



**CASE NO.: CA 40/2008**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**KATJUUKUA KAUAZUNDA**

**APPELLANT**

**versus**

**THE STATE**

**RESPONDENT**

***CORAM:* NDAUENDAPO, J et SIBOLEKA, J**

**Heard on: 2010 June 11**

**Delivered on: 2010 June 11**

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**APPEAL JUDGMENT**

**SIBOLEKA, J**

[1] The appellant and another appeared in the District Magistrate Court at Okakarara on a charge of theft involving four cattle valued N\$8,000,00. They pleaded not guilty. In their plea explanation the appellant said he did not steal or sell cattle belonging to the

complainant. Accused no. 2 said he did not know why he was reported. After trial they were convicted and referred to the Regional Court where they were each sentenced to ten (10) years imprisonment of which four (4) years was suspended for five (5) years on conditions of good behavior.

[2] The appellant, who was accused no. 1 in the Court below now appeals against both conviction and sentence.

[3] The matter came before this Court on the 11<sup>th</sup> of June 2010. Appellant appeared in person while Adv. Campher appeared for the respondent. Both accused were unrepresented in the Court below.

[4] After carefully considering arguments from both sides the conviction and sentence were set aside (this included the accused no. 2 who did not appeal).

[5] The Court had indicated at the time that the reasons for the ruling would follow later. These are the reasons.

The facts of the matter from the evidence placed before the District Magistrate at Okakarara are as follows:

The complainant is a certain Nagson Heuva. His stolen animals had the brand mark T151C which were swallow tail, a snip and half moon at the left ear. Their colours were grey, red and brown. This incident took place at his cattle post at Orunahi.

[6] The complainant is the biological father of the appellant. He does not know who took his cattle and was therefore unable to point a finger to any person in his evidence. According to him the community told him they have already interrogated the accused and they have admitted.

[7] Betel Rapingena is a family member of the complainant. He received a report about stolen cattle. He counted them and found that four were missing. He questioned the appellant about it, who, according to him admitted that he stole one cattle belonging to the complainant. My own underlining. This witness further told the Court that the appellant reported to him that accused no. 2 stole three cattle. The report further indicated that appellant sold the one cattle he stole at Okandjatu. No light was shed on the other three cattle.

[8] Cosmos Karuaihe testified that on the request of the appellant and in the presence of accused no. 2, he transported four cattle to an auction at Okandjatu. According to him these were accused no. 2's animals, my own underlining, and although no. 1 was also there, he does not know anything about him. He was paid N\$400,00 for the service. The animals were heifers, red in colour but he could not remember well. In cross-examination he said he could not testify as to whether the cattle were stolen or not.

[9] Tukamburaere Kahere testified that the complainant's cattle post is adjacent to his and that while at Okandjatu he saw four cattle that belonged to the home of the appellant.

My own underlining. He then referred the buyer, Manfred Tjizembua Tjirare to the appellant. However, the latter preferred to sell these animals at the auction and not to any individual.

[10] Licius Maherero is a member of the traditional authority at Orunahi where the two accused also reside. He testified that he knows them very well and that he was present at the meeting of stock theft when the two accused were questioned about the stolen cattle. After the meeting the traditional authority concluded that the appellant was the one who took the cattle to accused no. 2's kraal so that the latter could also organize transport. My own underlining. In cross-examination, both accused denied admitting to stealing any cattle.

[11] I will examine what the appellant and accused no. 2 admitted during questioning at Orunahi traditional authority. According to the witness Betel Rapingena the appellant admitted that he stole one cattle belonging to the complainant and that accused no. 2 stole three cattle. My own underlining. This admission by the appellant is in the Courts' opinion a confession. The Oxford Advanced Learner's Dictionary of Current English, Fifth Edition by A. S. Hornby, Editor: Jonathan Crowther, Assistant Editors: Kathryn Kavanagh and Michael Ashby, at page 240 defines the word, 'confess' and 'confession' as follows:

“confess ... 1(a) – to something, doing something ... to say or admit, often formally, that one has done wrong, committed a crime, etcetera ...”

“confession ... 1(a) a formal statement admitting that one is guilty of a crime etc. to make a full confession of one’s crimes ...”

[12] In *S v Msweli* 1980(3) at page 1162 E-F, the Court stated that:

“The test for the confession is well known. To be rated as such, the statement of an accused person must amount to an unequivocal acknowledgement by him that he is guilty of the crime in question. This means, as I understand the authorities, that he has unequivocally to admit all the circumstances which in law comprise the elements of the offence, without any qualification recognized by the law as a justification or excuse for his conduct.”

[13] It follows that, the statement the appellant allegedly made to the Orunahi traditional authority is an inadmissible confession because it lacks compliance with both sections 217(1) and 219 of Act 51 of 1977 respectively.

Section 217(1) states that:

“217. Admissibility of confession by accused. –

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence:

Provided - ...”

Section 219 states that:

“219A. Admissibility of admission by accused. –

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a

magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained - ...” My own underlining.

[14] The not guilty plea explanation of the accused was a complete denial of all the allegations made against them. Therefore, it is this Court’s view, that the state had the onus to prove these allegations contained in the charge which did not happen.

[15] In his submission before judgment the Prosecutor heavily relied on the alleged admissions made to the traditional authority despite the fact that they have been disputed during cross-examination. The complainant did not see the alleged stolen animals at Okandjatu to confirm that they were indeed his. A state witness, Cosmos Karuaihe testified that he transported the appellants’ cattle to the auction at Okandjatu. My own underlining.

[16] In his main heads of argument counsel for respondent stated:

“5.2 Appellant did not call any witness to verify his evidence.

5.3 Accused no. 2 did not testify.

It is argued that this is crucial to the case of both appellant and accused no. 2.

Appellant and accused no. 2 claims the cattle belongs to accused no, 2, but accused no. 2 the alleged owner of the cattle remains silent.

Surely accused no. 2 if it is claimed by appellant and accused no. 2 initially that it is his cattle must come and testify to that effect.

This is crucial to the case of appellant and accused no. 2.”

[17] It is this Courts' view that there is no duty placed upon the accused to testify or to say something especially where there is no allegation connecting him to the offence with which he is charged, and to which he would then be expected to furnish an answer.

[18] In *S v D and Another* 1992(1) SA 513 at page 514F, Frank, J, quoting with approval from *R v Differd* 1937 AD 370 at 373 stated:

“It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be 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.”

[19] In all the circumstances of this case the Court is satisfied that the respondent lamentably failed to discharge its onus of proof to the requisite standard in criminal matters; with the result that the appeal against conviction and sentence must succeed.

[20] It was the view of this Court that it will be an injustice to allow accused no. 2 to remain in prison solely for the reason that he did not appeal this matter and Adv. Campher conceded with this approach.

[21] Accordingly the conviction and sentence for both accused were set aside.



