

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-CAL-2019/00040

ABRAHAM KAMUNGA SHIWEDA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Shiweda v S* (HC-NLD-CRI-APP-CAL-2019/00040) [2020] NAHCNLD 11 (21 January 2020)

Coram: SALIONGA J *et* NAMWEYA AJ

Heard: 12 November 2019

Delivered: 21 January 2020

Flynote: Criminal Procedure – Appeal against conviction – Trial on a charge of – Theft of stock taking into consideration the provisions of section 11(1) (a), 1, 14 and 17 of the Stock Theft Act 12 of 1990 as amended – Appellant convicted after evidence was led in the Eenhana district court – Matter transferred to the Regional Court – Appellant

sentenced to six (6) years imprisonment – No qualm that State had proven beyond reasonable doubt that appellant committed the offence charged – Appeal court found in instant case no reason for this court to interfere in the trial court’s credibility finding.

Summary: The appellant pleaded not guilty. After the evidence was led he was convicted for theft of stock in the Eenhana district magistrate court. The matter was referred to the Regional court for sentence. He placed sufficient facts before the magistrate after being duly informed about his mitigating rights. The regional court magistrate after having satisfied himself that the conviction was proper sentenced the appellant to 6 (six) years imprisonment. The appellant was dissatisfied, initially appealed against both conviction and sentence but abandoned the appeal against sentence before the hearing. This court found appellant correctly linked to the commission of an offence. Further it is found that the State has proved its case beyond reasonable doubt that appellant committed the offence in question. The appeal against the conviction is therefore dismissed.

ORDER

1. Appeal against conviction is dismissed.

APPEAL JUDGMENT

SALIONGA J (NAMWEYA AJ concurring):

Introduction

[1] The appellant and his co- accused (whose trial was separated from the appellant) was convicted in the magistrate’s court for the district of Eenhana on charges of theft of stock read with the provisions of the Stock Theft Act, 12 of 1990 as amended. The matter was transferred to the Regional Court for sentencing. He was subsequently sentenced to six (6) years imprisonment.

[2] Dissatisfied with the outcome of the case, appellant initially appealed against both conviction and sentence. However he abandoned the appeal against sentence before the hearing and proceeded with the appeal against conviction only. Ms Amupolo represented the appellant and Mr Pienaar appeared for the respondent.

[3] The charge on count one arose under unusual circumstances, in that the stolen cattle were recovered before the theft thereof had been discovered by the owner. In my view that was not an unusual circumstances. It is usual possible for the stolen cattle to be recovered before the theft had been discovered or detected.

Grounds of appeal

[4] The grounds of appeal may be summarized as follows:

(a) The learned magistrate erred in law and in fact in finding that the state has proved its case of theft of stock beyond a reasonable doubt against the appellant, more so that there is no link proved or testified to between the actual theft of stock.

(b) The learned magistrate failed to take into account that the witness Selma Mbeeli did not clearly corroborate the branding on the stock brought by the appellant to that of other witnesses thereby leaving doubt as to which oxen were brought by the appellant.

(c) The learned magistrate erred in law and/or in fact by not finding that appellant's version that he took the cattle from Kavango region could be reasonably possibly true.

(d) The learned magistrate erred in law or in fact by failing to consider that there was no evidence placed forth that the permit to transport these oxen given to appellant and co-accused by the traditional authority was forged or fraudulent and as such, there was no basis to believe that indeed the appellant was not under a genuine impression that the cattle belonged to his father.

(e) The learned magistrate erred in law and/or in fact by finding that the appellant's version is improbable due to the fact that he did not call any witnesses, sight must not be lost that in law

an accused does not have any duty to convince the court of the truthfulness of his version, and that his version cannot be rejected solely because it is improbable.'

Factual background

[5] Upon an informer's tip off, Sgt Hauliyondjaba went to Eenhana Open market where he found appellant and his co-accused busy with a meat seller Mr. Lukas known as Blacky. The witness requested for the documents for the stock and was given a permit bearing accused one's particulars. Upon further inquiry it was established that accused one merely drove the said cattle and appellant informed the witness that the cattle belonged to him as he inherited them. He released them as he had no transport. To verify the appellant's explanation of ownership of the cattle, Hauliyondjaba proceeded to appellant's place of residence. He could not establish that fact as appellant's mother was uncooperative.

[6] Hauliyondjamba's investigation led him to Selma, the appellant's girlfriend who confirmed that the oxen in question were brought at her house by the appellant. The witness confirmed that a permit to transport the said animals was issued to accused one. On his return he charged the appellant and his co-accused of possession of suspected stolen stock. It was only after he placed an announcement on the radio, that the two complainants came. Complainant in count one and two identified their cattle with iron brand marks which matched the ones on the two cattle. According to this witness the third unidentified cattle was given to one of the complainants for safe keeping.

[7] Besides Sgt Hauliyondjamba's evidence, Selma Mbeeli the appellant's girlfriend at the time of the incident testified that the appellant brought three (3) oxen, one black, another black with white spots and a reddish ox to her house. She confirmed the testimony of Hauliyondjamba that the three (3) cattle were brought at her house in 2009. She further testified that the two oxen had slit cut on their ears and brand marks on the thigh. She however could not recall what brand mark she had seen. In cross examination the witness admitted that accused two, informed her that he obtained the cattle from Kavango.

[8] Moses Haikela testified about the two oxen a black cattle with its horns facing up and another light brown cattle. According to this witness the black cattle had two brand marks KG blurry and JAH. He could not recall the brand mark for the other cattle. He however confirmed that the stock belonged to his grandmother Lahia Natanga and that they were in the care of his uncle Julius Hamunyela. The witness further testified that the cattle went missing on 16 December 2008. After the radio announcement he went there and identified the cattle by the brand mark and a cut like a V shape ear cut.

[9] Julius Hamunyela was the complainant on count one. He testified that his black and a light brown oxen with white spots got missing. The black ox was found by the police in November 2008. He stated that he was a caretaker and the cattle belonged to Lahya Natanga. The two oxen a black ox having two private brand marks GK and JHA with a slit on the ear and the other one being light brown with white spots in the face brand marked LT 72. After the police radio announcement he went to the police station and identified one cattle by color and brand marks. He only recovered one ox valued N\$8 500. He explained that these cattle have two brand marks because he bought them from Gerald Kavela.

[10] The last state witness is Moses Mbweni the complainant on count two. He testified that he lost 20 oxen of which 11 were recovered. He does not know how the cattle went missing but identified one black cattle with white spots valued of N\$4000. He received his cattle. The reddish ox was not his but was given to him for safe keeping.

[11] Appellant in his defence testified that he received the cattle from his father who owned a cattle post in Kavango. His father did not have any brand mark and was using his brother's brand mark. The appellant decided to sell the cattle after the passing of his father. However the witness did not get a chance to obtain any document showing ownership of these cattle. According to the appellant Angula Kanana had knowledge of the cattle but has since passed on in 2015.

Application of the law and Evaluation of evidence

[12] The appellant was charged in terms of the Stock Theft Act 12 of 1990 as amended. Section 2 of the Stock Theft Act also states that any person who is found in possession of stock or produce in regard to which there is a reasonable suspicion that the stock or produce was stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence. This however does not shift the onus of proof to the accused person, but the state bears the onus in proving all the elements of the offence.

[13] The crime of theft consists of unlawful appropriation of another person's movable corporeal property with the intention to permanently deprive the owner of the property. Theft continues as long as the stolen property remains in the possession of the thief.

[14] Appellant's criticism that the learned magistrate erred in law or fact by not finding that the appellant's version that he took cattle from Kavango was reasonably possible true is not sustainable. The appellant stated that he inherited the cattle from his father who passed on in 2008. Notwithstanding that he failed to obtain any documents proving ownership of the cattle. Appellant had ample time after the death of his father to obtain duplicate documents of ownership before he decided to sell the animal. In his own words his father had no brand mark and was using his brother's brand mark. He also did not advance any reason why same brand mark was not used on these cattle. In any event appellant failed to call his uncle whose brand mark was used or any other witness to confirm his version and did not dispute that the brand marks on the cattle belonged to the complainants.

[15] Counsel for the appellant argued that the learned magistrate failed to take into account that the witness Selma Mbeli did not clearly corroborate the branding of the stock brought by the appellant. That might be the case, however she was not the only witness in that regard. These brand marks were identified by comparing them in the presence of the appellant and were confirmed as the ones for the complainants. In my view the brand marks were not disputed and it cannot be said that the failure of the

witness to corroborate the branding created doubt as to which oxen were brought by the appellant.

[16] Another criticism levelled against the learned magistrate by counsel for the appellant is that she erred in finding that the state has proved its case of theft of stock beyond reasonable doubt in that the link was established. I disagree with counsel's argument because a link was established. It is not disputed that the appellant was found in possession of these cattle. Whether the appellant was present at the time the cattle were stolen is immaterial and it cannot be said the link was not established.

[17] A well-established principle in our law is that a court of appeal when called upon to reconsider the credibility of witnesses who testified in the court *a quo*, must be mindful of the fact that the presiding officer in that court has advantages over the court sitting on appeal, namely having observed the demeanour of the witnesses during their testimony, and the court being steeped in the atmosphere of the trial. An appeal court will thus be slow to intervene with or reject findings of credibility by the trial court, unless satisfied that an irregularity or misdirection has been committed that vitiates that court's verdict. In the absence of any irregularity or misdirection, the appeal court will usually proceed on the factual basis as found by the trial court, as the function of acceptance or rejection of evidence falls primarily within the domain of the trial court¹.

[18] It is common course that the appellant was found in possession of stock and could not advance any form of identification of the cattle save that they belonged to his deceased father and he had inherited them. That the two cattle found in his possession were positively identified and returned to the lawful owners and/or their representatives; that the unidentified cattle was handed over to one of the complainant's for safekeeping; no reason was given as to why his uncle's brand mark was not used on the cattle in question. Even if his version was to be believed it is not apparent from the record whether appellant made efforts to obtain documents of ownership at all.

¹ *S v Ameb* 2014 (4) NR 1134 (HC)

Conclusion

[19] From a reading of the record in the instant case it is evident that the findings relied upon by the trial court when convicting the appellant were supported by proven facts, and its rejection of the appellant's defence was accordingly justified in law. It is our respective view thereof, that there is in law no basis for this court sitting as a court of appeal to upset the credibility findings of the trial court. In light of the above we accept that the state had proved its case against the appellant beyond reasonable doubt and the appeal ought to be dismissed.

[20] In the result

1. Appeal against conviction is dismissed.

J T SALIONGA
JUDGE

I agree,

M
NAMWEYA
ACTING JUDGE

APPEARANCES

FOR THE APPELLANT: Ms M Amupolo
Of Amupolo & Co. Inc, Ongwediva

FOR THE RESPONDENT: Mr J Pienaar
Of the Office of the Prosecutor General, Oshakati