

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: CA 113/2007

In the matter between:

KAVERUA KATJOISIKAMA

APPELLANT

VS

THE STATE

RESPONDENT

Neutral citation: *Katjoisikama v State* (CA 113/2007) [2014] NAHCMD 25
(29 January 2014)

Coram: SHIVUTE J and SIBOLEKA J

Heard on: 04 November 2013

Delivered on: 29 January 2014

Flynote: Criminal Procedure: In a criminal trial once the court in its reasons for judgment has pronounced its doubt as to whether the accused has committed the offence or not, such a doubt should by operation of law be a benefit it should

give to the accused in the form of an acquittal.

Summary: On the first count the allegation was that the appellant took two cattle he had stolen to Okamatapati auction pen for sale. The he inexplicably handed another person's identity document to the auctioneer Vevanguane Zeze who already knew him, and proceeded to register the animals for sale.

On the second count it was alleged that on the day of the incident the appellant took two calves and two cows he had stolen to Okondjatu auction for sale. There he met a certain Mukura Tjeriko whom he told about his own animals he had brought for sale.

Held: In an appeal once the record of proceedings is incomplete, such that head and tail regarding what transpired in the court *a quo* cannot be ascertained the conviction and sentence on such a matter cannot be allowed to stand.

Held: The conviction on both counts are set aside.

ORDER

The appeal succeeds and the conviction on both counts are set aside.

JUDGMENT

SIBOLEKA J (SHIVUTE J concurring):

[1] The appellant was convicted on two counts of stock theft in the Magistrate's Court, Okakarara and sentenced to four years imprisonment on the first count and to six years on the second count respectively. He now appeals against conviction on both counts.

At the hearing of the appeal Mr Sibeya appeared for the appellant and Mr Kumalo on behalf of the Respondent. This court appreciates both counsel's valuable contribution on this matter. The parties agreed to dispense with arguments on the application for the late filing of the appeal and instead opted to argue the matter on the merits.

[2] The grounds of appeal are as follows:

“AD CONVICTION

1. That the Learned Magistrate misdirected himself, alternatively, erred in law and or in fact.
 - 1.1 When he convicted the Appellant on two counts of Theft taking into consideration the provisions of the Stock Theft Act 12 of 1990 when his judgment is incomplete and falls short of such conviction;
 - 1.2 When he convicted the Appellant despite his finding that there was a reasonable doubt and that the court could not convict the Appellant.
 - 1.3 When he failed to keep a proper record of the Court Proceedings, *alternatively*, that the said record is so incomplete and inaudible that it is impossible to state that the proceedings were in accordance with justice;
 - 1.4 When he convicted the Appellant on count 1 when the Auction Register was not produced and also when no one saw the Appellant writing his names in the said register;
 - 1.5 When he found that Sgt Tjahikika confirmed that the register book contained the name Katjoiskoma Kuverua who brought the two cattle when such is not part of the testimony of Sgt Tjahikika;
 - 1.6 When he accepted that one can use another's identity document to sell cattle at the auction contrary to evidence that it was not possible especially when the owner of the identity document was not present;
 - 1.7 When he relied on the evidence of Makura Tjeriko and failed to find that he was not credible as he also mentioned that Mr Kahorongu was present when cows were registered when Mr Kahorongu testified that he does not even know as to who used his identity document;
 - 1.8 When he found on the evidence of Makura Tjeriko that the Appellant said that he was selling the cattle which were his when Makura Tjeriko also testified that he was told that the cattle were sold by Katjovikomi;

- 1.9 When he failed to find that the admission made by the Appellant regarding the cattle were not freely and voluntarily made but rather made under duress;
- 1.10 When he found that witnesses heard everything from Zeze and contradicted each other yet he still convicted the Appellant;
- 1.11 When he failed to properly evaluate and or consider the evidence of the Appellant and Uakotoka Kuhanga that the cattle were given only as a guarantee after being approached and assaulted by the Epanga;
- 1.12 When he failed to adequately analyze the evidence of the defence.”

[3] I will now look at the prosecution evidence placed before the trial court to ascertain whether the appeal against conviction and sentence on the two counts is in place or not.

[3.1] In respect of the first count:

[3.2] Natangwe Aluteni testified he is the complainant, he was alerted to the presence of his two cows at Okamatapati Auction kraal. He said he went there by himself contradicting police officer Abiud Tjahikika who is also the investigation officer who testified that this complainant was brought at the auction kraal by his own employee. This witness testified that he identified his animals by the brand marks 2900 and 801. He took the animals home, and does not know the appellant.

[3.3] Vekondja Kavita testified he saw the appellant at Okamatapati but did not know who he is. He looked in the auction register and saw that the two cattle he was missing were brought there by Katjovikami Kaverua.

[3.4] Sergeant Abiud Tjahikika testified he is stationed at Okamatapati, 24 years in the police and is the investigation officer on the matter. However, during cross-examination this officer confirmed he indeed investigated the matter but he did not take a statement from Zeze, and neither did he subpoena him to come to court and give evidence. This failure came to surface after the officer has admitted earlier on during cross-examination that Zeze is the only witness who could link the accused to the theft of the cattle. According to this officer an unknown person gave him the report of the stolen cattle. He said the person was

the employee of the complainant who later brought the latter to him to identify the animals. The complainant did not testify about any involvement of his employee at any stage, including when he identified the animals as his and took them away. The officer said he only came to know the accused when he saw him at Okamatapati.

[3.5] The evidence relating to the name of the auctioneer as well as that of the suspect appearing in the auction register which the auctioneer gave to this officer as that of the person who brought the two animals for sale are all inaudible and therefore not on the transcribed court record of proceedings. The above report from an unknown auctioneer given to this officer led to the arrest of the appellant whose name is not appearing on the record due to inaudibility. In my view the reason why this officer arrested the appellant for the theft of the two cattle relating to the first count on this matter is not apparent from his evidence due to inaudibility.

[3.6] According to this officer after the arrest the appellant told him he initially took four cattle but two escaped and he only managed to arrive with the other two animals at the auction kraal. This admission cannot hold because the right to legal representation and in particular the right not to incriminate himself was not explained to him at the time.

[4] In respect of the second count:

[4.1] Matjiukua Kavita testified he is the complainant, knew the accused as they used to meet at auctions. He missed three to four cattle valued at N\$8000 and were not recovered. He testified that Makura Tjeriko (Tjiumune) told him that he saw the appellant with his stolen cattle at the auction, a version Maruka Tjeriko Tjiumune pertinently denied in his evidence. Maruka Tjeriko testified that at the auction kraal he was told by people, the members of The Farmer's Association that the cattle were sold by the appellant. He never saw the appellant with the stolen cattle at all. This complainant went to Okondjatu and then he checked in The Farmer's Association book and found that his cattle were registered for sale on the identity document of Tjihimise Kahorongo who is not the accused person on the matter. This witness testified during cross-examination that depending on

the procedure The Farmer's Association had in place a person would be allowed to register and sell cattle using any other person's identity document. This is hearsay evidence because the Head of the Association did not come to testify about such an obvious fraudulent transaction being allowed to go ahead.

[4.2] There is no case in the complainants further evidence that the latter met the appellant who admitted the theft of his cattle. The alleged admission was made to the Epango Group in his absence. This evidence cannot take the matter anywhere because it relates to Tjihimise Kahorongongo who was not the accused on this matter.

[5] Makura Tjeriko testified that it was him who informed the second complainant that the appellant stole his four cattle. During cross-examination he stated that he did not see the appellant with the four cattle at the Okondjatu Auction kraal, he was only told by the unspecified members of The Farmer's Association who did not come to testify. This witness did not even look in the auction register to see who brought the animals for sale.

[5.1] During cross-examination he testified that it was him who pulled up the Epango group comprising of himself, Anepena, the angry complainant, his wife, two children (some grown up and some young) and other people from the complainant's house. They were many, they went to look for the appellant and when they got him and he was thoroughly interrogated for five days. This is despite the fact that the appellant, according to this witness admitted to the theft of the cattle on the first day of the interrogations.

[5.2] The mere fact that the appellant was subjected to interrogation for such a lengthy period without police involvement points to an unfair treatment. His basic rights to a fair pre-trial procedure was grossly violated, which should have resulted in the alleged admissions not being admissible as evidence in the court *a quo*.

[6] According to Makura Tjeriko if a person comes at the auction kraal to sell cattle, but has forgotten his identity document any other person who has one can

be asked to help provided the owner of such identity document personally presents his identity for cattle registration purposes to proceed with the sale. It means Tjihimise Kahongoro whose identity document the appellant allegedly used to register the cattle for sale was together with the appellant and had presented his identity document for the registration and sell of the animals. It is for this reason that this witness testified that after they had found the appellant they had to go and look for Tjihimise Kahorongo for interrogation as well, which never happened.

[6.1] Kahorongo was indeed a vital witness because the allegation of the use of his identity document connected him to the matter. Strange enough this witness (his Epango group) never bothered to find out how Kahorongo's identity document got involved in the matter.

[6.2] The second complainant's vital witness Makura Tjeriko's evidence does not link the appellant to any crime whatsoever. He stated that he did not see or find the appellant with stolen cattle, neither did he bother to look for the same in the auction register. He pertinently told the trial court that he caused the appellant's arrest because of what he heard from unspecified members of The Farmer's Association, who never testified in the trial court.

[6.3] The above evidence clearly shows that no case was made out against the appellant in the trial court. The Magistrate was therefore correct when he made up his mind and decided not to convict the appellant.

[7] From there the record of proceedings states that the recording machine started malfunctioning and the Magistrate stated that he will start making notes of the trial proceedings. The following further evidence appears on the record.

[7.1] Kazetjivua Erenfriede testified that Tjeriko told him that the appellant stole his cattle. Tjeriko's evidence is very clear, he stated that he did not see the appellant with cattle, but only heard from unspecified members of The Farmer's Association.

[8] Vevangaduze Zeze testified that he was the Registrar at Okamatapati Auction kraal. On 27 December 2001 the Appellant brought two cattle to him for registration. The appellant told him he was Kaverua which contradicted with the name appearing on the identity document he handed in showing Kaverua Uanongovanda. This witness then changed the name 'Kavenrua' to Kuverua. He registered the cattle and passed them to the point of sale. During the auction the police came to enquire about the two cattle.

[8.1] In cross-examination he said he wrote 'KU Kaverua in the register. He looked at the appellant's face and on the face appearing on the identity document. According to Zeze it is impossible to use another person's identity document. He said a person can only use his own identity document to sell another person's cattle. He wrote the initial 'U' in the register and the appellant's surname 'A K'.

[9] The matter was postponed for the appellant's section 174 of Act 51 of 1977 application.

[10] During arguments in support of the discharge, Hans, Counsel for the appellant in my view correctly prayed for the discharge of his client saying Vevangauze Zeze, a crucial witness did not show the appellant as the person who brought cattle at the two auction kraals for sale. He concluded by saying there was no *prima facie* to which his client had to answer.

[10.1] The Prosecutor argued there was indeed a prima facie case established by Tjeriko who in his evidence pertinently testified that he did not see the appellant with stolen cattle, but only heard from unspecified members of The Farmer's Association that it was the appellant who brought cattle to the auction kraal for sale.

[11] The Magistrate rejected the application for a discharge and put the appellant on his defence. The appellant testified he was assaulted by 16 people (referring to the Epango Group). He denied the allegation that he stole cattle.

[11.1] At the end of the trial the Prosecutor still maintained that Vevangauze Zeze and Makura Tjeriko saw the appellant with stolen cattle at Okamatapati and Okondjatu auction kraals to sell. This is despite the fact that those witnesses never placed such evidence before court.

[12] It is at the end of the defence case, and the Prosecutor asked for the conviction of the appellant on both counts. What is very strange here is the procedure allowed and followed by the court regarding the sequence of the various stages of the trial. Instead of submitting to persuade the Magistrate not to convict his client on the available evidence as he should have correctly done, Hans merely prayed for the reduction of bail. This is despite the fact that bail and bail money depending on the severity of the offence the suspect has been convicted of, may be substituted with a remand in custody after conviction.

[13] The Magistrate's reasons for judgment headlined 'Ruling' then followed I quote verbatim at page 62 of the typed record:

[13.1] "Ruling: Count one accused at Okamatapati and the other Okandajatu Zeze lacks credibility as he contradicted on the name used. It was material and it is something to be considered in this case as it was given allegedly to authority. Zeze never said anything concerning brand TC 161 he only stated id and registration book. Witnesses heard everything from Zeze and therefore I can they contradicted each other. Count 2 if we play the id game. Question can one use another's id. Who should be believed all give different procedure. Admission to Epanga not admissible as state did not cross examine as to the plastic bag. What have the four people to gain. Complainant blames someone, police arrest someone. Godfried evidence not challenged by Prosecutor. One witness in London. Where did accused contradict himself as stated by Prosecutor. Concerning id what will the court decide concerning the procedure as witness differ. What id was in the registrar book. There is reasonable doubt. Court not to convict."

[14] In a criminal trial once the court in its reasons for judgment has pronounced its doubt as to whether the accused has committed the offence or not, such a doubt should by operation of law be a benefit it should give to the accused in the form of an acquittal, and the matter should end there. This is what should have happened in this matter. In my view the Magistrate committed an irregularity when, after making up his mind and

pronounced himself that he will not convict the accused for the reason that there was a reasonable doubt in that the prosecution witnesses cannot be believed, he should not again have proceeded to convict the same accused on the very same evidence he has already ruled as wanting. This procedure does not exist in our criminal justice system. In *S v Kubeka* 1982 (1) SA 534(W) at 541 A-B an acquittal was ordered when the court found that the evidence placed before it was insufficient to disturb the accused's presumption of innocence.

[14.1] Another strange procedure allowed and followed by the trial court is that after the above reasons for judgment the matter was postponed to 26 October 2005 for yet another judgment. The trial court instead resumed on 27 October 2005 and I quote verbatim at page 65 of the typed record what transpired:

“Crt: judgment accused guilty on both counts.

Count 1: Guilty as charged

Count 2: Guilty as charged

PP: proves previous convictions

Hans: Submitting statement i.t.o. section 212 concerning acknowledgment of previous convictions.

Acc: I confirm.

Hans: Testify from the dock and no witnesses.”

[14.2] Instead of asking the Prosecutor to submit in aggravation of sentence the court allowed only Hans, the appellant's counsel. Briefly stated was that his client had four children dependent on him.

[14.3] The above was followed by the second judgment (reasons) in which the Magistrate made a turn around from his previous judgment, an exercise not provided for in our criminal justice system. He now stated that the name of the appellant Katjoisikami Kuverua was registered by Vivangauze Zeze at Okamatapati auction office and that Makura Tjeriko saw the appellant with stolen cattle at Okondjatu. The Magistrate then proceeded and convicted the appellant on both counts when in actual fact there was no such evidence placed before him as could be seen from the evidence discussed here infra.

[15] It is therefore my considered view that the convictions and sentences on this matter should not be allowed to stand for the following reasons:

- There is no credible evidence that supports a conviction on any of the two counts.
- The large volumes of inaudible portions on crucial parts of the evidence, cross and re-examination makes a proper determination of what actually happened virtually impossible.
- The trial Magistrate made two separate contradicting reasons for judgment on different occasions.

[16] In the review matter of *S v Gustav Lucas*, Case No. 58/2008 (unreported) delivered on 03 June 2008, this court per my brothers Muller J and Frank AJ as they then were, had to set aside both conviction and sentence due to the incompleteness of the record.

[17] In the result the appeal succeeds, both convictions and sentences are set aside.

A M SIBOLEKA
Judge

N N SHIVUTE
Judge

APPEARANCES

APPELLANT:

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RESPONDENT:

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