

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 06/2014

In the matter between:

THE STATE

and

EDMUND MBAUKA

ACCUSED 1

JOHAS HAGOBEB

ACCUSED 2

GEORGE UIRAB

ACCUSED 3

Neutral citation: *S v Mbauka* (CR /2014) [2014] NAHCMD 43 (12 February 2014)

Coram: NDAUENDAPO J and SIBOLEKA J

Delivered: 12 February 2014

Fly note: Criminal Law – In our law a conviction should follow only if the suspect has been connected to the wrong doing leveled against him beyond reasonable doubt.

Summary: Accused 1, 2 and 3 were arrested for theft of three cattle after they had offered carcasses of cattle meat to others for sale.

Held: The carcasses of the meat accused 1 and 3 had offered for sale could not be connected to the carcasses of cattle meat the police found under the bridge at Outjomuise, Windhoek.

Held: The guilt of the three accused related to the theft of three alleged cattle has not been established beyond reasonable doubt.

ORDER

The conviction of the three accused on stock theft by the Magistrate Court, Windhoek is set aside, and they should be released immediately.

REVIEW JUDGMENT

SIBOLEKA J (NDAUENDAPO J concurring):

[1] The three accused appeared in person at the Magistrate's Court, Windhoek on the charge of stealing three head of cattle valued at N\$515.000. They pleaded not guilty and after trial they were convicted and the matter was referred to the Regional Court Magistrate for sentence in terms of Section 116(1) of Act 51 of 1977. The latter was not satisfied with the conviction and he in return referred the matter to this court for consideration in terms of Section 116(3)(a) of Act 51 of 1977 as amended.

[2] The prosecution had called seven witnesses on this matter and out of them only three testified about the allegations related to stock theft (the allegations the three accused are facing). It is not clear from the record why the other four witnesses testified because their evidence is irrelevant and had nothing to do with the matter.

[3] I will now look at the three prosecution witnesses who testified in relation to this matter.

[4] Moses Nguvauva testified that on 18 January 2010 accused 1, Edmund Mbauka who was alone at the time, brought cattle meat in the form of cut pieces of biltong to his house at around 02h00 at night. The police found and arrested him there while busy cooking some of that meat. It is the arrest of this accused that led to the rounding up of accused 2 and 3 on this matter. The evidence of Nguvauva clearly contradicts that of the police officer Masake Harris who testified that all the three accused persons actually brought the meat at Nguvauva's house which is totally not the case. No connection has been established between the cattle meat brought by accused 1 at Nguvauva's house and the carcasses of meat the police found under the bridge at Outjomuise, Windhoek. This is as far as accused 1 is concerned on this matter.

[5] As regards accused 2, none of the witnesses shades lights as to why he was arrested, save Masake Harris who erroneously testified that all three accused persons brought meat at Moses Nguvauva's house the night of the incident. There was absolutely no other reason that was placed before the Magistrate's Court that could be legally said, he was supposed to be arrested on this matter.

[6] Masake Harris, the police officer at the Stock Theft Unit in Windhoek testified that he found an unskinned thigh of cattle meat in accused 3's room brand marked WBK. The brand mark WBK is the mark found in the kraal shared by Immanuel Uiseb, the complainant and Mika. This is one of the marks detected on the unskinned carcasses of cattle meat the police found under the bridge. However, this officer is materially contradicted by the evidence of another prosecution witness, a businessman and shebeen owner, Salmon Johannes. This witness testified that accused 3 took him to his room where he found a shoulder blade and ribs which were offered to him for N\$400. Salmon Johannes's evidence is silent as to whether there was any brand marks on the parts accused 3 offered to him.

[7] It is therefore my considered view that accused 1, 2 and 3 have not been connected to the theft of the cattle whose carcasses the police found under the bridge at Outjomuise, Windhoek at all. The Regional Court Magistrate's hesitation on the accused's conviction is legitimate.

[8] In the result I make the following order:

[9] The conviction of the three accused is set aside.

If the three accused are in custody let them be released immediately and if any of them had paid bail money on this matter the same should be refunded immediately.

A M SIBOLEKA
Judge

G N NDAUENDAPO
Judge