

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

APPEAL JUDGMENT

HC- NLD-CRI-APP-CAL- 2017/00005

In the matter between:

SIMON WILPARD KALOLA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Kalola v S* (HC-NLD-CRI-APP-CAL-2017/00005) [2018] NAHCNLD 27
(13 March 2018)

Coram: JANUARY J and TOMMASI J

Heard: 08 March 2018

Delivered: 13 March 2018

Flynote: Criminal Procedure – Appeal – Conviction– Late filing of notice of appeal – Application for condonation – Reasonable explanation for delay – Prospects of success on appeal on conviction – Counsel for respondent conceded – concession justified – Conviction and sentence set aside.

Summary: The appellant was convicted of stock theft. He appealed against that conviction. An application for condonation was filed. The prosecutor in the court a quo conceded that there was no evidence to convict and that the appellant must be acquitted. Mr Gaweseb conceded that the appellant should be acquitted. The concession is justified. The court found that there are prospects of success on conviction. Condonation granted. The conviction and sentence are set aside.

ORDER

1. The application for condonation is granted;
 2. The conviction and sentence are set aside.
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JUDGMENT

JANUARY J (TOMMASI J concurring):

[1] The appellant in this appeal was convicted in the district court of Opuwa of stock theft in accordance with the Stock Theft Act, Act 12 of 2004: In that upon or about 25th day of March 2010 and at or near Otjomukandi village in the district of Opuwo the accused did unlawfully steal stock, to wit 5 x cattle valued at N\$21 000.00 the property or in the lawful possession of Vazapuye Mbinge. The matter was transferred to the Regional court for sentence. The appellant was sentenced to 8 years' imprisonment of which 2 years' imprisonment were suspended on conditions.

[2] Mr Tjirera is representing the appellant in this appeal. He was also representing the appellant in the Regional court for sentence. The matter was heard in the magistrate's court after the appellant pleaded not guilty with a co-accused who was accused 1 and the appellant accused 2. He pleaded not guilty and gave an explanation

as follows; 'I am not guilty as that man who came with his cattle which he stole. I did not steal them. I just took him to my brother in law who wanted to buy cattle. The man who brought the cattle to me is Seblon Uukongo, accused 1 in the dock. He brought 4 cattle to me the 5 cattle is mine which he found me at Okatshiidi as I went to look for our missing cattle.'

[3] The grounds of appeal are that:

'1. The Learned Magistrate erred in law and or in fact by ignoring the confession by counsel for the State that there is not sufficient evidence to sustain a conviction against the appellant;

2. The Learned Magistrate erred in law or in fact by holding that it was common cause that both Appellant and his co-accused committed the offence:

3. The Learned Magistrate erred in law and or fact by holding that Appellant knew that the cattle were stolen despite there being no evidence to base such finding on;

4. The Learned Magistrate erred in law and or in fact by inferring that the Appellant acted in common purpose to commit the offence.'

[4] The State called witnesses. Sgt Jacob Shilunga is a police officer at Okahao Police Station and an investigating officer for stock theft cases. He has 10 years' experience in the police service.

[5] He knows both the accused persons and where they are residing. The accused are involved in a stock theft case of 4 cattle. The 4 cattle were handed to their lawful owners. The cattle were stolen at Otjomukandi village and belonged to Vazapuye Mbinge. The cattle were confiscated in the Tsandi area in the field of Mr Uusiko Nikodemus who is now deceased. The cattle were brought to Mr Nikodemus for him to buy. The cattle were then taken to the Okahao police station and people were asked to come and identify the cattle. Mr Mbinge identified his cattle. The accused was then charged with stock theft. Accused 1 remained silent but accused 2 gave a statement and stated that accused 1 was the one who took the cattle from Otjimikande village. Accused 1 denied this. The police found 5 cattle in the field. According to the owner his cattle did not have ear and brand marks but the cattle had fresh brand marks on them when the police found them.

[6] In cross-examination accused 1 denied that he brought the cattle. Accused 2 put to the witness that accused 1 was the one who brought the 4 cattle to him where he was with 1 of his own cattle. The witness did not know about that.

[7] Ismael Simon is another police officer who was involved with the investigation of the case and is from Outapi police station. He was informed by his station commander about the case and the arrest of accused 1. Accused 1 confirmed that he drove 4 cattle from Otjomukandi area to Onamatanga area where he met accused 2 with 1 head of cattle. They put the cattle together and drove them to Uukwanandjenga for the purpose of selling. According to what accused 1 stated there were 2 heifers, 2 oxen and accused 2 had 1 heifer. Accused 1 knew that the owner was Uthapuye Mbinge as accused 1 used to stay in his village.

[8] Accused 1 took this police officer to the house of a Mr Usko in Uukwanandjenga where the cattle were taken to. Accused 1 also informed the witness of the arrest of accused 2 at Okahao police station. The police officer found the 5 cattle in a nearby camp. There were 2 heifers of light brown colour, 2 oxen of brownish colour and white dots all over the body and 1 heifer black in colour. At a later stage the owner, Mr Mbinge, identified 4 of the cattle as his and they were handed to him. Accused 2 confirmed the statement of accused 1 who found the second accused at Onamatanga village with one head of cattle in his possession. Accused 1 had the 4 cattle in his possession. Accused 2 denied having been at Otjomukandi village.

[9] In cross-examination accused 1 denied that he showed the police officer where the cattle were. He further denied that he drove the cattle. Accused 2 denied that his one head of cattle was for sale and sold. Only the 4 head of cattle in possession of accused 1 were sold.

[10] Nikodemus Jonas is residing at Elamba- Uukwaluudi and is unemployed. He only knows accused 2 as his friend and not accused 1 although he observed him two times at the court. He testified that on 04th March 2010 at 04h00 accused 1 brought 4 cattle to sell. There were 5 head of cattle but one was not for sale. The witness requested for documents and accused 2 referred the witness to accused 1. Accused 1 stated that he

will bring the documents at a later stage. Sometime thereafter the witness observed police officers approaching him. The witness showed the cattle to the police officers in a kraal. They took the cattle to Okahao and later handed the cattle to the rightful owner. The cattle were bought by the witness's uncle for N\$29 000.00. The witness was present when the money was handed to accused 1. The accused person did not hand documents to his uncle. The cattle were 2 bulls and 3 heifers but one heifer was not for sale. The cattle had no brand marks or ear marks. The witness enquired from accused 2 where the cattle are coming from. Accused 2 referred the witness to accused 1.

[11] In cross-examination the witness stated that accused 2 brought accused 1 to their house. The witness confirmed that when the money was handed to accused 1, accused 2 was not present.

[12] The court found that there was a prima facie case against both accused and they were put on their defence. Only accused 2 testified in his defence. Accused 1 remained silent.

[13] Accused 2 testified that he is 40 years' old and unemployed. He stated that on 04th March 2010 he was at Okatiidhi- Uukwaluudi. He went searching for cattle of their home and only managed to find one cow. He met with accused 1 who was in possession of 2 heifers and 2 bulls. Accused 1 stated that he is having cattle given to him by his uncle and he was looking for a person who can buy them. Accused 2 answered that his brother in law may buy if accused 1 had the necessary documents. Accused 2 phoned his brother in law who showed interest to buy if accused 1 had the documents.

[14] Accused 2 asked accused one about documents. Accused 1 responded that he had the necessary documents. Accused 2 took accused 1 to his brother in law helping him to drive the cattle thereto. Accused 2 left his 1 head of cattle at the brother in law because there was a fence for safekeeping for it not to get lost again. Accused 2 then parted from accused 1 and was not present when money was handed to accused 1. Accused 1 never informed accused 2 that the cattle were stolen at this time. He stated that the cattle belonged to him and that he had the necessary documents. Accused 1

only told accused 2 that the cattle were stolen after he was brought by the police on another occasion. Accused 1 told the police that he stole the cattle Otjomukandi village.

[15] In cross-examination by accused 1, he denied that he brought cattle to accused 2 and also denied that he produced any documents. Accused 2 stated that accused 1 produced his ID document and another document that accused two could not read as he cannot read.

[16] In his submissions the public prosecutor in the court a quo conceded that there was no case proven against accused 2 and requested for his acquittal. Mr Gaweseb, representing the respondent in this court, conceded that the magistrate of the district court of Opuwo misdirected himself by convicting the appellant as there is no evidence which can sustain a conviction. The appellant's appeal is out of time and there is an application for condonation with a supporting affidavit. Mr Gaweseb, correctly so, did not take issue with that.

[17] I am satisfied that the concessions of both Mr Gaweseb and the public prosecutor a quo are justified and correct.

[18] In the result;

1. The application for condonation is granted;
2. The conviction and sentence are set aside.

H C January
Judge

I agree,

M A Tommasi
Judge

APPEARANCES:

For the Appellant:

Mr Tjirera

Directorate of Legal Aid, Opuwo

For the Respondent:

Mr Gawaseb

Office of the Prosecutor – General, Oshakati