

KUDZAI MUKUNGWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 20 June 2022

Chamber application for Condonation for Late Noting of Appeal – Criminal

MAWADZE J: This record of proceedings has been endlessly shuffled between Harare High Court and Masvingo High Court since the conviction and sentence of the accused and his co-accused in 2019.

The brief reasons for that as I could glean from the record is as follows;

After the accused's conviction and sentence in 2019 the accused who was at Chikurubi Maximum Prison lodged a Chamber Application in person for the condonation for late noting of an appeal and also for leave to prosecute the appeal in person. This was at Harare High Court on 11 November, 2021.

The application was placed before my brother KATIYO J. in January 2022 and he declined to entertain the matter as the accused was tried and convicted at Masvingo Magistrates Court. He directed that the record be sent to Masvingo High Court.

I received the record of proceedings on 9 February 2022 and I directed the Deputy Registrar for Masvingo High Court to forward the accused's application to the National Prosecuting Authority for their response to the application before I could deal with the application. This was done on 10 February, 2022. The National Prosecuting Authority responded on 23 February, 2022.

On 15 March, 2022 after perusing the documents I granted the following order;

“IT IS ORDERED THAT;

- 1. The Chamber Application for Condonation of Late Noting of the Appeal be and is hereby dismissed.*
- 2. Despite the appreciation of the delay of 2 years and the reasonableness of the explanation thereof there are no prospects of success in respect of both conviction and or sentence.”*

Having granted that order it would have served no useful purpose for me to dwell on the application for leave to prosecute the appeal in person.

The applicant (*hereinafter the accused 1*) on 29 May wrote to the Registrar seeking reasons for the order I granted. This request was forwarded to the Masvingo Deputy Registrar under cover of the minute dated 7 June, 2022 which request I received on 16 June, 2022. This is the brief history of the matter.

I now proceed to provide the requested reasons for order I granted on 15 March, 2022.

The then 23 year old accused was arraigned before the then Provincial Magistrate for Masvingo Province Mr T.L. Ndokera together with his 19 year co- accused. Richard Mabambe (*hereinafter accused 2*) on 7 counts of stock theft as defined in s 114(2) (a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. They both pleaded not guilty to all the 7 counts.

The gist of the 7 counts of stock theft is that on different dates but in October, 2018 accused 1 and his accomplice stole a total of 23 cattle or bovines from the 7 complaints in the grazing area of Nyajena Communal Lands.

All the 7 complainants being Mapfumo Mharadze, Forbes Marufu, Daniel Pisirai, Mubayiwa Chinyasa, Davison Ngomani, Elphas Dumba and Albert Jovo testified on how each lost a specified number of cattle from the grazing area in October 2018 and how they recovered them in custody of police at ZRP Muchakata. They all had no knowledge of who stole their cattle or how the cattle were recovered save from the police report they all received.

The case against accused 1 and his accomplice is that after stealing the 23 cattle they drove them to Village 19 Mukosi Resettlement Area. Accused 1’s sister resides in that village. Thereafter it is said they approached Phineas Mutenheri a cattle buyer of 84 Morningside, Masvingo offering the 23 cattle for sale. However before buying the cattle Phineas Mutenheri carried out due diligence

and established that the accused persons did not own any cattle. As a result he alerted the police. Accused 1's accomplice accused 2 Richard Mabambe temporarily fled after accused 1's arrest but he too was apprehended.

The defence outlines of accused 1 and his accomplice just like their respective evidence are mutually destructive.

Accused 1 (*the applicant herein*) pleads the defence of innocent association. Accused 1 said it is his accomplice who called him to the place where the cattle were to be sold. Accused 1 said he immediately distanced himself from this impending transaction pointing out that the cattle could not be sold in a bush moreso without involvement of elders [*presumably because accused 2 was just a 19 year old who could not possibly own the 23 cattle*]. Accused 1 said he immediately left the scene.

On the other hand accused 1's accomplice said he and accused 1 were hired by the said cattle buyer Phineas Mutenheri, for a fee, to drive the said cattle to Village 19 Mukosi Resettlement Area. He said in Village 19 Mukosi Resettlement the local villagers refused to allow the said cattle to be loaded into Phineas Mutenheri's lorry. This incensed Phineas Mutenheri who then inexplicably threatened to fix both accused 1 and accused 2. This is how accused 2 said police arrested both accused 1 and accused 2 despite that the cattle in question as far as accused 1 and accused 2 were concerned belonged to Phineas Mutenheri.

The evidence placed before the trial court clearly showed that both accused 1 and accused 2 stole the 23 cattle. This is well captured also in the reasons for judgment by the learned Provincial Magistrate.

The evidence of Phineas Mutenheri, the cattle buyer, is very simple and clear. He was not known to both accused 1 and accused 2 prior to this case. He was telephoned by accused 2 Richard Mabambe who was using accused 1's mobile number and offered the 23 cattle for sale. He proceeded to Village 19 with a lorry in the company of his driver to see the cattle. Before meeting accused 1 and accused 2 he advised the local village head about his mission after which he met accused 1 and accused 2.

Phineas Mutenheri said a number of factors convinced him that accused 1 and accused 2 had not lawfully acquired the 23 cattle. These included the following;

- (a) both had no stock card or stock cards for any of the 23 cattle

- (b) the local dip tank attendant was unaware of the impending sale
- (c) the accused persons refused to involve the local veterinary officer raising flimsy reasons
- (d) the inquiries from local villages revealed accused 2 did not own any cattle
- (e) accused 2 who over heard the said inquiry immediately fled from the scene.

Phineas Mutenheri's evidence demonstrated clearly that accused 1's defence of innocent association is false. He said it is accused 2 who claimed ownership of the 23 cattle saying they belonged to his late father and had been authorised to sell them. Accused 1 who was present masqueraded as a relative of accused 2 and his role was to negotiate and determine the price of each bovine which accused 1 proceeded to do. This means therefore that accused 1 and accused 2 were involved in the sale of these 23 cattle. Phineas Mutenheri defines each of the accused's role clearly.

Phineas Mutenheri was clear that accused 1's defence is false because he said he met accused 1 first. Further he said these cattle were being sold with the full participation of accused 1 and in the bush. He dismissed accused 2's assertion that the cattle belonged to him (Phineas Mutenheri).

The evidence of Amon Bemhura (*hereinafter the Village Head*) who is the Village Head of Village 19 is simply an icing on the cake. He confirmed that both accused 1 and accused 2 were not residents of his village where this sale of 23 cattle was to take place. He further confirmed that accused 1 and accused 2 were selling these cattle not at a homestead but in a bush inside a grave yard. Upon inquiry he was surprised that accused 2 who claimed ownership of the 23 cattle fled from the scene as accused 1 was apprehended. The Village Head said accused 1 was the one who actually pointed to Phineas Mutenheri each of the beasts [*presumably as they negotiated the price*]. The Village Head therefore implicates both accused 1 and accused 2.

To his credit accused 2 during his defence case literally threw in the towel and virtually pleaded guilty to the charges. He admitted that he drove the 23 cattle from where they stole them to Village 19 Mukosi Resettlement with accused 1 (*the applicant*). He admitted telephoning Phineas Mutenheri offering the 23 cattle for sale. He admitted fleeing from the scene upon realising that the net was closing in. Most importantly he admitted stealing the 23 cattle which they later offered to Phineas Mutenheri for sale with accused 1 [*the applicant*].

As for accused 1 [*the applicant*] his defence cannot possibly be true at all. In fact it is clearly false. He was at the scene where the 23 cattle were being offered for sale in the bush. His mobile number was used to contact the potential buyer Phineas Mutenheri. The Village Head and Phineas Mutenheri have no reason to implicate accused 1 in participating in the sale of the 23 cattle if indeed he played no role.

The evidence against accused 1 [*the applicant*] is overwhelming. Thus accused 1 was properly convicted.

Accused 1 (*just like accused 2*) was sentenced on each of the 7 counts to 9 years imprisonment. A finding was properly made that there are no special circumstances. The learned Provincial Magistrate was enjoined to impose the mandatory minimum sentence of 9 years imprisonment on each count. In order to mitigate the overall sentence the trial court suspended 38 years imprisonment from the total of 63 years imprisonment leaving the effective sentence of 25 years imprisonment.

The sentence for stock theft is provided in the Criminal Law Code and a minimum mandatory sentence should be imposed. All the trial court endeavoured to do to lessen overall sentence was to suspend a substantial part of the sentence. Sentencing however remains the discretion of the trial court. A higher court may only interfere if there is a misdirection or an improper exercise of such discretion.

The founding affidavit by accused 1 brings nothing new to this case.

The draft grounds of appeal do not speak at all to the evidence of record. The fact that accused 1 was not advised his right to appeal is neither here nor there. One wonders why accused 1 believes it was the duty of the trial court to prosecute accused 1's case. Accused 1 is clearly mistaken that corroboration is a requirement in a case of stock theft. The investigating officer was not even necessary to testify in this case as his evidence in common cause.

The learned Provincial Magistrate can therefore not be faltered in any way.

The law in the application of this nature is a well beaten path. The factors to be considered are as follows;

- (a) the extent of the delay
- (b) the reasonableness of the explanation for the delay
- (c) the prospects of success on appeal

The applicant is given the benefit of doubt in respect of both the extent of the delay and the reasonableness of the explanation for the delay.

It is on the prospects of success that accused 1's case flatly falls on its face. There is clearly no merit on appeal both in respect of conviction and sentence. It is foolhardy for me to grant this application as this would simply be delaying the inevitable for no good cause.

These are the reasons which informed the order I made on 15 March, 2022 dismissing the application for condonation of the late noting of the appeal by accused 1(*the applicant*). Such an appeal is doomed to predictable failure and is simply a fishing expedition or a waste of any appeal court's time. The respondent properly opposed this application. The appeal in respect of both conviction and sentence has no prospects of success at all.

Applicant, in person
National Prosecuting Authority, respondent's legal practitioners