

CHRISTOPHER ADMIRE KASARU  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUZENDA J & SIZIBA J  
MUTARE, 13<sup>TH</sup> NOVEMBER & 19<sup>TH</sup> NOVEMBER 2024

### **CRIMINAL APPEAL**

Mr *C. Chibaya*, for the appellant  
Mrs *J. Matsikidze*, for the respondent

SIZIBA J: The appellant found his way to this court through an appeal against both conviction and sentence. He was convicted of Stock Theft contrary to section 114 (2) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] by the Magistrates Court sitting at Nyanga and he was sentenced to the mandatory minimum sentence of 9 years imprisonment on 11 January 2024. When we heard the submissions from counsel on the 13th of November 2024, we found no merit in the appeal and we accordingly dismissed the appeal against conviction and sentence and we indicated that the reasons will follow and those reasons are articulated in this judgment.

### **THE EVIDENCE ADDUCED BEFORE THE COURT A QUO**

The allegations against the appellant were that on 29 September 2023 at Sangoma Village, Chief Katerere, Nyanga at the grazing area, he stole two black cows, two black heifers and one white calf belonging to the complainant one Taurai Nyagunyu who was taking care of the said cattle on behalf of one Takesure Dzvukutu who was his son in law. The State's case was that the accused person had driven the said beasts some forty to forty – five kilometers to Mutoko Village where he sold them to one Gilbert Kativhu at the price of US\$700.00 of which US\$500.00 was paid to him upon delivery of the cattle while the balance thereof was paid to the appellant's wife whom he sent to collect it at a later date.

The evidence adduced before the court *a quo* was that at the material time surrounding the commission of this offence, the villagers at Sangoma Village had been fed up with cases of

stock theft that had escalated to unacceptable levels. Most of the cattle buyers were in Mutoko Village. The villagers rallied together under the Village Head one Misheck Sangoma and contributed resources so as to send a team to go to Mutoko Village to look for their missing cattle. The team that was dispatched consisted of three men being Patrick Sangoma, Sunshine Chikumbindi and Moses Chikumbindi. When the trio arrived in Mutoko Village, they found the complainant's five missing beasts at Gilbert Kativhu's kraal. Upon being questioned as to where he had obtained the beasts from, Gilbert Kativhu produced an invoice or agreement which reflected the appellant's name as the seller of the beasts in question bearing his wife's signature. He indicated that the appellant had sold him the said beasts at the price aforesaid. The crew from Sangoma Village then indicated that they would take him to the Village Head so that he can explain further since the beasts in question were stolen. Sunshine Chikumbindi remained behind with the cattle and he drove them to Sangoma Village the following day while the other two men took Gilbert Kativhu back to Sangoma Village the same day. A team of villagers went to the appellant's homestead at around 0200 hours and Gilbert Kativhu is the one who knocked at the appellant's door. When the appellant opened the door, Gilbert Kativhu is alleged to have told him that he had sold him stolen cattle. It is alleged that the appellant agreed that he had indeed sold him the stolen cattle. The appellant was thereafter arrested for the crime of Stock Theft.

During the trial, the appellant was initially charged with one Sekai Chapandira but the State withdrew the charges against her at the close of its case. The State called four witnesses the first of whom was the complainant one Taurai Nyagunyu. Patrick Sangoma and Sunshine Chikumbindi who were part of the team that went to recover the cattle in Mutoko Village also testified. Gilbert Kativhu was the last State witness. The appellant also testified on his defense and called his wife one Sophia Nyamauta as a witness. The appellant in his defense denied that he had stolen the said beasts from the grazing area. He also denied having driven them to Mutoko Village as alleged and he also denied having sold them to Gilbert Kativhu as alleged. He told the court that Gilbert Kativhu had implicated him because of bad blood between them as Gilbert Kativhu's son is married to his sister. He also told the court that he had agreed having sold the cattle to Gilbert Kativhu because of being assaulted by the team of villagers who came to his home at night. His wife who testified as his witness also denied having signed any agreement of sale for the cattle. She also denied having been sent to collect any money from Gilbert Kativhu.

From the evidence led before the court *a quo*, it was common cause that the complainant's cattle were stolen from the grazing area. It was also common cause that the stolen cattle were recovered at Gilbert Kativhu's kraal in Mutoko Village. It was also common cause that Gilbert Kativhu led the villagers at 0200 hours to the appellant's homestead alleging that the appellant had sold him the stolen cattle. It was also common cause that the appellant did admit to Gilbert Kativhu in the presence of Patrick Sangoma and other villagers that he had sold him stolen cattle. It was also common cause that Gilbert Kativhu did not produce any veterinary permit or police clearance regarding the alleged sale of the cattle to him and neither did he allege that any Village Head had witnessed the sale of the cattle. Gilbert Kativhu and Patrick Sangoma denied that the appellant had been assaulted when he admitted having sold the cattle to Gilbert Kativhu.

#### **FINDINGS OF THE COURT A QUO**

After assessing the credibility of all the State witnesses and warning itself against the accomplice evidence of Gilbert Kativhu in implicating the appellant, the court *a quo* found that the appellant was indeed the one who had stolen the complainant's cattle and sold them to Gilbert Kativhu as alleged. The court *a quo* also dismissed the appellant's allegation that he had bad blood with Gilbert Kativhu on the basis that his version that he had assaulted Gilbert Kativhu for telling his son to divorce his sister prior to these allegations had not been put to Gilbert Kativhu during cross examination for him to either agree or disagree. Gilbert Kativhu on the other hand had denied any bad blood between him and the appellant. The court *a quo* also dismissed the appellant's assertion that he had admitted having sold the cattle to Gilbert Kativhu because of being assaulted by the villagers. Its finding was that the appellant's admission had occurred prior to any assault that might have occurred to him just as soon as he was verbally confronted by Gilbert Kativhu that he had sold him stolen cattle. The court *a quo* thus took the view that such an admission was admissible against the appellant.

#### **APPELLANT'S GROUNDS OF APPEAL AGAINST CONVICTION**

The appellant's grounds of appeal against conviction were as follows:

1. The court *a quo* grossly misdirected itself on law by convicting the appellant on stock theft despite that the state had failed to prove the essential elements of the charge given the following:
  - (a) The appellant was never seen unlawfully taking the bovines in question.
  - (b) There was no evidence to prove that the appellant sold the bovines to Gilbert Kativhu who was improperly allowed to testify as a witness without any witness statement having been recorded from him.
  - (c) There was no evidence proving that the appellant was never having possession of the bovines in question at any given time.
2. The court *a quo* grossly misdirected itself when it convicted the appellant of stock theft on the basis of a purported agreement between appellant and Gilbert Kativhu despite that there was evidence that such agreement had not been made at all but was an afterthought by Gilbert Kativhu.
3. The court *a quo* grossly misdirected itself in terms of the law when it convicted the appellant on the basis that the appellant had allegedly admitted to having stolen the bovines when he was approached by several men from Sangoma Village around 2am where appellant was being intimidated.

#### **SUBMISSIONS BY COUNSEL**

State counsel did not make any submissions as she had conceded that the appeal against conviction should succeed. Counsel for the appellant persisted with his arguments as captured in the appellant's heads of argument. His main point of emphasis was that the appellant ought not to have been convicted on the basis of an agreement of sale that was dated 31 August 2023 when the offence is alleged to have occurred on a subsequent date being 29 September 2023. Counsel also made emphasis on the alleged bad blood between the appellant and Gilbert Kativhu. He also reiterated the argument that the appellant had made an admission of having sold stolen cattle to Gilbert after he was assaulted.

**THE ISSUES FOR DETERMINATION IN THE APPEAL AGAINST CONVICTION.**

Although some of the appellant's grounds of appeal were not elegantly drafted, this court could relate to the issues being raised by the appellant as being the following:

1. Whether the appellant's conviction by the court *a quo* can be faulted on the basis that he was not seen taking the bovines in question or having possession of them.
2. Whether it was proper for Gilbert Kativhu to testify without his recorded statement having been given to the appellant.
3. Whether the appellant was properly convicted on the basis of the agreement of sale that was allegedly an afterthought by Gilbert Kativhu.
4. Whether the appellant was intimidated to admit having sold stolen cattle to Gilbert Kativhu.

**THE LAW AND ITS APPLICATION TO THE APPEAL AGAINST CONVICTION**

The basis of an appellate court's interference with a lower court's findings of facts is limited to those instances where the lower court would have been irrational or grossly unreasonable in its findings of facts or assessment of evidence in a manner that can be shown to vitiate its decision. In *Mupande and Others v The State* SC – 58 – 22 at pages 6 to 7 of the cyclostyled judgment, the Supreme Court articulated the law thus:

*“It is trite that an appellate court is loath to interfere with the findings of fact made by the trial court unless the findings are grossly unreasonable. This position was articulated by this Court in Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S), wherein it held that:*

*“The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion.”*

*It is not enough to merely aver that another court would have arrived at a different conclusion on the same set of facts. One must go beyond that to prove that the court in making its decision had taken leave of its senses and therefore the finding is irrational.*

In *Khumalo v The State HB – 28 - 24*, the court further articulated the position as follows:

*“It is trite that an appellate court can only interfere with the trial court’s findings of credibility and facts if such findings are so outrageous in their defiance of logic that no reasonable person properly applying his mind to the question to be decided would arrive at such a conclusion. (Barros & Another v Chimpondah 1999 (1) ZLR 58 (S), Hama v National Railways of Zimbabwe 1996 (1) ZLR 664)*

*The assessment of witnesses’ credibility is par excellence the province of a trial court (S v Zulu HB 52-03, S v Shoko S 118-92, S v Mbanda S 184-90)*

*In S v Mlambo 1994 (2) ZLR 410 (S) GUBBAY CJ succinctly put it thus:-*

*“The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense.”*

Apart from the complaint regarding the admission of Gilbert Kativhu’s testimony in the alleged absence of his recorded statement, the other issues arising from the appellant’s grounds of appeal are issues of factual findings that were made by the court *a quo* basing on the credibility of the witnesses who testified in the court *a quo*.

It is apparent from the court *a quo*’s judgment that it did not convict the appellant on the sole basis of the written agreement of sale. The court *a quo* was clearly alive to the fact that the said agreement had not been signed by the appellant and that he had not been furnished with the copy thereof. The court *a quo* considered the totality of the testimony which pointed to the appellant as the link between the stealing of the cattle and their recovery by the witnesses from Gilbert Kativhu as well as the appellant’s own admission to Gilbert Kativhu that he had sold him stolen cattle. The court *a quo* also took note of the appellant’s failure to advance his version of alleged bad blood between himself and Gilbert Kativhu by failing to cross examine the latter on the very alleged cause of their alleged bad blood. The court *a quo* also made a finding of fact that the appellant made his admission of having sold stolen cattle to Gilbert Kativhu prior to any assault that may have been made. The fact that the appellant was not seen driving the stolen cattle becomes immaterial in light of the findings that were made by the trial court that he did sell them to Gilbert Kativhu. The evidence that the appellant had possession of the stolen cattle came from the testimony of Gilbert Kativhu who was found with the cattle and pointed to the appellant as the source of the stolen cattle. In addition, his own admission to Gilbert that he had

sold him the stolen cattle further buttressed his possession of the cattle at some point. All these findings of facts by the trial court which are based on the credibility of the witnesses who testified before it cannot be impugned by this court on any legal basis.

The appellant's argument that he was improperly convicted on the basis of an agreement of sale that was dated 31 August 2023 prior to the alleged date of the theft has no substance for two major reasons. The first reason is that such argument, being a question of fact, was never presented or advanced before the court *a quo*. It is being raised for the first time on appeal. This militates against the trite position that new matters which are not points of law should not be raised for the first time on appeal as the appellant will not be allowed to turn the appellate court into a second court of first instance. See *Ndewere v President of Zimbabwe N.O and Others SC – 57 – 22*. The second reason why this argument has no merit is that no foundation was put in the trial court to sustain it as the appellant never challenged the witnesses on the issue of when the agreement of sale was signed nor was there any clarification on the dates when the cattle were recovered from Gilbert Kativhu. The court *a quo*'s judgment cannot therefore be impugned on the basis of this aspect when the material facts which formed the basis of the appellant's conviction are clear.

The appellant's argument that Gilbert Kativhu was improperly allowed to testify without a statement having been recorded from him has no merit. The record of proceedings reflects that appellant's counsel raised the issue that he had not been served with the statement of Gilbert Kativhu after the witness had finished his evidence in chief. This complaint should have been raised before the witness gave his testimony. The raising of the issue after the witness had testified so as to argue that the testimony of the witness was unfair was unwarranted and it was clearly calculated to prejudice the interests of justice. The record also reflects that the case was adjourned and the trial magistrate made a ruling against the appellant wherein the appellant's attitude of laying an ambush against the State was rebuked after which the witness was cross examined by appellant's legal counsel. There is no legal basis to therefore argue that there was any unfair trial or gross irregularity that resulted from the testimony of Gilbert Kativhu being on the record. It is for these reasons that we came to the conclusion that the appeal against conviction had no merit and that the concession by the State was not properly made.

## **THE GROUNDS OF APPEAL AGAINST SENTENCE**

The appeal against sentence was predicated on the following grounds:

1. The court *a quo* grossly misdirected itself in terms of the law by failing to explain special circumstances to the appellant because he was legally represented.
2. The court *a quo* grossly misdirected itself by failing to make a finding that there were special circumstances in the matter and impose 9 years imprisonment sentence upon the appellant.

The record of the proceedings in the trial court does not reflect anything on mitigation of sentence and special circumstances. The record also reflects that the trial magistrate remarked that the fact that the appellant had been incarcerated for three months did not amount to special circumstances. What also appears on the record is that the appellant was a repeat offender who had been convicted of theft of six goats in 2020 under case number NY110/20.

#### **THE LAW AND ITS APPLICATION TO THIS CASE**

In his Heads of Argument, the appellant relied on the cases of *S v Mhungu HMA – 09 – 16* and *Ziyadhuma v The State HH – 303 - 15* for the legal position that the explanation of special circumstances should be recorded by the trial court together with the special circumstances, if any. This is the correct position of the law. However, there are other considerations that should be made in deciding whether this court should set aside the sentence of the court *a quo* or not. The appellant has prayed that this court should uphold the appeal and sentence the appellant to five years imprisonment. He has not pointed to any special circumstances that exist pertaining to the circumstances of this case or to his person. He has also not addressed this court on whether there is a basis at law for this court to remit the case to the lower court for the recording of the explanation on special circumstances. In *S v Mhungu (supra)* at page 7 of the cyclostyled judgment, the court observed as follows:

*“Regarding the failure by the magistrate to record his own explanation to the accused of the expression “special circumstances peculiar to the case”, I agree that this was a misdirection. As the review court or judge, I am unable to tell what exactly the court’s explanation was and whether or not it was adequate. In such circumstances, the general approach would be to remit the matter to the trial court for the proper recording of the explanations on special circumstances. However, this is not a rule of thumb. Every case depends on its own special facts.*



*In terms of s 57[4] of the Magistrate's Court Act, the review of a criminal matter from the magistrate's court is done in accordance with the High Court Act, [Cap 7:06]. Section 29 of the High Court Act says that, among other things, if on review the judge considers that the proceedings of the inferior court are in accordance with real and substantial justice, he shall confirm them. Sub-section [3] says that no conviction or sentence [of the inferior court] shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the review judge is satisfied that a substantial miscarriage of justice has actually occurred.*

*Thus, it is not every irregularity or defect in the record or proceedings that leads to the setting aside of the sentence, or the quashing of the proceedings of the court a quo. It is only those from which the court is unable to conclude that real and substantial justice has been done. The situation has to be considered holistically and objectively, not in an over fastidious manner.*

*In this case, it is not that the magistrate did not explain the term "special circumstances" to the accused. He did. It was because of something explained to him that the accused proffered an explanation about having stolen the heifer so as to exchange it for a bicycle which he would in turn exchange to pay lobola for his wife."*

In the above case, the court dismissed the appeal without remitting the matter to the trial court as the record together with the accused's statement on review showed that there were no special circumstances at all. In *Ziyaduma v The State (supra)* which was an appeal, the court remitted the matter to the trial court for the recording of the explanation of special circumstances. The present case is distinguishable from the two cases cited by the appellant. In both cases cited above, those accused persons were not legally represented at the time when they were tried and sentenced. The appellant in this case was legally represented. The question that arises is whether the trial magistrate had a legal duty to explain the purpose of special circumstances to the appellant. I do not think so. To hold otherwise is to unfairly assign a judicial officer with the responsibilities that rest upon the legal practitioner who has been employed to safeguard both the substantive and procedural rights of his client. Where the accused person is legally represented, a judicial officer must still be sensitive to the rights of an accused person but only in his capacity as a referee in a game of football as the two sides of the match in our adversarial system of adjudication would be well represented and balanced. It is only when an accused is unrepresented that a judicial officer has a duty to bend over and ensure that the procedural rights of an accused person are well explained and safeguarded in all stages of the trial. A legal practitioner who fails to safeguard and explain the procedural rights of his client while he is in attendance during a criminal trial is like a pilot who takes a nap in the cockpit at high altitude and hence he or she should have no one to blame for the crash. We would have had sympathy with the appellant if his ground of appeal had been that the trial magistrate refused to allow him

a chance to address the court on the special circumstances. That is not the case before us. The case before us is that the special circumstances were not explained and recorded. This is therefore a case whereby if there is any prejudice to talk about, which we do not see, surely the sins of the appellant's legal counsel should be visited to the appellant. I am fortified in this approach by the remarks made by the Supreme Court of Appeal in *Director of Public Prosecutions, Kwazulu - Natal v Pillay (2023) ZASCA* at page 13 of the cyclostyled judgment as follows:

*“Where an accused person is legally represented, the obligation which rests upon a presiding officer is of a different character. The presiding officer remains under an obligation to ensure that the trial is fair and that an accused person's constitutional rights are protected. But the general obligation is to be carried out in the light of the accused having exercised the right to legal representation”*

The above passage was subsequently relied upon by HENDRICKS JP in *Khaka and Another v The State ZANWHC64/2024* whereupon at page 7 of the cyclostyled judgment the following further remarks were made:

*“In light of this, it is accepted that where an accused is legally represented, it is not necessary for the officer to explain in detail each and every single one of his numerous constitutional rights. The fact that the court did not inquire directly from the legally represented accused on whether the trial was to proceed with or without assessors cannot qualify as an irregularity and it does not vitiate the proceedings.”*

It is clear from the record in the matter at hand that the appellant was represented by legal counsel at all the material stages of the matter before the court *a quo*. In the absence of an indication that his legal counsel was oppressed and prevented by the trial court from making submissions on special circumstances or from explaining such circumstances to the appellant, we do not see any irregularity in the proceedings before the court *a quo* and we hold that there is none at all because his legal counsel ought to have explained his rights to such effect. We do not see any reason why this matter should be remitted to the trial court. We do not see any special circumstances in this case that would have warranted a departure from the mandatory minimum sentence that was imposed by the trial court and hence the appeal against sentence has no merit and it was dismissed accordingly.

Muzenda J concurring

*Chibaya and Partners*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners