

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

**RULING: APPLICATION FOR A DISCHARGE AT THE CLOSE OF THE
PROSECUTION CASE IN TERMS OF SECTION 174 OF THE CRIMINAL
PROCEDURE ACT 51 OF 1977**

CASE NO: CC 6/2014

In the matter between:

STOCKLEY KAUEJAO

AFAS KAMUTJEMO

v

THE STATE

FIRST APPLICANT

SECOND APPLICANT

RESPONDENT

Neutral citation: *Kauejao v S* (CC 6/2014) [2018] NAHCMD 277 (10
September 2018)

CORAM: SIBOLEKA J

Heard on: 04 September 2018

Delivered: on: 10 September 2018

Flynote: Criminal law: Section 174 discharge at the close of the State's case – only tenable if there is no case upon which a reasonable court acting carefully may convict, such is not the case here – application declined.

Summary: A farmer who lost fifteen head of cattle gave the deceased the names of two suspects and asked him to investigate the whereabouts of the animals. The deceased, a community based stock theft investigator got hold of the suspects and started to investigate when he suddenly disappeared. The remains of his burnt out bakkie and body were later found prompting the arrest and prosecution of the four accused inclusive of the two applicants in this matter.

Held: There is a *prima facie* case requiring answers from the applicants.

ORDER

In the result I make the following order:

The application for the discharge of the applicants at the close of the prosecution case is declined.

RULING: APPLICATION FOR A DISCHARGE IN TERMS OF SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

SIBOLEKA J;

[1] The applicants are charged together with two others on the following counts of the indictment. Murder, Theft, read with the provisions of Act 12 of

1990; Defeating or obstructing or attempting to defeat or obstruct the course of justice.

[2] At the close of the prosecution's case, Counsel for the above two applicants are of the view that there is no *prima facie* case requiring them to stand on their two feet and furnish answers.

[3] Section 174 states the following:

'174 Accused may be discharged at close of case for prosecution: -

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[4] In the ordinary language the above paragraph means that if the trial were to be halted there and then at the close of the prosecution case and all parties including the defence, records that they will not testify and will not call any witnesses in support of their not guilty plea on the matter, could any court acting carefully convict the accused on the charges he/they are facing or on any competent crimes thereon. If the answer to the above is "yes", the application should not succeed. On the other hand if the answer to the above question is "no" it means the application should be allowed, because no *prima facie* case exists against them. The value that is protected in section 174 of the Criminal Procedure Act 51 of 1977 is to protect the accused from prosecuting himself, when in actual fact "no" connection between them and the offence has been established whatsoever.

[5] The *prima facie* case that has been established by the prosecution witnesses at the close of the State's case:

[6] Mwashekele, the owner of Farm Brazil and the complainant on the stock theft count gave the names of two suspects to the deceased with a request to investigate what happened to his animals. The first suspect he handed to the deceased was accused two who was also his own herd boy. The other name was that of accused three, a herd boy at Farm Le Brandt. Farms Brazil and Le Brandt are adjacent to each other and are divided by a mesh wire, which constitutes a fence boundary between the two farms. Evidence under oath was also placed before court to the fact that the said mesh wire dividing the two farms was lowered at the spot where the fifteen herd of cattle were driven through from Farm Brazil to Farm Le Brandt. The deceased got hold of the two suspects and took them along with him, investigating to find out where and what they have done to the stolen cattle. He was in the company of the two accused' when he disappeared from home.

[7] The wife of the deceased alerted Det. Chief Insp. Simeon Kandetu about her husband's disappearance, and a massive search was launched on Farm Brazil owned by accused one's brother. Accused one, according to police evidence (per Chief Kandetu) also farms with cattle at his brother's farm.

[8] The two Det. Chief Insp. Kandetu and Van Wyk were both overseeing the foot and helicopter police search teams, trying to locate the bakkie as well as the remains of the deceased. Kandetu was attached to the Serious Crime Unit while Van Wyk headed the Stock Theft Unit, both were stationed at Gobabis. The burnt out bakkie of the deceased was later located but the deceased's body was not there. Det. Chief Insp. Kandetu and Det. Chief Insp. Van Wyk who is also the arresting officer of accused one testified that at the time of the incident, they were both residing at Gobabis, their work station. They stated that they knew accused one as Mbaruu. In particular Chief Van Wyk only knew accused one as "Mbaruu". When Chief Van Wyk spoke to Chief Kandetu and the name "Mbaruu" came to surface, he immediately became aware of the fact that the name Mbaruu referred

to and related to accused one before court. Accused one was with Insp. Iyambo at the time Chief Van Wyk arrested him.

[9] The evidence of these two Det. Chief Insp. corroborates the evidence of Jesaya Daniel that “Mbaruu” is in fact accused one. Usiel Kamutjemo testified he lives and farms at Groot Ums where his sister is resettled. In December 2012 accused one, Mbaruu, told him he will bring cattle allegedly belonging to accused four (the second applicant). In this witness’s conversation with Chief Kandetu he stated that accused one told him the animals belong to him and accused four. The MTC telephone data shows that from 6 December 2012 to 10 January 2013 the two ie. Mbaruu and this witness had telephonically contacted each other twelve times. On the eve of new year accused four came to Groot Ums and showed Usiel the 15 cattle which had no ear tags and were without a transport permit. Accused four said they belonged to him and another fellow young man referring to accused one as per this witness’s own evidence. During a bail application accused one testified that him and Usiel Kamutjemo know each other very well. This evidence is confirmed by Kamutjemo in his own police statement, wherein he clearly refers to accused one as “Mbaruu”.

[10] According to Kamutjemo, Mbaruu called him during December 2012 and asked him not to leave the farm as he was coming to offload Afas’s cattle, but this did not happen. Later while Kamutjemo was in Gobabis, Mbaruu called and informed him that “two guys” were on their way to offload the said cattle a bit late in the evening. Kamutjemo assured him that although he was not at the Farm Ums, his workers will put the cattle in a small camp. When Kamutjemo later arrived at the farm, his workers showed him the 15 head of cattle which Afas, accused four confirmed were his animals. It is therefore *prima facie* clear that any reference to “Mbaruu” by the investigation officers; the prosecution witnesses is a reference to accused one on this matter.

[11] During the investigation Det. Chief Insp. Kandetu received information from Kauaria, a prosecution witness, to the fact that during the days when the deceased went missing he was underway to attend the funeral of a family member driving along the Aminus – Groot Ums gravel road when he saw the deceased's bakkie parked alongside the said gravel road. It was along the Aminus – Gobabis gravel road that the said witness met/crossed accused one's tinted Land Cruiser. According to Chief Kandetu, the Aminus – Groot Ums gravel road passes near Farm Brazil belonging to accused one's brother, which is where he is also farming with cattle. Like Chief Kandetu, the said prosecution witness Kauaria knows accused one very well, as well as his tinted Land Cruiser. However, when the said prosecution witness came back from the funeral along the same route, the deceased's bakkie was not there where he left it parked.

[12] Following on this information, Chief Kandetu asked accused two and three separately and apart from each other whether they can drive a vehicle, and he was told they don't know how to drive. Chief Kandetu asked them how the deceased's bakkie came to be found at the place where it was burnt out -; who removed it from where it was parked along the Aminus – Groot Ums gravel road to where it was burnt out. Both accused two and three told him that it was accused one who drove it there so that it could be burnt out, which is what they in fact did.

[13] According to the evidence before court, Jesaja Daniel had given his cellphone to the deceased. Accused three brought the cellphone back and handed it to Jesaja Daniel telling him that him, (accused three), and accused two had killed the deceased. Accused three further told Jesaja Daniel that they buried the deceased's body along the frontier between Farms Brazil and Vasdraai. Jesaja Daniel related this information to Det. Chief Insp. Kandetu during the joint foot and helicopter police search. This information yielded good results as the deceased's burnt body was retrieved in the vicinity where Jesaja Daniel had directed Chief Kandetu.

[14] The first count of murder is only in respect of accused one, two and three, while all four accused are jointly charged on the second count of stock theft and the third count of defeating or obstructing the cause of justice. It is *prima facie* on record on this matter that accused one, two and three worked on the disappearance of the deceased Wilfred Kazeurua also known as 'Majoor'. This, according to the *prima facie* evidence already before court was done to prevent the detection of the theft of the fifteen head of cattle. Also *prima facie* record is the evidence that accused one, two and three had acted in common purpose in bringing about the disappearance of the deceased on this matter.

[15] Counsel for the first applicant intensively argued that apart from hearsay evidence that has been collected by the investigators from various witnesses on this matter there was no direct evidence connecting this applicant to any alleged wrongdoing on this matter. He submitted that the prosecution witnesses Usiel Kamutjemo and Jesaja Daniel have contradicted themselves to such an extent that no Court acting carefully can place any worthwhile reliance on their evidence. He requested this court to discharge the first applicant because his view of what is on record, that would be the right thing for the court to do.

[16] Counsel for the second applicant also intensively submitted that he has not been connected to any wrongdoing on the allegations he is facing, and should not be placed on his feet. This counsel stated that although Jesaja Daniel identified him as the driver of the truck which allegedly loaded the fifteen head of cattle, nothing can be attached to this evidence because, the same Jesaja Daniel also pointed out another suspect taken to him by Const. Platt as the driver of truck that loaded the animals.

[17] Counsel for the prosecution submitted that the application for the discharge should fail because there is a *prima facie* case on record that has been established. He submitted that the witness Jesaja Daniel's identification of the second applicant as the driver of the truck that loaded the stolen cattle is valid.

This counsel stated that Const. Platt only wanted to establish the identity of the lorry assistant who was together with the second applicant at the time the animals were loaded.

[18] From the evidence, Counsel for the second applicant is correct when he submitted that Usiel Kamutjemo and Jesaja Daniel appear to protect the first applicant by saying that they don't know him. This is not the case because Jesaja Daniel was the foreman at Farm Brazil where the first applicant is also farming with cattle. Usiel Kamutjemo also knows the first applicant well, that is why the MTC data shows that they telephonically contacted each other twelve times shortly before the cattle went missing.

[19] In an application of this nature the court is not required to make any credibility finding on the evidence. Such a conclusion can only be done at the end of the trial itself when all the counsel have finished addressing court before judgment.

[20] From the evidence placed before this Court so far, there is indeed a *prima facie* case requiring the two applicants to be placed on their feet and furnish answers.

[21] In the result I make the following order:

The application for the discharge of the applicants at the close of the prosecution case is declined.

A M SIBOLEKA

Judge

APPEARANCES:

FIRST APPLICANT: Mr. S. S. Makando
Instructed by Conradie & Damaseb Legal
Practitioners, Windhoek

SECOND APPLICANT: Mr J. Wessels
Instructed by the Directorate of Legal Aid, Windhoek

RESPONDENT: Mr D. Lisulo
Office of the Prosecutor-General, Windhoek