

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA, MAIN DIVISION**

**JUDGMENT**

**CR No: 52/2016**

In the matter between

**THE STATE**

And

**KANGUMBE MUTITA**

**HIGH COURT MD REVIEW CASE NO 1359/2016**

*Neutral citation: S v Mutita (CR 52-2016) [2016] NAHCMD 261 (09 September 2016)*

**CORAM: LIEBENBERG J et SHIVUTE J**

**DELIVERED: 09 September 2016**

**Flynote:** Criminal procedure – Review – Accused charged with contravention of s 2 of Act 12 of 1990 – Found in possession of suspected stolen stock – Accused convicted on basis of common purpose – Evidence adduced falling short of establishing any link between the two accused in committing the offence – Court erred by relying on evidence of the investigating officer when contradicted by other State witness – Fact that cell phone of accused had been used to contact the buyer not proof of his involvement – Accused’s explanation that co-accused used his phone whilst in his custody reasonably possible – Insufficient evidence to convict – Conviction overturned on review.

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### **ORDER**

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1. The conviction and sentence in respect of accused no 2 are set aside.
2. Accused Kangumbe Mutita is to be liberated forthwith.

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### **JUDGMENT**

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LIEBENBERG J: (Concurring SHIVUTE J)

[1] This is a review matter in which the accused persons were arraigned in the magistrate’s court for the district of Rundu on a charge of contravening section 2 of the Stock Theft Act 12 of 1990, for having been found in possession of suspected stolen

stock for which they were unable to give a satisfactory account for such possession. Accused no 1 absconded half way through the trial where after the court ordered the separation of trials and finalised the matter against accused no 2 who was convicted (as charged) and sentenced to a fine of N\$4 000 or 2 (two) years' imprisonment.

[2] Upon perusal of the proceedings sent on review I have come to the conclusion that there was insufficient evidence against accused no 2 for a conviction, and that the accused will be severely prejudiced if a statement of the magistrate first had to be obtained as required by law. It was accordingly decided to dispense with any further statement as provided for in s 304(2)(a) of the Criminal Procedure Act 51 of 1977.

[3] Both accused pleaded not guilty and in their respective plea explanations accused no 1 said that the ox in question was from their kraal 'in the inland', whilst accused no 2 proclaimed his innocence by saying that he had never taken possession of the said ox, that it was not found at his place, and that he was not involved. It is common cause that no evidence was adduced which brought accused no 2 in direct contact with either the ox or its meat after it had been slaughtered. From a reading of the court *a quo's* judgment it is evident that he was convicted on the basis of having acted with common purpose. The court deduced this from evidence presented about the cell phone of accused no 2 having been used during a transaction made with the buyer. By way of inferential reasoning the court found that accused participated in the slaughtering of the ox and that he was unable to give a satisfactory explanation. He was accordingly found guilty of possession of suspected stolen stock.

[4] The findings reached by the trial court is flawed in more than one way. Firstly, there is no evidence which remotely suggests that accused no 2 participated in the sale or killing of the subject ox and, secondly that he was found in possession of the ox or its meat. He was merely implicated by his cell phone having been used to make calls from to the buyer. Though accused no 2 does not dispute that the said calls were made from

his phone, he denies having done so himself and explained that during the relevant times he had left his cell phone at accused no 1's place where the battery had to be recharged. It was the undisputed evidence of accused no 2 and his wife, Innontia Shimbara that he would regularly have his cell phone recharged at the house of accused no 1 which had electricity, whereas there was none at his own house.

[5] Both were extensively cross-examined as to the exact time the phone had been with accused no 1 over a period of days in order to negate any explanation that accused no 1 could have made the calls from accused no 2's phone whilst it was with him. Not surprisingly the witnesses were not on all occasions able to explain the exact times when the phone was at accused no 1's place for charging, from which the court inferred that accused no 2 was unable to give a reasonable explanation for his alleged involvement and convicted him.

[6] In the absence of evidence to the contrary,<sup>1</sup> ownership of the ox belonging to one Simbo Masiye had duly been established and was not an issue in dispute as far as it concerns accused no 2.

[7] The second witness called by the State was Gideon Emile who runs a catering business as well as a butchery. She had her willingness to buy cattle from the public announced on the radio and was subsequently telephonically contacted by someone who offered her one head of cattle for sale. Though she could not initially remember the name of the person, she came to meet him later and it turned out to be accused no 1. He confirmed having called her earlier and then showed her a black and white coloured ox that was for sale. She had only met with accused no 1 and at no stage had any contact with accused no 2. After the ox had been slaughtered someone came up and asked accused no 1 whose ox it was, to which he replied that it belonged to his grandmother. He had also given the same explanation to Sergeant Sindimba when he

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<sup>1</sup> Accused no 1 absconded before he had given evidence.

was found in possession of meat. As it turned out, accused no 1's grandmother denied ownership of the ox in question. He then approached the potential buyer (Gideon Emile) and obtained from her the telephone number from which she was contacted during their dealings. He learned that it was that of accused no 2 who was then arrested and charged. According to him Emile told him that she expected to meet up with a person by the name of Mukutu, but that it was accused no 1 who took her to the ox that was for sale.

[8] I pause here to remark that Emile during her testimony was unable to recall the name of the person she had spoken to on the phone but, even if it had been a person going by the name of 'Mukutu', it is clear that accused no 2 does not go by that name, therefore it could not have been him. This notwithstanding, Sergeant Sindimba, in cross-examination, said that Emile had told him that she had been communicating with accused no 2. He said this indicated to him that they had 'acted with one criminal intent'. On a further question as to whether accused no 1 had told him that he (accused no 2) was also involved, he answered in the negative but added that he had been linked 'through [the] investigation'. There can be no doubt that the trial court, in the absence of any other evidence, solely relied on the testimony of the investigating officer when it came to the conclusion that accused no 2 was an accomplice.

[9] It is clear from the afore-stated that the testimony of Sergeant Sindimba as regards the identity of accused no 2, contradicts that of Emile. Not only was she unable to recall the name of the person with whom she had earlier spoken over the phone, she never implicated accused no 2 during her testimony. There can be no doubt that Sergeant Sindimba's evidence on this score is unreliable and seems to have been tailored to implicate accused no 2 for the sole reason of phone calls having been made from his cell phone. The trial court thus erred when it relied on the investigating officer's evidence in order to establish a link between the two accused as there was no reliable evidence in support thereof. Already at the close of the State's case it should have been

evident to the trial court that there was insufficient evidence to put accused no 2 on his defence.

[10] The only link between the two accused was the cell phone of accused no 2 that had been used to communicate with the buyer, Emile, on different occasions. It was explained by accused no 2 that he was not part of any of the discussions with Emile and his evidence on this score was not refuted in any manner. His explanation of him having left his cell phone at accused no 1's place for purposes of having the battery recharged was corroborated by his wife. In addition accused no 2 led the evidence of a herdsman, Makanga Hamutenya, who said that he had seen only accused no 1 collecting some cattle from the field and that accused no 2 at the time was at home. That also tends to show that he was not directly involved in either the driving of cattle to a specific place, or the slaughtering of the ox. Also clear from Emile's evidence is that accused no 2 was not present during the slaughtering, yet the court found that he participated. On this point the trial court clearly erred on the facts.

[11] It is settled law that the accused is entitled to his acquittal if the explanation he gives, considered against the body of evidence, is reasonably possibly true. In the present instance where evidence rebutting his story is lacking, the court could not have convicted on the evidence presented, and the conviction falls to be set aside.

[12] In the result, it is ordered:

1. The conviction and sentence in respect of accused no 2 are set aside.
  2. Accused Kangumbe Mutita is to be liberated forthwith.
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J C LIEBENBERG

JUDGE

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NN SHIVUTE

JUDGE