



**IN THE HIGH COURT  
OF ESWATINI  
JUDGMENT**

Criminal Case No. 231/2018

In the matter between

**PHINEAS MCHITHENI MVUBU**

**APPELLANT**

And

**PRINCIPAL MAGISTRATE FLORENCE MSIBI  
N.O.**

**1<sup>ST</sup> RESPONDENT**

**CLERK OF COURT NHLANGANO  
MAGISTRATES COURT**

**2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Phineas Mchiteni Mvubu v Principal Magistrate Florence Msibi N.O. & 3 Others* (231/2018) [2018] SZHC 143 (06 July 2018)

**CORAM:** **MAMBA J**

**HEARD:** **06 JULY 2018**

**DELIVERED** **06 JULY 2018**

[1] *Criminal law – Sentence – Compensation order per Section 321 (1) of Criminal Procedure & Evidence Act 67 of 1938 (as amended). Principles applicable thereto – Amount of*

*compensation must either be agreed to between victim and the accused person or proved. Degree of proof required stated.*

- [2] *Criminal law – Sentence – Compensation for damages following conviction for theft – per Section 32 (1) of Criminal Procedure and Evidence Act 67 of 1938, can only be done on application by the Crown or victim of the theft.*
- [1] On 14 February 2018 the Accused, a 71 year old man, was tried and convicted of the theft of an ox. The ox belonged to Zelinah Khumalo of Hlathikhulu Government Hospital. She said the ox had gone missing in 2015 after it had been given or handed over to her as part of emabheka by a family from Ntshanini.
- [2] In her evidence, the complainant revealed that after the Accused admitted having killed the ox, she had suggested to him that he must replace it with another one or compensate her in the sum of E7000-00 “--- as he saw how big [her or] was’.
- [3] Upon conviction, the Accused was sentenced to pay a fine of E2000-00 failing which to undergo imprisonment for a period of 2 years. In addition to this sentence, he was ordered to compensate the complainant in the sum of E7000-00 (for the ox) he had slaughtered. This order was supposedly made in terms of Section 321 (1) of The Criminal Procedure and Evidence Act 67/1938. The Learned trial Magistrate fell into error in this regard.

First, there was no application made in Court for the order for compensation, either by the Crown or the complainant herself. Secondly, there was no proof or credible or sufficient evidence as to the value of the ox in question. That the complainant had at one stage demanded E7000-00 for it, was not the required proof.

[4] In *Sipho Vusi Maseko & Another v Rex* (84/2014) [2014] SZHC 156 (14 July 2014) at para 8 this Court said:

‘[8] It is noted that although there was evidence led by the crown on the value of the leg irons in question, there was no application made by the crown for the compensation thereof, after the conviction of the first accused. In *Sikelela Matsenjwa v Rex, Crim. Case No. 20/08*, judgment delivered on 19 February 2009, a similar situation arose and this Court quashed or set aside that Order. It held that:

“[25] This was a gross violation of the rules of procedure by the learned magistrate. First, there was no application by the crown on behalf of the Government for the compensation ordered by the Court. Secondly, there was no basis for ordering double compensation for the damaged handcuffs. Only one pair had been

damaged. Thirdly, the Magistrate had no power to withdraw the bail granted to the Appellant in the manner he did. The Appellant ought to have been heard before such a decision, adverse to him could be taken. Fourthly, assuming that the conviction for escaping was on an offence that had resulted in the damage or destruction of the handcuffs, at the conclusion of the trial, the learned trial Magistrate had no power to mero motu order the Appellant to pay the compensation. Fifthly, the value of the handcuffs had not been established by evidence and the E1000.00 was a figure arbitrarily determined by the trial Magistrate.

[26] Section 321(1) of the Criminal Procedure and Evidence Act 67 of 1938 states that:

“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.” (The underlining and emphasis is mine).”

Again in *R v Vivian* [1979] 1 ALL ER48 at 50, [1979] 1 WLR 291 at 293, the

Court stated that:

‘No order for compensation should be made unless the sum claimed --- is either agreed or has been proved. ---In the absence of agreement or evidence as to the correct amount which could be claimed --- no order for compensation should have been made ---.’

[5] For the above two reasons; *viz*, the want of proof of the value of the ox in question and lack of an application for such compensation; the order for compensation made by the Court *a quo* was incompetent and is hereby set aside.

[6] For the foregoing reasons, the following order is made:

- (a) The conviction of the Accused is hereby confirmed.
- (b) The sentence meted out by the lower Court is hereby confirmed, and
- (c) The order for compensation is hereby set aside.



MAMBA J

**FOR THE APPELLANT:**  
**FOR THE CROWN:**

**MR. P.K. MSIBI**  
**MR. N. LUKHELE**