



IN THE HIGH COURT OF ESWATINI

JUDGEMENT

HELD AT MBABANE

Case No. 489/2023

In Matter between:

SIMANGA NDLOVU

Appellant

And

REX

Respondent

Neutral citation: *Simanga Ndlovu v Rex* (489/23) SZHC 355
[2024] (06.02.2025)

CORUM: Z Magagula J

Date heard: 25.07.24

Date delivered: 06.02.25

JUDGMENT

- [1] The Appellant in this case was charged with two offences, in the Magistrates Court (The court *aquo*). On the first count it was alleged that the accused (Appellant) contravened Section (3) (a) as read with section 18 (1) of the stock theft Act 5 of 1982 as amended in Act 11 of 1987, in that upon or about the 5th August 2020 at or near Ka-Ntunja area in the Manzini District, the said accused person, did wrongfully and unlawfully steal one black Ox, ear-tagged 788/01087 valued at E 10 000.00 (Ten Thousand Emalangeni) the property in the lawful possession of Richard Hlatjwako and thereby contravened the said Act.
- [2] In the second count it was alleged that the accused was guilty of contravening section 38 (1) of the stock Disease Regulation of 1933 in that upon or around November 2019, at or near Ngculwini area, in the Manzini District, the said accused person did wrongfully and unlawfully move the following cattle from Ngculwini area, at Mhlamanti dipping tank area 502, kraal 50, 502/327, 502/3362, 502/3458, 68/250, the property or in the lawful possession of Nhlonipho Sibusiso Tsabedze to Luve area at

Mbangamadze dipping tank area 856 kraal number 114, belonging to Ntfokotisi Ndzinisa without a stock removal permit and thereby contravened the said Act.

[3] The Appellant was convicted in respect of count 1 and acquitted and discharged in respect of count 2. The court found that there were no extenuating circumstances and sentenced the Appellant to Two (2) years imprisonment without the option of a fine.

[4] The Appellant has now appealed to this court against both conviction and sentence on the following grounds:

1. *The court aquo erred both in fact and in law by finding that the evidence presented by the Crown witness satisfied the elements of the offence while the evidence of the Crown's witnesses was riddled with inconsistencies and contradictions.*

1.1 *The court aquo erred both in fact and in law by ignoring the glaring and crucial documentary evidence of Pw5 (Celimpilo Musa Mngometulu) which was marked as exhibits "SN 1" and "SN2" which evidence collapsed the Crown's case against the Appellant.*

1.2 *The court aquo erred both in fact and in law by ignoring the glaring inconsistencies and contradictions in the evidence of Pw1 (Richard Hlatjwako), Pw2 (Mirriam Hlatjwako), Pw3 (Jerome Mathokoza Hadzane), Pw4 (Siphamandla Alson Hlatjwako) and Pw6 (Assistant Inspector Ngozo) as a result, wrongly and unlawfully convicted the Appellant of the offence of stock theft without the Crown having presented evidence beyond a reasonable doubt that the Appellant committed such offence.*

- [5] The Crown's evidence before the trial court was that Pw1, Richard Hlatjwako had livestock registered in his name at Madlebeni dipping tank. Some of the cattle though registered in his name belonged to other members of his family. Madlebeni dipping tank is identified by the number 788, Pw1's Kraal number is 788/0162. The bull referred to in the charge sheet has identifying ear tag number 788/01087.
- [6] Sometime around 2012 a certain Bhembe man who had impregnated Pw1's brother's daughter paid a fine [Inhlawulo] by delivering to Pw1's brother a male calf. They needed to slaughter the Inhlawulo beast, so his brother exchanged it for a full grown cow which was slaughtered in the place of the male calf.

- [7] Later it transpired that the calf Bhembe brought to the Hlatjwako's was stolen or was the subject matter in a case of stock theft. It was traced to the Hlatjwako's of ka-Ntunja who were instructed by the court to keep it as an exhibit in the matter involving Bhembe.
- [8] Apparently the matter involving Bhembe was finalised by the court, but the Hlatjwako's still kept the calf, which had grown into a bull. Although the bull "belonged" to Pw1's brother who had since passed on by the time of the occurrence of the events in issue herein, the bull was kept in Pw1's kraal and as such remained registered in his name at the dipping tank.
- [9] In about August 2020 the Appellant came to Pw1 and told him that he had been sent by the court to collect the bull. Pw1 was with his sister-in-law, who is his late brother's widow. A boy was sent to collect the bull from the veld and it was loaded onto a half-lorry that Appellant had brought. When Appellant was asked for the stock-removal-permit that would allow him transport the bull to its destination, he told them he had a court order that he would leave with the assistant Veterinary officer. The bull was loaded onto the truck by Siphamandla and some boys who had come with the Appellant. The appellant then gave Siphamandla the sum of E 30.00 appreciating him for his assistance in loading the bull. Siphamandla was called as Pw4.

[10] Pw1 was asked by a dipping tank official for the whereabouts of the bull and he informed him that it had been collected by the Appellant. It turned out that the dipping tank officials knew nothing about the removal of the of the bull prompting Pw1 to report this to the police.

[11] Pw2 was Mirriam Hlatjwako, Pw1's sister in law. Her evidence corroborated the evidence of Pw1. Both Pw1 and Pw2 did not give the date on which the Appellant came to fetch the bull. The date is first mentioned by the Crown Counsel when leading Pw3, one Jerome Hedzane.

Crown Counsel : Question - On 05.08.20 what happened?

Pw3: *Answer- Officer Ndlovu called to say he was fetching the cow to put it at the pound. Ndlovu is the accused in the dock. Having received the call, I then went to Malume's home to tell them that Ndlovu was coming for the cow to take it to the pound. KaMalume is Phuyane Hlatjwako. I conveyed the messeage to Richard Hlatjwako and Mirriam Hlatjwako"*

[12] Pw3 said the appellant came for the cow, by cow, I assume the witness means the bull, because in SiSwati the common name of cattle is Tinkhomo or Singular inkhomo. This is irrespective of whether it's a female or male. So Appellant came to collect the bull on the same day. He arrived around 4:00 pm. The same question about the events of the 5th August 2020 was put to Siphamandla Hlatjwako Pw4. In response to that question he said it is the day on which Appellant came to collect the bull. Pw4 was given E 30.00 by Appellant appreciating him fetching the bull from the veld.

[13] After the evidence of Pw4 the matter was postponed on about six (6) occasions because Appellant's attorney could not make it to court for a variety of reasons. The matter eventually resumed on the 24th February 2022 without Defence Counsel. The Learned Magistrate made a note on the record that:

"Accused ready. Right to cross-examine Pw5 explained. Accused understands"

[14] The Magistrate did not record exactly what was explained to the Appellant nor did she record why she felt compelled to proceed with the trial in the absence of Defence Counsel. It may be mentioned here that the Defence Counsel had not formally informed the court that he was

withdrawing his services, of course this is not entirely the courts fault but legal practioners ought to show a certain degree of the respect to this court by either appearing for their matters or properly and formerly advise the court if they are unable to proceed for any reason. Legal practioners are officers of the court and they owe the court the duty of outmost respect.

[15] Pw5, Celimpilo Musa Mngometulu testified that he was the veterinary attendant at the Mdlebeni Dipping tank in 2020. He became aware in September of that year that Pw1's cattle were short by one beast. Hlatjwako, Pw1, explained that one beast was taken by the Appellant. Pw5 called the Appellant who confirmed to have taken the beast but he failed to appear at the veterinary offices to explain the circumstances under which he took the beast. Pw5 was led by crown counsel on documentation that proved that the bull was registered in the name of Pw1 in the veterinary offices. He pointed out that on the 21st September 2020 there were two missing beasts from Pw1's kraal, of the two, one had gone astray and the other one is the one taken by the Appellant; the documents were marked annexure "SN1" and "SN2" respectively.

[16] The Crown's last witness, was Assistant Inspector Ngozo who is attached to the Stock Theft Division and was the Principal Investigating officer in

this matter. Inspector Ngozo told the court *aquo* that he got a report that Richard Hlatjwako of Ka-Ntunja area had reported that his black Ox with eat tag No. 788/1087 valued at E 10 000.00 was stolen by a police officer on the 5th August 2020. Inspector Ngozo then confronted appellant and cautioned him in accordance with the Judges Rules; that is: he was investigating a complaint by Pw1 that the Appellant had stolen his Ox with tag No.788/1287. Following this, the Appellant was arrested for contravening the Stock Theft Act.

- [17] In cross examination, it was put to Inspector Ngozo that there seemed to be some confusion as to the date the beast was taken. The witness insisted that it was the 5th August 2020. When he was pressed that according to exhibit "SN1". On at least two dipping sessions after the 5th August 2020 the dipping tank register shows that there were ten registered cattle in Pw1's kraal and all ten were available for dipping. Inspector Ngozo then speculated that the herdsman collected stray cattle in order to give the impression to the assistant veterinary officer that all the registered livestock were accounted for. In his unsworn statement, the appellant denied having collected the "Cow" from Pw1 and stated that the last time he had anything to do with it was in 2017 after he had given evidence in the original criminal case.

[18] It is trite that in criminal cases, the duty or onus of proving the state's case is on the Crown. This proof need not be beyond all shadow of doubt, but beyond reasonable doubt. The accused person on the other hand does not have to prove his innocence, all he has to do is give an explanation which is reasonably probably true. If the Crown does not discharge this onus, the accused is entitled to his acquittal.

[19] **Greenberg J in the case of R v Difford 1973 AD 370 at 373** made this proposition:

“No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable the court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.”

[20] This principle has been applied in a plethora of decided cases in this jurisdiction and beyond such as **S v P 1974 (1) SA 581 (Rhodesia) at 582**, **The King v Dominic Mngometulu and Nine Others High Court Criminal case No.94/1990**; **Obert Sithembiso Chikane v Rex Appeal Case No. 4/2000**.

[21] The Crown in this case alleged that the offence was committed on the 5th August 2020. That is the date on which the bull was allegedly taken from Pw1 by the Appellant. But for two consecutive dipping tank sessions after that, the assistant veterinary officer recorded that no beast was missing from Pw1's kraal. The Crown, despite having the opportunity to do so, failed to rectify this anomaly. The evidence by Pw6, Assistant Inspector Ngozo to the effect that the herd boy would collect stray cows to cover the shortfall is firstly speculative and secondly improbable. The herd boy, Siphamandla Alson Hlatjwako was called as Pw4, he was not asked to explain why he was able to record 100 percent dipping tank attendance when one beast had already been taken by the Appellant. Secondly, there was no reason for Pw4 to conceal the fact that the Appellant had taken the beast as this was done in board daylight (well in a manner of speaking)

[22] Another rather worrying feature is that the Crown did not seem interested in the where-about of the beast. If it was taken by the Appellant from Pw1, then what became of it afterwards. Placing the beast in the possession or control of the Appellant or his proxy would have augmented the Crown's case. This taken against the Appellant's version that he did not collect the bull from Pw1, leaves the court with some doubt.

[23] The applicable principal is found in the land mark judgement of Lord Denning in the case **Miller v Minister of Pensions [1947] All ER 372** when he said;

“The court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a, reasonable possibility that it may be substantially true.”

[24] Lord denning proceeded to espouse the Criminal started as follows:

“The degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “ of course its possible but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice”

[25] In order to find for the accused, the court need not even reject the Crown case. As long as the accused proffers an explanation that in all circumstances, is reasonably probably possible.

[26] Slomawitiz AJ in *S v Kubeka* 1982 (1) SA 534 at 537 put it this way:

“Whether I subjectively disbelieve the accused is, however, not the test: I need not even reject the state’s case in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the onus on the state”

[27] The contradiction presented by the veterinary assistants and the records of Pw1’s livestock dipping records would and should have raised some doubt in the court *aquo* in the evidence of the Crown. The onus of proving the case being on the Crown, if the version of the accused is reasonably possibly true. Then the Crown would have failed to discharged the onus. After the evaluation of the evidence, the Appellant should have received the benefit of the doubt and acquitted. See *S v Mlambo* [1957] 4 SA 326
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[28] I have no doubt in my mind that had the court *aquo* applied these principles, it would have come to a different conclusion on the question whether the Appellant was guilty or not.

[29] In the premises the appeal succeeds. The verdict the court *aquo* is hereby set aside and substituted with one of not guilty.



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Z. Madagula
Judge of the High Court

Appearances:

For the Crown – Mr F. Mngomezulu

For the Accused – Mr B. Xaba