

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT,
PRETORIA

Case no: A87/2013

In the matter between:

10/12/13

LUCKY BOY NKOSI

APPELLANT

AND

(1)	REPORTABLE: <input checked="" type="checkbox"/> YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
10-12-2013	
DATE	SIGNATURE

THE STATE

RESPONDENT

DATE OF HEARING : 02 DECEMBER 2013

DATE OF JUDGMENT : 10 DECEMBER 2013

JUDGMENT

MANAMELA AJ

[1] Thembi Harriet Vilakazi lived at the material times at New Stand, Driefontein, Mpumalanga Province. She was a herdsman [no gender insensitivity intended] of 9 (nine) head of cattle belonging to her mother. The cattle were kept for subsistence and their milk was vital for maintenance of the children. Every evening or afternoon she would lock the cattle up in the kraal or pen and in the morning she would let them out. The afternoon of 06th November 2008 was no different. She locked the cattle up after counting them and being satisfied that all 9 (nine) were there, but she awakened the next morning to an open gate and an empty kraal. The cattle had disappeared. As this has never happened before, she immediately reported the matter to the police.

[2] This was to be the beginning of her long journey to find her cattle and the quest for justice. At the police station, she was informed that there was no transport ostensibly to assist her in looking for the cattle. She wasn't dispirited. She hitch-hiked her way for about 200 kilometres the very same morning to a stock auction in Standerton. She had heard the rumours in her neighbourhood before, that thieves sell their cattle-loot there and the auctions were on Fridays. She indeed found three of the cattle and again brought the matter to the attention of the police. She identified her cattle by their brand marks and colours: two of them red and the third, black and white. She even managed to talk to the buyer of her cattle, who promised to co-operate if she came to his place with the police. But her faith in the police wasn't to be repaid, as the police did not act fast enough to prevent two of the cattle being slaughtered the next day. She only recovered one.

[3] Lucky Boy Nkosi (the appellant) was at all material times before the regional not known to Thembi Harriet Vilakazi (the complainant). He is a 35-year old [as at the date of sentencing on the 29th September 2009] self-employed scrap-metal dealer and a married father of 7 children, the oldest being 14 years then. His wife was unemployed and the family depended on his R5000.00 monthly income. He pleaded not guilty to a charge of stock theft valued at R18 900.00 in the Regional Court for the Regional Division of Gauteng, Piet Retief (regional court). He was convicted and sentenced to 9 (nine) years imprisonment.

[4] The appellant was convicted of stock theft and sentenced to nine years imprisonment. He appeals against both the conviction and the sentence, with leave of this court. His conviction was significantly based on the testimony of the complainant, Ms. Vilakazi and Mr Makasonke Absalom Mtshali, a constable in the stock theft unit of the South African Police, Wakkerstroom (constable Mtshali). The complainant testified that, when she identified her cattle by their brand marks and colours, she had noted that they had another new brand mark. But before the regional court, she could not remember how the new mark looked like and could not even identify this mark on the removal certificate [exhibit "A" to the record]. However, she was unwavering on the colour and the other (old) brand marks.

[5] Constable Mtshali [with five years stock-theft unit experience from the seven years with the police] corroborated the complainant's identification of her cattle through their brand marks and colour. He also confirmed the existence of an additional or second (new) brand mark on the cattle. And unlike the complainant, he identified at the trial the new mark as the one on exhibit "A". However, under cross-

examination he conceded that, the brand mark on exhibit "A" was not entirely the same as described on his statement. He attributed this discrepancy to a mistake on the certificate by the auctioneer. He added that, the new branding on the cattle belonged to one Mahlangu and not the appellant's father, a Nkosi - ostensibly alluding to the difference in the initial alphabets of the surnames. He also stated that, he had agreed with his colleague, one inspector Adendorf to bring the impugned cattle to the police pound, but in vain. He told the regional court that, two of the cattle were brought by a speculator from Greylingstad and another by a speculator from Volksrust. He also testified that, the appellant denied selling any cattle at the auction.

[6] Before the regional court, the appellant admitted selling three head of cattle at the auction, one red, one black and the third red with white marks (spots). He told the regional court, these were his father's cattle and they bore his father's mark. He also told the regional court that his father passed on in June or July 2008, but this was proven a lie when a death certificate surfaced confirming his father's death as being in 1999. He also admitted that the police at the auction told him the brand marks were not his father's either, but there was nothing he could do about it. But he denied the animals he sold had another brand mark in addition to what appeared on exhibit "A". He also admitted that, he was being investigated in Sheepmoore for another stock-theft offence, when the state handed in a warning statement in that matter. It is contended now on appeal that, this was irregular and would have possibly influenced the court in convicting the appellant. As it would be, nothing turned on this.

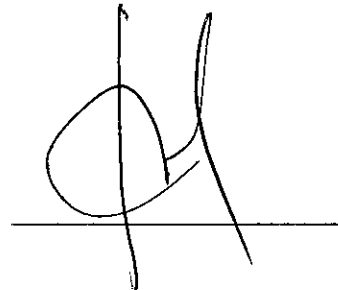
[7] The regional court accepted both the complainant's and constable Mtshali's versions. It rejected the appellant's version as being lies and improbable, and convicted him. This was the appellant's second conviction on stock theft charges. In February 2002 he was convicted of a stock theft charge and sentenced to a fine of R2000.00 or 8 (eight) months imprisonment. It was no wonder that, the regional court sentenced him to 9 (nine) years imprisonment.

[8] The appellant sought the intervention of this court through this appeal. In the heads of argument filed and in submissions made before this court, it is contented on behalf of the appellant that, there was no causal link between the impugned cattle and the cattle he auctioned. The complainant may have identified her cattle at the auction through their colours; pointed them out to the police and even spoke to the purchaser thereof, but this has nothing to do with the appellant, it is contended. Also that, the appellant sold three head of cattle at the auction and their branding was as on exhibit "A", which differs with the one identified on the cattle by constable Mtshali, although almost identical. It was also argued that, the auctioneer ought to have testified about what constable Mtshali labelled a mistake on his [the auctioneer's] side in recording the branding on exhibit "A". The complainant could not assist the regional court on the alleged new branding, even when exhibit "A" was shown to her. The aforesaid is fatal to the state's case and the conviction is unsustainable as the state had failed to prove the case against the appellant beyond reasonable doubt. The regional court misdirected itself in its analysis of the evidence, and in particular, by rejecting the appellant's version on the ground that it was lies and improbable in the light of the available evidence [**Shackell v S (380/99) [2001] ZASCA 72, [2001] 4 All SA 279(A) (30 May 2001)**].

[9] The appeal accordingly succeeds. The following order is made:

- (a) the appeal against the conviction is upheld;
- (b) the conviction and the sentence are set aside and the order of the regional court is substituted with the following:

'The accused is acquitted'

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K. MANAMELA

**(ACTING JUDGE OF
THE HIGH COURT)**

I agree

A handwritten signature in black ink, featuring a large, stylized 'T' followed by 'M' and 'K', positioned above a horizontal line.

T.M. MAKGOKA

**(JUDGE OF THE HIGH
COURT)**