



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 377/17

In the matter between:

**ZAKHE MABUZA**

**APPELLANT**

and

**REX**

**RESPONDENT**

**Neutral Citation** : **Zakhe Mabuza vs Rex (377/17) [2018]**  
**SZHC 224 (29 NOVEMBER 2018)**

**Coram** : **MABUZA – PJ**

**Heard** : **04/06/2018**

**Delivered** : **29/11/2018**

## SUMMARY

*The Appellant was charged and convicted of ten counts of various offences. He now appeals from the Magistrate's Court sitting in Manzini against conviction and sentence in respect of some of the counts.*

## **JUDGMENT**

### **MABUZA -PJ**

[1] The Appellant was charged in the Manzini Magistrate Court with ten counts briefly set out hereunder:

Count 1 – Theft

Count 2 - Assault (common)

Count 3 – House breaking and theft with intent to steal and theft

Count 4 – Theft from motor vehicle

Count 5 – Theft from motor vehicle

Count 6 – Theft

Count 7 – C/s 89 (1) ARW s 122 (i) (7) RTA

Count 8 – c/s 88 (i) a ARW s 122 (i) (5) a RTA

Count 9 – c/s 88 (i) d ARW s 122 (i) (5) b RTA

Count 10 - c/s 88 (i) f ARW s 122 (i) (5) b RTA

[2] The conviction and sentences meted out in respect of each count are as follows:

Count 1 – 2 years imprisonment without an option of a fine.

Count 2 – Acquitted and discharged.

Count 3 – 7 years imprisonment without an option of a fine

Count 4 – 1 year imprisonment without an option of a fine.

Count 5 - 1 year imprisonment without an option of a fine.

Count 6 - 1 year imprisonment without an option of a fine.

Count 7 – Cautioned and discharged

Count 8 - Cautioned and discharged

Count 9 - Cautioned and discharged

Count 10 - Cautioned and discharged

[3] The Appellant has appealed against both conviction and sentence. Save for the amended notice of appeal, the original notice of appeal is not before me. Respective Counsel used the amended notice of appeal during submissions before me.

**re: Conviction**

[4] The Appellant's submissions are that he should not have been convicted in respect of Counts 3, 4 and 5. His arguments are that the conviction in respect of Count 3 is based on circumstantial evidence.

**re: Count 3**

- [5] Count 3 was committed on the 22/8/2016 in the house of Velaphi Mabila situate at Ngwane Park Manzini. According to the charge sheet the total value of the items reportedly stolen amounted to E45,700.00. Mr. Mabila (PW1) the complainant testified that on the 22/8/16 around 0300 Hrs he was awakened by unknown people who were already in his house. He went to investigate and the people fled, even though he tried to chase them. He never saw who they were. He noticed that some items were stolen from his house. These are set out in Count 3 of the charge sheet. He discovered that the assailants had scaled up the wall into the premises and had broken the garage door leading into the house. They left the same way.
- [6] The complainant testified that the stolen things amounted to E25,000.00 (Twenty five thousand Emalangeneni). The following day he was called to the police station to identify his things as they had been found. He identified the items in Court.
- [7] When the Appellant cross-examined the complainant, he laid claim to the decoder. He also stated that the big speaker was given to him by his father. The complainant responded that he had lost a decoder identical to the one

found by the police in the Appellant's home, and that the speakers went with a projector.

[8] The Appellant then changed tune and said that even though the things were found at his house, they were brought by Sibusiso to his house.

[9] From the Appellant's response it is clear that there is an admission that these items were found in his house. He did not call his father to testify on his behalf that the latter had given him the "big speaker" nor did he call Sibusiso to testify on his behalf. Had he called these two witnesses a reasonable doubt would have been raised and concretized. But he failed to do so.

[10] PW5 (5746 Detective Constable A. Madlopha) and PW6 (6039 Detective D. Ndlangamandla) investigated Count 3. On the 23/8/2016 they went to Ngwane Park to attend to Mr. Mabila. The Appellant lived next door to Mr. Mabila. Upon further investigation they found stolen things in the Appellant's house which they confiscated. Among these things were Mabila's things. They called Mabila to the police station and he identified some of the items as belonging to him.

[11] When the Appellant gave evidence he did not give any explanation in Court as to how Mabila's things came to be in his possession. He was in law obliged to explain recent possession but he failed to do so. The evidence led against him was not circumstantial but direct. In my view he was correctly convicted in respect of Count three as the Crown proved its case against him beyond a reasonable doubt.

#### **Count 4 and 5 – Theft from motor vehicle**

[12] These were committed on the 12/6/2016. The crime of breaking entry and theft are normally charged as one. In this instance there is a splitting of the charges which is not allowed in law. Consequently I shall deal with these counts as one count.

[13] The complainant herein is Menzi Magagula. He testified that on the 12/6/16 someone broke into his car and stole a laptop HP 650 and Verbatim hard drive and cellphone. Together these items were valued at E5,000.00. This amount included the laptop hard drive. Only the laptop was found.

[14] PW6 when handing in Exhibit 4 stated that theft from Magagula's motor vehicle was 1 x HP laptop, which was grey in colour. PW6 further stated

that the laptop was found among the things that were removed from the Appellant's house.

[15] I am satisfied that Count 5 was proved beyond a reasonable doubt. The Appellant did not bother to explain why the laptop was found in his house. Once again he was in law obliged to explain his recent possession of the goods but he failed dismally to do so.

[16] As explained above in respect of Counts 4 and 5, this Count is treating them as one as splitting of charges is not allowed. Count 4 is merged with Count 5 which is the competent charge and it is so ordered.

**re: Count 6: Theft**

[17] It is alleged under this Count that on the 19/8/2016 the Appellant stole a Black/Mint cellphone worth E220.00 from Mthokozisi Hlatshwayo (PW2). The evidence of Hlatshwayo is that on the 19/9/2016 the Appellant attempted to rob him but finding nothing noteworthy to steal, the Appellant and another boy called Chester marched him at knife point to this home where they demanded food. He gave them food. After they had eaten they

left. It was after they had left that he discovered that his laptop had been stolen. But it mysteriously returned the following morning.

[18] However, later upon returning from a funeral he found that some items were missing and these included the mint cellphone. He was called to the police where he identified his cellphone. Hlatshwayo only noticed the following day that his cellphone was missing. There is no direct evidence linking its loss to the Appellant. Chester could have stolen it. PW5 and PW6 did not state in their evidence where they had found it. they did not state in their evidence whether or not it was on the list they prepared after collecting some stolen things from the Appellants house. It is not among the things that PW6 handed in as Exhibit "4". The charge sheet clearly states theft of a Black/Mint cellphone. The one that PW6 handed in is described as 1 x Iphone cellphone.

[19] For the aforementioned reasons, I agree with the Appellant and hereby set aside the conviction in respect of Count 6.

**re: Count 1 - Theft**



[20] Even though the Appellant did not appeal against the sentence in Count 1, I hereby exercise the power to automatically review it. The learned Magistrate sentenced the Appellant to 2 years imprisonment with no option of a fine. I assume that the sentence was based on the value of E16,000.00 (Sixteen thousand Emalangeni) as stated in the charge sheet. However, Mdluli in evidence in chief stated the value of the cellphone at E6,000.00 (Six thousand Emalangeni). Consequently I shall review the sentence downwards.

[21] Mr. Mabila also valued his goods at E25,000.00 (Twenty five thousand Emalangeni) when he gave evidence as opposed to the value of E45,700.00 (Forty five thousand seven hundred Emalangeni) stated in the charge sheet. The difference is E20,700.00 (Twenty thousand seven hundred Emalangeni). The learned Magistrate may have been influenced by the higher figure. I shall review the sentence downwards.

[22] The Appellant was sentenced to 1 year each in respect of Counts 4 and 5 without an option of a fine. The sentences were ordered to run concurrently. The value of Mr. Hlatshwayo's hard drive was E500.00 (Five hundred Emalangeni). The laptop which was valued at E4,500.00 (Four

thousand five hundred Emalangeni) was recovered. The two counts should have been taken as one for purposes of sentence instead of being only ordered to run concurrently.

[23] The sentence takes into account the nature of the crime and the victims. It does not take into account the personal circumstances of the Appellant. And for that reason I shall interfere with the sentence.

[24] In the event the orders of this Court are as follows:

**Count 3**

**The Conviction is confirmed.**

**Count 4 and 5**

**The counts are merged into one and the conviction is confirmed.**

**Count 6**

**The conviction is set aside.**

**Sentences**

**Count 1: The sentence is set aside and replaced as follows:**

**The Accused is sentenced to a fine of E2000-00 (Two thousand Emalangeni) failing payment two years imprisonment.**

**Count 3**

**The amount involved being now reduced, the sentence of 7 years imprisonment is set aside and replaced with the following:**

**“The Accused is sentenced to 5 years imprisonment, two years of which are suspended for 3 years on condition the Accused is not convicted of any crime of which theft is an element.”**

**Counts 4 and 5**

**The sentence is set aside and replaced with the following:**

**“The Counts are hereby treated as one for purposes of sentence; and the Accused is sentenced to a fine of E2,000.00 (Two thousand Emalangeni) failing payment to two years Imprisonment.**


**Count 6**

**The sentence is hereby set aside.**

[25] The sentences in Counts 1,3,4 and 5 are hereby ordered to run concurrently and are hereby backdated to September 2016 being the date when the Accused was arrested and taken into custody.

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**Q. M. MABUZA  
PRINCIPAL JUDGE**

For the Appellant : Mr. Dlamini

For the Respondent : Mr. Nxumalo