEZIKAME HEI**

**ACCUSED 1  
ACCUSED 2  
ACCUSED 3  
ACCUSED 4  
ACCUSED 5  
ACCUSED 6**

(HIGH COURT REVIEW CASE NO.: 775/2012)

**CORAM: SMUTS J**

Delivered on: 15 May 2012

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**REVIEW JUDGMENT**

**SMUTS, J.:** [1] The District Court in Otjiwarongo convicted the first, second and third accused of stock theft of four head of cattle. That court then proceeded to commit these accused for sentencing by the Regional Court, given the provisions of the Stock Theft, Act 2004.

[2] The Regional Magistrate, after considering the record of proceedings, formed an opinion that the proceedings were not in accordance with justice and recorded the reasons for this opinion and then transmitted the matter to the Registrar of this court for the purpose of a review of those proceedings pursuant to the provisions of s 116 (3) of the Criminal Procedure Act, 1977 read with s 303 of that Act.

[3] The charge faced by the accused was the theft of 10 head of cattle valued at N\$30 000.00. There were originally six accused but after the fourth accused had been repeatedly absent, there was a separation of trials and the case then proceeded against the first, second, third, fifth and six accused. At the conclusion of the trial, the prosecutor rightly did not seek convictions in respect of accused numbers 5 and 6 and they were acquitted.

[4] The accused were all unrepresented throughout the proceedings. Each provided a clear explanation at the outset. They each denied any involvement in the theft of the complainant's cattle.

[5] The complainant gave evidence that during the period of 2004 to 2006 twenty five head of cattle had gone missing from his farm and that he suspected they were stolen. The charge sheet was however in respect of the period December 2005 to June 2006.

[6] The circumstances which gave rise to the charge being laid in August 2006 are of some significance. The complainant stated that he was approached by the police on 4 August 2006 that a certain Mr N. Koshipati, who became the main witness for the prosecution and who was in custody at the time, wanted to see him. He then called upon the police station at the Okakarara where Mr Koshipati was being held. The latter approached the complainant with an offer of providing information about the theft of the complainant's cattle by accused number one in exchange for paying Mr Koshipati's bail of N\$1 600.00.

[7] Although the complainant testified that he did not pay this bail money, Mr Koshipati nevertheless provided information to the police which resulted in the charges being preferred against the accused.

[8] The thrust of Mr Koshipati's evidence was that he had in December 2005 observed accused no. 2 driving five head of cattle in the area where he stayed. He testified that accused no. 2 had said to him that he had been sent by his uncle (accused no. 1) to bring the cattle from the complainant's farm. Mr Koshipati also testified that he noted a brand on the cattle with certain figures or symbols which also appeared in the brand utilised by the complainant.

[9] Mr Koshipati was however vague on almost every detail relating to his testimony. He initially stated that this occurred in December 2006 and only after he had been shown his statement made to the police, did he accept that it was in

December 2005. The presiding magistrate did not however direct that the statements should be made available to the accused for the purpose of cross-examination as he should have done. Mr Koshipati also stated that he could not recall the month very well either. He recalled that it was in November – and not December as was put to him by the prosecutor which presumably appeared in his statement.

[10] Mr Koshipati also referred to five head of cattle which accompanied accused no. 2 even though the prosecutor at one point sought to put it to him in an incomplete question that there were three head of cattle and three calves. I have already referred to the fact that the charge sheet referred to ten head of cattle. This aspect as well as the circumstances under which he offered to give the information to the complainant were not canvassed at all in cross-examination. Despite this, the presiding magistrate in his judgment curiously referred to the cross-examination of Mr Koshipati by the accused as being thorough. The presiding magistrate should in my view have enquired about the circumstances under which this witness came forward (with his offer to the complainant) to give evidence, seeing that the accused were unrepresented. This would have been an aspect – alluded to by the complainant – for the court to have enquired about in order to evaluate his evidence.

[11] Accused no. 2 did however question Mr Koshipati about his delay in coming forward with his information – some eight months. The answer to the

brief question put to him in this regard was unsatisfactory and provided no proper explanation for his failure to have done so. His reference to what was told to him by the police officer, namely that the complainant had laid a charge, although elicited hearsay, but it was in any event directly contradicted by the complainant's evidence which was to the effect that the charge was only laid after he had received information from Mr Koshipati. The police officer in question was not called by the prosecutor to give evidence.

[12] The complainant in his evidence also stated that when he had informed one of his former farm workers that there had been arrests in connection with stock theft from his farm, that worker then disappeared. The complainant suspected that the worker in question was also implicated in the theft. This aspect was not the subject of cross-examination or of any questions by the court.

[13] The complainant also testified that the first and third accused, who are brothers, had approached him with a view to dropping the charges against them. His testimony in that regard was however disputed by both those accused.

[14] One of the other witnesses for the prosecution was the female partner of the first accused, Ms Nguyapewa. She stated that accused no. 2 had in about December 2005 transported two calves and two cows from accused no. 3 to his brother, accused no. 1. The presiding magistrate made an express finding that she had impressed him as a witness.

[15] All of the accused gave evidence. Their evidence in essence, was to the same effect, namely that accused no. 2 had taken two cows and two calves from the home of accused no. 3 to accused no. 1 pursuant to an arrangement between them.

[16] In his judgment, the presiding magistrate referred to Mr Koshiapati's description of the cattle as being vague but the court made no finding at all in respect of the credibility of this crucial witness. After referring in some detail to the evidence, the court proceeded to make certain findings. As far as the number of cattle was concerned, the court finding was contradictory. In this segment of the judgment, it is stated:

“It is also not in dispute that there are six cattle that were seen by the witness who also came and testify before in this court, which were driven by accused no. 2”. (sic)

[17] As I have already pointed out, this is entirely incorrect. Mr Koshiapati's evidence was in fact to the effect that there were five head of cattle. The reference to six head of cattle featured in an incompleting question which was not proceeded with by the prosecutor, referring to three head of cattle and three calves.

[18] The court then referred to the evidence that during December cattle were in fact brought by accused no. 2 to accused no. 1 from the home of accused no.

3. The judgment then proceeded along the following lines:

*“There is also undisputed evidence before this court that these cattle were four, simply because the third state witness, in the mind of the court was a very honest witness. The court also takes into account the evidence of the second state witness, Mr Koshiapati. He mentioned that he met accused no. 2 with five cattle. He cannot clearly describe the cattle but he could tell that the cattle were not from the reserve, they were from somewhere. And he confidently testify that in fact he was told by accused no. 1 to collect these cattle, not accused no. 3 evidence argued before this court. That these cattle were for the complainant. There is also evidence that, in fact the same witness had requested the police to ask, to pay his bail of one thousand six hundred but the complainant did not pay that bail, he referred the matter to the police. There is no evidence, unfortunately I must say that suggest that in fact accused no. 1 knew where these cattle came from. How these cattle came, came in his custody remains something which is very unclear before this court. It was also today when accused no. 3 said, in fact they came from him from Ombora, to come and separate the calves from the cows. Accused no. 3 was also a farmer and if the cattle were brought to accused no. 1’s purpose, really it makes his version very shaky, because it is only today that he introduced that part of his version. In fact he said, there were his cattle and how he could*

*separate them if the cows was also they, that was also a problem and that brings his testimony into bad light or a bit shaky. Surprisingly enough, these cattle were collected from accused no. 1's place of residence and then back to him, for purposes of selling them to Meatco. However, he proceeded and took these cattle to another place where these cattle were slaughtered and after that, the meat was sold. The court finds that it is not by coincidence that the number of cattle chased and the time at which they were chased, during the December, can possibly not true. In fact I am convinced that there was common purpose between accused no. 1, 2 and 3 to commit this offence. Simply because the court also is indebted to the testimony of the second witness, because there was no good reason why he could implicate accused no. 2 except if he met him. The court is not only satisfied that this offence was premeditated, but it was also organised considering the movement of the cattle from one point to the other, to accused no. 1's house later on to accused no. 3, brought by accused no. 2 at accused no. 1's place. So that itself, the only inference that can be drawn, circumstantially the State has proved its case beyond reasonable doubt against accused no. 1, 2 and 3. Therefore I am satisfied that the State proves its case against accused no. 1, 2 and 3 and I thus find accused no. 1, 2 and 3 guilty of stock theft, taking into account the provisions of the amendment Act 19 of 2004, that is on four cattle" (sic)*



[19] The Regional Magistrate in the reasons for her opinion expressed that the proceedings were not in accordance with justice, referred to the fact that Mr Koshiapati was a single witness in respect of the event he testified to which had led to the six accused being charged and the first, second and third accused being convicted. The Regional Magistrate pointed out that in the course of giving his evidence the presiding magistrate had stated that Mr Koshiapati looked very nervous. The Regional Magistrate also pointed out that his answers in cross-examination were vague and were repeatedly "I don't know". The Regional Magistrate also referred to the fact that the versions of the accused during the trial remained the same and were in essence consistent with each other. The Regional Magistrate also referred to the failure on the part of the presiding magistrate to make a credibility finding in respect of Mr Koshiapati and the failure to indicate whether he had applied caution when considering his testimony. The Regional Magistrate also referred to the reliance upon the doctrine of common purpose to find that the state had "circumstantially... proved its case" against the accused in concluding her reasons for the opinion that the convictions were not in accordance with justice.

[20] The unsatisfactory features of Mr Koshiapati's evidence would appear to be overlooked by the presiding magistrate except with reference to his vagueness of his description of the cattle. It is clear from the record that the evidence of Mr Koshiapati was far from satisfactory. His vagueness as to detail, coupled with the failure to properly explain the delay in raising the alleged theft, in my view

undermine his testimony. The accused were unrepresented and did not raise in cross-examination the circumstances under which Mr Koshiapati made his offer to give evidence in return for payment of his bail. As I have already said, this was not canvassed by the prosecutor or magistrate either.

[21] Accused no. 2 denied the exchange with Mr Koshiapati and stated that the latter could have become aware of the fact that he had driven cattle from accused no. 3 to accused no. 1 at that time, given the fact that he and Mr Koshiapati lived in the same area and that the comings and goings in the area are often widely known.

[22] It would also appear that the version of the accused that four cattle, namely two cows and two calves, were driven by accused no. 2 and not 5 as testified by Mr Koshiapati was not only reasonably possibly true but had been corroborated by a State witness who the presiding magistrate had expressly found to be credible and honest. This discrepancy in numbers, although briefly alluded to by the presiding magistrate, was not addressed in his judgment.

[23] It would thus seem to me that the version of the accused could have been reasonably possibly true. This is reinforced by the unsatisfactory features of Mr Koshiapati's evidence, including circumstances under which he tendered the evidence. There was also the complainant's evidence that his farm worker disappeared when he heard that arrests had been made in respect of his missing

livestock. The reliance on the part of presiding magistrate upon the doctrine of common purpose was also misplaced and unsupported by the evidence before him.

I am accordingly of the view that the Regional Magistrate was justified in expressing the opinion that the proceedings did not accord with justice.

[24] It is clear to me from the record that the prosecution failed to establish the guilt of the accused beyond reasonable doubt.

[25] It follows that the convictions of accused no. 1, 2 and 3 cannot stand and are set aside.

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**SMUTS, J**

I agree

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**Hoff, J**