

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**REVIEW CASE NO. 29 OF 2009**  
**District Record No. 1131 of 2008**

**In the matter between:**

**THE KING**

**VERSUS**

**MASHACK MHLONGO**  
**SIZWE DLAMINI**

**Date of hearing: 28 April, 2009 Date**  
**of judgment: 30 April, 2009**

**JUDGMENT ON REVIEW**

**MASUKU J.**

[1] Both accused persons were charged and eventually convicted of contravening the provisions of section 3 (a), as read with section 18 (1) of the Stock Theft Act, No. 11 of 1982. It was alleged that on 10 September, 2008, they, acting in furtherance of a common purpose,

unlawfully and wrongfully possessed a goat valued at E500.00, which was in the possession of one David Fakudze.

[2] The accused persons initially pleaded guilty to the offence, but when the Court set to ascertain their agreement to the constituent elements of the offence, it turned out that their plea of guilty was not unequivocal. The trial Court thereafter proceeded on the basis that they had pleaded not guilty. After conviction, they were each sentenced to 2 years' imprisonment without the option of a fine and were further ordered to compensate the complainant in the amount of E500.00 each.

[3] I have not qualms regarding the conviction. All that I need to point out is that in cases of stock theft, it is imperative that the beast allegedly stolen should be described in full by reference to colour, sex, brand marks, ear-marks, if any e.t.c. The allegations so set out in the charge sheet should find corroboration in the evidence led. There must be no lingering doubt that the beast allegedly found in an accused person's possession as it emerged in evidence is the one fully described in the charge sheet.

[4] Regarding the custodial sentence imposed, I have no doubt. I do, however, have difficulty with the Order for compensation. My difficulty stems from the non-observance of section 321 of the Criminal Procedure and Evidence Act 67 of 1938, which provides as follows:-

"(1) If any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon an application made by or on behalf of the injured party, forthwith award him compensation for such injury, damage or loss:

Provided that the amount so awarded shall not exceed the civil jurisdiction of such court.

(2) For the purposes of determining the amount of compensation or the liability of the accused therefore, the court may refer to the proceedings and evidence at the trial or hear further evidence either upon affidavit or verbal,

or the amount of compensation may be awarded by court in accordance with an agreement reached between the person convicted and the person to be compensated.

(3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to any sum awarded under subsection (1): Provided that if such private prosecution was instituted after a certificate by the Attorney-General that he declined to prosecute, the

court may order the costs thereof to be paid by the Government.

(4) If a court has made any award of compensation, costs or expenses under this section and such award has been accepted by the person in whose favour it has been made, such award shall have the effect of a civil judgment of such court.

(5) Any costs so awarded shall be taxed according to the scale, in civil cases, of the court which made the award.

(6) If any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from such moneys.

(7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made, and who has accepted such award, to any other civil proceedings in respect of the injury for which compensation has been awarded."

[5] It is clear from a plain reading of the above section, particularly section 321 (1), that the Order for compensation can be made by the Court only pursuant to an application made by or on behalf of the injured party. In the instant case, no such application was made and it appears that the Court ordered compensation *suo motu*. This is wrong and it not in keeping with the letter and spirit of the above section.

[6] The second difficulty I have is with the amount of compensation. Whereas the charge sheet alleged that the value of the goat was E500.00 and this was also testified to by David Fakudze, without being controverted thereon, the Court ordered each accused person to pay E500.00 to Fakudze. The total amount of the compensation was E1,000.00, which was twice the value of the goat. Clearly, the complainant was, through the instrumentally of a Court Order, irregularly issued, if I may add, unjustly enriched at the expense of the accused persons.

[7] Regarding the Court acting *suo motu* in ordering compensation, this Court has, on previous occasions had to set aside the compensation Order even on automatic review. See *R v Mhlanga 1970 - 76 S.L.R. 358* and a recent judgment of *The King v Moses Vusani Mvubu* Review Case No. 124 of 2009.

[8] For the foregoing reasons, it is my considered view that whereas I find that the conviction is eminently justified, and therefore in accordance with real and substantial justice, this is proper case in which to confirm the custodial sentence but to set aside the compensation order for not complying with section 321 of the Act aforesaid.

[9] In the premises I order as follows:-

9.1 The conviction of the accused persons be and is certified as being in accordance with real and substantial justice;

9.2 The custodial sentence of two (2) years' imprisonment is also certified to be condign in the circumstances.

9.3 The Order for compensation be and is hereby set  
aside.

**DONE IN CHAMBERS IN MBABANE ON THIS THE 30<sup>th</sup> DAY  
OF APRIL, 2009.**