

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**REVIEW JUDGMENT**

Case no: CR 32 /2018

In the matter between:

**THE STATE**

v

**INNOCENT KALALUKA**

**ACCUSED**

**(HIGH COURT MAIN DIVISION REF. NO. 171/2018)**

**(MAGISTRATE CASE NO. NG 79/2017)**

Neutral citation: *S v Kalaluka* (CR 32 /2018) [2018] NAHCMD 116 (2 May 2018)

**Coram:** SHIVUTE, J et SALIONGA, AJ

**Delivered:** 2 May 2018

---

**ORDER**

---

- (a) The conviction is confirmed.
- (b) The record is returned to the Regional Court Magistrate with the direction to sentence the accused accordingly.

---

**REVIEW JUDGMENT**

---

SALIONGA, AJ (SHIVUTE, J concurring)

[1] The accused appeared in the Magistrate's court on a charge of stock theft, taking into consideration the provisions of s 11(1) (a) 1, 14 and 17 of the Stock Theft Act (Act 12 of 1990) as amended. He pleaded not guilty and after evidence was led, was convicted of theft of four heads of cattle. The matter was referred to the Regional Court for sentencing in terms of s 116(1) (a) of the Criminal Procedure Act, Act 51 of 1977.

[2] The learned Regional Court Magistrate upon receiving the record of the proceedings was not satisfied that the accused was properly convicted and he submitted the matter for review in terms of s 116 (3) of the Criminal Procedure Act with the following comments. As appears verbatim:

- '1. The accused appeared in the district court of Katima Mulilo sitting at Ngoma charged with the offence of theft of stock involving four (4) heads of cattle.
2. After perusing the record of proceedings in the district court, the Regional Court was not satisfied that there was sufficient evidence justifying the conviction of accused.

[3] The magistrate opined that it was not proven whether or not the Namibian Broadcasting Corporation Radio services carried an announcement alluded to by the accused person; whether or not Mr. Chrispin Siambango made a radio announcement of the sale of his cattle before selling them to the complainant and whether or not Mwape, Pumulo's mother and /or Pumulo existed as a person.

[4] According to him, the witnesses called by and for the state did not destroy the accused's explanation raised in terms of s 115 of the Criminal Procedure Act and on that basis, the Regional Court found the accused's explanation reasonable and possibly true.

[5] The matter was therefore forwarded to the judge in Chambers for consideration. In the event the judge of the high court holds a similar or same view as regards the insufficiency of the evidence led by the state in this case that accused's conviction be set aside.

[6] Upon receiving the matter, the reviewing judge directed a query to the district magistrate to provide reasons for conviction.

[7] The trial Magistrate responded as follows:

'(a) It was not necessary for the state to prove that an advert for the sale of the cattle was made on the Silozi radio station because there is evidence before court that the livestock in question were no longer belonged to Mr. Siambango as he had sold the said livestock to the complainant's husband way before the date that accused alleges he bought the cattle from Mr. Siambango's daughter.

(b) That she rejected the accused's version that he gave the sale agreement to the arresting officer because she found no reason why the arresting officer would have arrested the accused if the accused had shown him the agreement of sale. Furthermore, when the accused in cross-examination admitted that he did not tell the arresting officer about the existence of the sale agreement because he wanted to have a lawyer first.'

[8] In dealing with the issue whether there is sufficient evidence justifying the conviction, it is necessary to give a brief outline of the evidence led in the trial. The accused pleaded not guilty to the charge. He explained in terms of s 115 that he bought the four heads of cattle from Monde Fani and Mwape Siambango Fani at a place called Gomora, in Lusese area for N\$8600. He later took the said cattle to Mutikitila and he kept them in a kraal of his former boss the late Zoost Matengu whom he worked for, during 2001 – 2003. He denied to having stolen the cattle in question. He however admitted the identity, the colour, ear tags and possession of the cattle as well as the dates.

[9] The state called Patricia E. Mulisa, the complainant. She testified that she is a resident of Lusese area. She does not know the accused. She confirmed to have lost her cattle during August 2016 at the riverside. These cattle had ear tags that belong to her father-in-law Marrison Chunga Mulisa. She further testified that the cattle were hers, as she inherited them from her late husband Charles Mulisa Shekanda. That the four cattle valued at N\$22000 and were all recovered.

[10] Mathew K. Katjire gave evidence that he is employed in the Namibian Police Force attached to stock theft unit since 2004. He knew accused as he met him on 16 August 2016. He found him in possession of the cattle at Mr. Cosmos' kraal in Mutikitila and the cattle belongs to Patricia, the complainant. When inquired from the accused where he got the cattle, accused told him that he worked at Mbalasinte for a long time and that is how he acquired the cattle. Accused did not tell him that he bought the cattle but said he wanted to sell them because his wife was sick. The witness testified that if accused had told him that he bought the cattle, he would have investigated the matter further. He said the cattle were recovered and given back to the lawful owner, the complainant.

[11] Chrispin Fani Siambango's testimony is that he only came to know accused the day he was found in possession of the cattle in August 2016. He identified the four heads of cattle as his because, he sold them to his in law, Patricia, the complainant. He

did not sell the cattle to the accused and has no child by the name Mwape Siambango. His daughter Monde had been sick for two years and had died.

[12] Accused testified under oath, that he knew nothing about the theft allegations made against him. He stated that he bought those cattle from the person who is not the lawful owner. He came to know the seller on the 12 August 2016 when an announcement about the sale of the cattle was made on the radio by Chrispin Siambango. He reacted to the announcement and went to Bukalo area at an unknown village. He found Monde and Pumulo's mother under the tree. He told them that he had come in response to the advert for the sale of cattle. He however, did not find Chrispin Siambango there as he was in Katima Mulilo. Monde told him to go to the cattle post, Gomora and was given a young boy to take him to the post. At Gomora he found Mwape and another person who were cattle herders and he was shown the cattle in question. They had ear tags and one of them had a brand mark.

[13] Accused was not told who the owner of the cattle was but after seeing the cattle, he was interested in the transaction and came back to Monde to make payments. He negotiated the price and bought the four heads of cattle at N\$8600. According to accused the sellers were Monde and Pumulo's mother but Mwape, a cattle herder assisted him to move the cattle and was present when the cattle were sold. Accused said he left the cattle there, went to look or ask for a kraal to keep them at Mbalasinte without success and later took them to Mutikitila. The animals were collected by Kudumo and Matengu and given back to the complainant.

[14] Coming to the issue whether there is sufficient evidence justifying the accused's conviction, the trial Magistrate in her reasons rejected the accused's version and her reasons are spelled out in her judgement. The magistrate amongst others, reasoned that accused kept on changing his story as to with whom he concluded the sale transaction, an issue that created doubt if such a transaction ever took place. He also failed to call any witness in this respect to confirm his version.

[15] It is common cause that accused was found in possession of the four heads of cattle few days after they were stolen and could not give a satisfactory account of his possession. Notwithstanding, accused had no document to show that he bought those cattle, let alone any document to move the animals from one place to another. In his plea explanation, accused said he bought the cattle but it seemed he does not know exactly who the seller was. Even though it is accused's version that he dealt with more than one person during the alleged purchase none of them was called to testify to confirm his version. Initially the accused stated that he was going to call Pumulo's mother as his witness but later he decided to do away with her because he said he could not trace her, without indicating what efforts were made to trace her. If indeed Pumulo's mother was a party to the sale agreement surely her details ought to be in the alleged agreement. Thus accused version that he does not know where to find Pumulo's mother could not be true.

[16] Accused also admitted that when confronted by the police about the cattle he did not inform him that he bought the four heads of cattle. Why would he fail to inform the police if that was his defense. Surely if the investigator was informed of the sale, the matter should have been investigated further, the same way he went to Mbalasinte to investigate when he was told that the accused got the cattle from his previous employer. Furthermore, the accused did not have a withdrawal receipt because he alleged his wife was the one who withdrew the money. One wonders why she was not called as a witness. He also did not verify who the lawful owner of the cattle was despite the fact that he was shown the stock book. When Chrispin Siambango testified it was also not put to him that the accused reacted to his announcement in the radio that he was selling cattle.

[17] In *Small v Smith* 1954 (3) SA 434 (SWA) 'the court held that 'a party has a duty to cross-examine a witness on aspects of his evidence which are disputed. In general, a failure to cross examine may imply acceptance of the evidence although this should not be held against an undefended accused.'

Accused in this proceedings was defended but he did not inform his lawyer to put his version to the witness. Therefore his version can only be regarded as an afterthought.

[18] Considering the evidence in its totality, I have no doubt in my mind that the district Magistrate was correct in finding that accused's version could not be reasonably possibly true. This court is satisfied that the state had proved its case beyond reasonable doubt and find that there is no misdirection on the part of the trial Magistrate that warrants the court to interfere with her decision.

[19] In the result the following order is made:

- (a) The conviction is confirmed.
- (b) The record is returned to the Regional Court Magistrate with the direction to sentence the accused accordingly.

---

JT SALIONGA  
Acting Judge

---

NN SHIVUTE  
Judge