

**State
Versus
Phanuel Chekere**

HIGH COURT OF ZIMBABWE
KUDYAJ
HARARE, 8 November 2006

Criminal Review

KUDYA J: On a date which was neither indicated on the charge sheet nor in the trial magistrate's record of proceedings the accused person was charged as follows:

" Theft of Stock in terms of section 9(b) of Stock Theft Act (Chapter 9:18)

In that on 20th day of October 2005 and at Clare Chikore and Daniel Muzhinyu both or one of them unlawfully and intentionally stole 2 beasts the property of Munenga Chigeregede and in his lawful custody."

The outline of state case fared no better in identifying the "two beasts from the grazing land" which were valued at \$18 million and were not recovered. The accused person pleaded guilty to the charge while his co-accused denied it and a separation of trials was granted. Notwithstanding the separation, the trial magistrate recorded that the charges were withdrawn after plea against the co-accused and he was accordingly acquitted.

The trial magistrate proceeded to properly canvass the essential elements of the offence. She convicted the accused person. She took mitigation, and after certifying from him that he had sold the two beasts she proceeded to sentence him. It was only in her reasons for sentence that she revealed that the 2 beasts were in fact 2 head of cattle.

She sentenced him on 7 February 2006 to as follows:

"48 months imprisonment of which 18 months imprisonment are suspended on condition the accused restitutes the complainant Murenga Chigeregede in the sum of \$18 000 000.00 before 31st December 2006 through the clerk of court Rusape". There are several irregularities which appear in this record..

The first is a reference to section 9(b) of Stock Theft. Section 9 confers special jurisdiction on Regional, Provincial and Senior Magistrates to impose the sentences of imprisonment not exceeding 6 years for a contravention of section 11 and the mandatory sentence of between 9 years and 25 years for a contravention of stock theft or attempted theft of any equine or bovine animal. The trial magistrate being of the rank of senior magistrate was obliged to impose sentence under section 12 of the Stock Theft Act in terms of section 9(a) of the same statute. It was unnecessary even

to make reference to section 9 in the heading of the charge sheet as the offence of Stock Theft is not created by this Act.

The second irregularity related to the failure to identify the 2 beasts in question. They were only identified in the trial magistrate's reasons for sentence. It was necessary that this be done in both the charge sheet and the statement of agreed facts.

The third irregularity related to the inclusion of the co-accused's verdict on the charge sheet and notes of proceedings in *casu*, when a separation of trials had been granted. A separation of trials entails the opening of a new record of proceedings for the co-accused.

The fourth and most fundamental error was the failure by the trial magistrate to pay regard to the mandatory provisions of section 12 of the Stock Theft Act, *supra*, see *S v Gangarahwe and another* ..HH 29/2005. This is a peremptory provision which admits of no discretion on the trial magistrate. She would have to impose an effective sentence of not less than 9 years and not more than 25 years imprisonment in the absence of special circumstances. Even before imposing the minimum mandatory sentence, the trial magistrate is obliged to explain the concept of special circumstances to the accused person which explanation must be recorded. If she finds any she must record them.

She proceeded to sentence the accused person without explaining the concept to him and without recording them. A gross miscarriage of justice occurred which requires that I set aside the sentence and remit the matter for the consideration of an appropriate sentence which takes into account all the sentiments expressed in this judgment.

It is accordingly ordered that:

1. The heading of the charge sheet be and is hereby amended by the deletion of the words in terms of section 9(b) of the Stock Theft Act [*Chapter 9:18*] .
2. The word beasts, wherever it occurs in the charge sheet be and is hereby substituted by cattle
3. The verdict of the former co-accused of the present accused be and is hereby deleted from the reverse side of the charge sheet and the trial magistrate's recorded notes.
4. That the sentence be and is hereby set aside. The matter is remitted to the trial magistrate for sentence afresh after explaining and if any are found recording, special circumstances in the particular case.

KUDYA J:

GOWORA J, agrees:

