



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 123 OF 2017

KASPAN LOKITOWIAL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Cr. No. 268 of 2015 in the Principal Magistrate's Court at Kabarnet delivered on the 29th day of February, 2016 by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant herein was charged with the offence of stealing stock contrary to section 278 of the Penal Code and, alternatively, handling stolen property contrary to section 322 (2) of the Penal Code. The particulars are that the appellant on the 9th day of April, 2015 at around 1700 hrs at Kotoron Village in East Pokot Sub-county within Baringo County, jointly with another not before court, stole sixteen goats valued at forty five thousand shillings (45,000/=) the property of Susan Kipturu. And on the alternative that the appellant on the 11th day of April, 2015 at Kapturo Trading Centre in Baringo North District within Baringo County, otherwise than in the course of stealing, dishonestly retained sixteen goats valued at forty five thousand shillings (45,000/=) the property of Susan Kipturu knowing or having reasons to be stolen property.

2. the appellant herein appeal against conviction and sentenced passed on by the trial magistrate and appealed with the following grounds of appeal:

1. That the trial magistrate erred in both law and fact by relying on prosecution evidence full of contradictions.
2. That the trial magistrate erred in both law and facts by convicting me on a case which was not water tight since there was no recovered exhibits from me.
3. That the trial magistrate erred in both law and facts by not considering that the recovered exhibits 'money' was from the witnesses and I was not a culprit.
4. That the trial magistrate erred in both law and facts and law by not considering that there was no agreement, receipt or permit recovered from the witness that they were actually the buyer if not thieves.
5. That the trial magistrate failed in both law and facts by relying on false evidence adduced and a photograph without the said assailants by only indicating the livestock.

3. In support of his grounds of appeal the appellant through his written submissions submitted that:

The trial magistrate erred by not considering that the charge sheet was totally of contradiction upon the prosecution relying on the charge of handling while the prosecution's evidence indicates that he charged the accused with the offence he is forcing and the trial magistrate did not highlight the meaning of facing which does not relate to the charge.

The trial magistrate erred also by not presenting the photographs and attach with the court proceedings and with the said certification of the letter CID Nakuru KSS/3174/2015 as stated to satisfy and to prove to reasonable doubt.

The photographs highlighted are not pictured at the time of prosecution evidence setup.

The nature of the alternative charge is stealing stock and the same charge of handling stolen property does not make the nature of the said offence according to the prosecution's evidence.

There was no witness who stated that the appellant handle stolen and was at the scene before the said transaction.

The allegations of PW1 cannot be found where it states that the appellant had handled the said goats. The evidence of PW1 is different from that of PW2.

p. 12 line 7 shows the setup of the evidence of PW2 was wrong according to the allegations, in that he was not at the scene of transaction that it was his first time to see the appellant.

The evidence PW3 shows there are no specified names he used only boys which is unknown. At p. 14 the witness testified said he sent two (2) boys by the names Jeremiah Kemboi and Willy Lochokei. Calling through phone yet the person did not testify as a prosecution witness.

The said purchaser had not present the agreements or any documents relating to the transaction between the seller and the buyer.

The evidence of PW4 cannot show any agreement showing that the county revenue authority give out receipt of revenue to the buyer, in order to find the deposit he highlighted of Ksh.100,000/= and Ksh.7,000/=. There was no witness who witnessed the transaction.

The prosecution's evidence is contradictory.

The trial magistrate did not give any reason for rejecting my defence.

4. In reply Ms. Kitilit Counsel for the DPP made oral submission and stated that:

Prosecution opposes the appeal.

The charge is one of stealing stock contrary to section 278 of the Penal Code. Prosecution called a total of seven witnesses. He was charged with another not before the court.

In his submission, the appellant states that the charge was not proved.

PW4 stated that he had bought goats from the appellant 16 goats and had agreed to pay Ksh.48,000/=. they only Paid Ksh.17,000/= together with PW2 and agreed that the appellant and the other person not before the court to pay the balance the following day. The appellant was during arrest found with the money because it was PW4 who told the police to arrest the appellant. Accused was arrested with Ksh.16,000/= in his pocket. PW1 the complainant who returned home and found her 16 goats were no longer there, she received a call that 16 goats had been recovered and were at AP camp. She identified all the 16 goats as hers. She said she did not know who had taken her goats.

PW2, the Chief corroborated that she reported the loss of her goats. The Chief got information that the goats they had been looking for had been found somewhere and the members of the public had gone to the home and arrested the person who informed the Chief that he had bought the goats from the appellant.

PW5 and PW4 mentioned the same amount of Ksh.16,000/= and the prosecution proved its case.

Identification of the appellant

The Chief Pw2, PW4, and PW5 positively identified him and they knew him even before the incident.

The sentence

The appellant was sentenced to serve six years the court considered that he was a first offender. The sentence was lenient.

5. The prosecution had a total of 7 witness who testified in evidence of the offence charged to the accused as follows:

1. **PW1** Susan Kipturu

"I am a resident of Chemolingot. I am a Ward Administrator Lipulo Ward. On 9/2/2015 about 5pm I went home after work. I had found a few goat at home. I had sent my son to go and look for the other goats and he came back with a few and 16 were missing. We searched but we did not find them and we had slept.

The following day we searched and found foot paths towards Kositei area.

I asked the boys to continue searching and I took boda boda to Kositei area. I had rung the area chief but I did not find them. I had gone to Kositei and I continued to search.

I had met the Kositei Chief and we continued to search and elders were assigned to search and we went home.

Later i received a call and I was informed that the goat had been recovered and they were at Bartabwa Police Station.

The goats had slept at the police station from Friday to Saturday.

All the 16 goats were recovered and they were brought home by police officers and i was able to identify them.

The accused was on the police motor vehicle when the one goat brought home. The goats were photographed and released to me.”

Cross-examined by accused

“I saw you for the 1st time on the G.K Motor vehicle. You are the one who was arrested over the theft of my goats. I do not know whether there is any person who saw you steal the goats.”

2. PW2 Kemboi Jeremiah

“I am a resident of Chemolingot. I work as a boda boda rider. On 10/4/2015 at about 6 pm I had received a call from Susan. I went to her home and she informed me that the goats had disappeared and she had sent children to look for them but they had not found them.

I had gone with Susan to Kositei area and we had met the area Chief and Susan PW1 had explained the Chief gave us four men to assist us. We searched but we did not find them.

We had reached Kapturo area and the residents informed us that they had seen goats at the area with two strangers and that the goats had gone to Bartabwa area.

I went to Bartabwa and I had found the said goats at the centre. I knew the goats before they had been stolen. The goats were with one man who had been arrested by members of the public. There was one person who had purchased the said goats and he was asked to go and find the person that had sold the goat to him. The said purchaser had stated that he has not paid for the seller the entire amount and so he was to come back. We went and slept.

The following day the person who had sold the goats had come to the centre and he was arrested.

We had taken the goats back to the owner. They were identified and photographed 16 in number.”

Cross-examination by accused

“We did not find the goats with you. The purchaser is the one who stated that you were the one who sold him the goats. The said man is not in court.”

3. PW3 Joshua Akeno

“I am the Chief Kositei Location. On 10/4/2015 I was at Katigit village at 1pm when I received a call from Susan Kipturu, ward administrator who informed me that her goats had been stolen then previous day. She stated the foot prints had gone towards Kositei Location. I went to Kositei and I reached there at 2pm and I talked with elders and Susan came there. I made inquiries and I was informed that the goats had gone to Kositei area and boys had followed the said goats. I decided to send more men to follow.

I received a call from my village elder Nyangatiany who informed me that some goats had been taken to Kapturo by two boys. I asked him to notify elders about it.

I sent two elders to go ahead and check the said goats. I had sent two boys Jeremiah Keoi and Willy Lochokei to go ahead with Lokorei to where the said goats had gone.

I went back to Chemolingot at about 6pm I received a call that the goats had been found at Bartabwa and identified.

I asked the area Chief one Peter to have the goats impounded and taken to the Police Station.

On 12/4/2015 I went with the Police to Bartabwa to see the goats and the suspect. We went to Barturo Police Post where we found the 16 goats, 10 he goats and 6 she goats.

The suspect was shown to us and I was able to identify the accused, he comes from my area of jurisdiction and we had then taken him Nginyang Police Station.

The goats were taken to the owner Susan and she was able to identify them.

Cross-examination by accused

“I know you well. We are from the same location. You were not found with the goats. The person found with the goats stated that he had purchased them. The said purchaser had gone to Kapturwa where he had arrested you.”

4. PW4 Charles Chelimo Yegon

“I am a resident of Chemoi, I am a business man I sell and buy goats. I carry out the same business within Kipsereman area. I know Kaspani the accused herein for many years, he is my neighbour. On 10/4/2015 at 6am I received a call from Kaspani the accused herein, he informed me that he had goats for sale. I asked him to bring the goats to Kapturo. I went to Kapturo and I met the accused there with goats while in the company of one boy. The goats were 16 in number.

I was with Michael another business man. We purchased the 16 goats at Ksh.48,000/=. I had Ksh.10,000/= and the other person Ksh.7,000/=. We paid the accused Ksh.17,000/= and asked him to come for the balance the following day at the centre.

We left the two at the centre and went with the goats towards Kipsereman. Midway I looked at my phone and I saw missed call from Peace Chairman, Nyangatiany.

I rung him and he informed me that goats had been stolen and they were looking for them 16 in number. I informed him that I had purchased 16 goats and they should come and see them. I went back with the goats to Kapturo where I had left the accused.

I met Police Officers on the road and I informed them that the person who had sold me the goats was at Kapturo centre.

I met the chairman and the owner of the goats as we went to Kapturo. I asked them whether they had found my person on the road and they said that they had not.

I met the KPR Officer and asked them whether they had seen the accused and they stated that they had not.

I slept at the centre the following day I met the accused and I asked him to come for his balance at Kapturo.

The accused had come to the hotel where I was and we were given tea and porridge.

I sent one buyer to call police officer and the officer came and we went to the police station. The goats were brought to the station. The accused had spent Ksh.1000/= out of the money that we had paid him, he then gave us back the balance of Ksh.16,000/=. ”

Cross-examined by accused

“I know you well to your home in Kositei area. We had purchased the goats within the centre. You have stayed within the area for many years. You are the one who had the goats. There were many people at the centre who saw you with the goats. There are no County Officers at the centre where I purchased the goats very few goats were sold within the centre. We sometimes exchange goats with no money and we pay later.”

5. PW5 Kakuko Sikayang

“I am a resident of Limpur I am a Peace Chairman within Nginyang Division. I know Susan Kipturu she is a County Officer. I know the accused he is my neighbour. On 9/4/2015 I was at Kapturo Peace meeting with people for Peace we ate goat and slept there. At the meeting the accused had passed at the school field with 16 goats. In the evening he Chief rung me and informed me that some goats had been stolen. I informed him that I had seen some goats with the accused at Kapturo. I asked the Chief to come to Kapturo. I had then gone to Bartabwa where the goats had been taken to. I met the police officer with the said goats together with the person that had purchased them.

The person that had purchased stated that he had not been paid fully that the person that had sold was to come for the balance. The following day the accused herein came for the balance and he was arrested.

The accused had used Ksh.1000/= and had Ksh.16,000/= which he had been paid by the purchaser.

We slept at Kapturo at the following day Police officers came took him to Nginyang Police Station.”

Cross-examined by accused.

“I had followed the goats together with other people. I found you at the centre with the goats while in the company of Lotowili Kamsong before you sold the said goats. Lotowili is at large, you were at Kapturo with the goats on Friday before you sold them to two people. I do not know where the people you sold the goats to. The person who purchased the goats from you was refunded his Ksh.16,000/= and he is claiming Ksh1000/= from you.

The goats were sold on Friday by you and they were recovered on Saturday. The purchaser had not paid you the entire purchase price.”

6. **PW6** Michael Karueni

“I am a resident of Kapturo a business man in livestock. The accused before had sold me goats on 9/4/2015 at Kapturo centre. On that day I was meeting with the Chief for Kapturo area after the meeting one person informed me that there were people who were selling goats at Kapturo centre. One person by name Sote informed me that he wanted to buy the said goats but he was unable to pay the entire price. The goats were 16 in number.

We had paid Ksh.17,000/= and the accused was to receive balance on the following day as he knew Sote.

We had taken possession of the goats and while going home Sote was informed that the goats had been stolen. We decided to take the goats back and we left them at the AP post. Later we heard that the accused had been arrested.

I went to Bartabwa and I recorded y statement. I later went to Kapturo police post.”

Cross-examined by accused

“Arap Sote had met you while you had the goats. I was with Sote when you sold us the goats. I paid Ksh.17,000/= and Sote was to pay the balance the following day. We had shared the goats with Sote. You were recovered with Ksh.16,000/= when you were arrested.”

Re-examination

“I had paid money for the goats so that Sote could purchase the goats we gave the money to the accused.”

7. **PW7** No. 235297 Inspector Bentny Mwinzi

“I am the Officer commanding Nginyang Police Station. I am the Investigating Officer in this case. The goats were stolen at Katigit area and they were recovered within Baringo North. The goats were 16 in number and belonged to ward administrator one Susan. On 12/4/2015 a Sunday in the morning the area Chief together with the complainant had reported the theft of the said goats and they had been recovered in Kapturo area.

One subject by name of Kaspani had also been arrested. I went to Kapturo area North Baringo where we found the suspect the accused herein.

The goats were identified by the owner and we took photographs of them and handed the goats back to the owner.

I recorded statements for the witnesses and I took the accused to Nginyang Police Station where I charged the accused with the offence he is facing before the court.

Cross-examined by accused

“The goats were found at Kapturo

I was not there when the goats were recovered. The witness stated that you were the one who had the goats. They were persons whom you had sold the goats.”

6. The accused appellant herein as **DW1** gave an unsworn statement in Pokot and English interpretation as follows:

“My name is Kaspan Lokotoywola. I am a resident of Emotoi and Tugwa within East Pokot. I am a herdsman.

O the day of the incident I was with my cattle; on weekdays I leave my cattle with a relative. On the date of arrest I had gone to Kapturo centre to pick seedlings and as I was there police officers had come and they took me to the camp and one Nyangatiany came and stated that I was to pay for the goats but I declined because I was not found with the said goats.

The said Nyangatiany asked me to sale my cows and pay but I declined.

Police officers from Nginyang had come and they took me to the police station and I was charged.

This was a frame up by Nyangatiany as he wanted me to give him our cows. Two witnesses Charles and Yego were the ones who were found with the goats and not me. When the two testified they stated that they were the ones who purchased the goats but you cannot sale without ID card. The two differed on their evidence in regard to the amount they paid me as one stated that they had given me Ksh.15,000/= and the other stated Ksh.17,000/=.”

7. The trial magistrate in his judgment stated that upon the hearing of the evidence it was clear that there was no witness who saw the accused steal the said 16 recovered goats. He considered issues for determination as follows:

“Whether it is the accused who sold the goats to PW4 and PW6 herein.

As per the evidence of PW2 he was informed by members of the public that the goats had been seen with the boys. PW5 stated too that he had seen the accused with the goats at Kaprturo school field while in the company of Lotowil Kamsing and PW4 confirmed too that the accused was with one other boy when he sold them the goats. It was then true as per the charge sheet that the accused with one other person who was not before court when they stole the goats.

PW5 stated that he had seen the accused with the goats on 9/4/2015 before he sold them. The goats had disappeared on 9/4/2015 when the complainant released them to the fields and PW4 and PW5 had purchased them on the same day 9/4/2015. That they said that it was the accused that had stolen them on as he was seen within there and sold them on the same day that they were stolen.

The accused’s defence did not contradict the prosecution’s evidence as PW4 stated that he had paid Ksh.10,000/= whereas PW6 had paid Ksh.7,000/= which gave a total of Ksh.17,000/= and PW5 had witnessed when the Ksh.16,000/= was recovered from the accused and handed to PW4 and PW4 was claiming Ksh.1000/= from the accused which then confirmed that the accused had received Ksh.17,000/= from PW4 and PW6 and not 15,000/=.

The accused’s defence that Nyangatiyany wanted him to sale his cows holds no waters as Nyangatiyany was not the complainant nor was that issue raised on cross-examination.

The prosecution had established a prima facie case against the accused person that he was the one who stole the complainant’s goats on 9/4/2015 as he was seen with them by PW5 before he sold them to PW4 and PW6. That was the same day when the goats were reportedly stolen as per PW1’s evidence.”

Issue for determination

8. The issue for determination is whether the appellant was guilty of theft or whether he was a guilty handler of the goats subject of the charge.

Determination

9. Having considered the evidence before the trial court in accordance with the principle of **Okeno v. R** (1972) EA 32, the court has determined that there was no evidence that the appellant stole the goats. There was evidence from the complainant PW1 that her 16 goats were stolen from her home at Chemolingot on the evening of 9th April 2015 and recovered on the 10th April 2015. This was confirmed by the evidence of the *boda boda* rider PW2 and the area Chief Kositei Location where the animals were recovered and by the Peace chairman of Nginyang Division, PW5 all of whom were involved in the search for the stolen goats.

10. Although the goats had been sighted at Kapturo under escort of two strangers according to PW2, it was only PW4 who knew the accused as a neighbour for many years and PW6 both of whom purchased the goats from the accused and PW5 who had seen the accused together with another young man named Lotowili Kamsong, who was during the trial at large, with the goats that could place the goats in possession of the accused at Kapturo.

11. The purchasers PW4 and PW6 had paid part payment of Ksh.17,000/- of the total purchase price of 48,000/- for the 16 goats, and this money was recovered from the appellant in the sum of Ksh.16,000/- he having spent Ksh.1000/-.

12. The principles for application of the doctrine of recent possession are well known, and were set out in **Arum v. R** (2006) 1 KLR 233 as follows:

“1. The property was found on the suspect:

2. *The property was positively identified by the complainant;*

3. *The property was stolen from the complainant; and*

4. *The property was recently stolen from the complainant.”*

13. The principle is that if stolen recently stolen goods are found in possession of an accused who cannot explain his possession, there is a presumption that the person is the thief or handler of the stolen goods. In **Chaama Hassan Hasa v. Republic** (1976) KLR 6, 10, the Court (Trevelyan & Hancox, JJ.) put the matter as follows:

“[W]hat is generally referred to as the doctrine of recent possession, often expressed in this way: **that where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (through not by way of retaining).** But this doctrine does not apply to all the cases. What has been laid down is that, where it is proved that property has been stolen and very soon after the stealing the accused has been found in possession of it, it is open to the tribunal of fact to find him guilty of stealing, **or of handling it by way of receiving;** see *R v Seymour* (1954) 38 Cr App Rep. 68;

14. The appellant faced an alternative charge of handling stolen property. In **Mungai v. Republic**, (2006) 2 KLR 262 considered the

ingredient of the offence of handling as follows:

1. Under section 322(1) of the Penal Code (cap 63), a person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

15. As the appellant did not offer an explanation as to his possession of the stolen goats, the court may in accordance the court may properly infer guilty knowledge that the goats had been stolen. See **R v. Aves** (1950) 34 Cr. App Rep 159 considered in **Chaama hassan Hasa**, supra. The appellant's alibi defence is in view of the overwhelming evidence of the prosecution witnesses who place the goats in the possession of the accused and his companion at large not acceptable, and must be dismissed.

16. The court, therefore, finds that the appellant had handled the goats otherwise than in the process of stealing knowing them to be stolen and assisted in their disposal by sale to the prosecution witnesses PW4 and PW6. There is evidence in the testimony of PW4 who is a businessman in the buying and selling of goats that the appellant had assisted in the sale of the goats as he had called him and told him that he had goats for sale.

17. I would, accordingly, find the appellant guilty of the alternative charge of handling stolen property contrary to section 322 (2) of the Penal Code. Taking into account the large number of the stolen goats suggest an organized crime in the theft and sale of goats, which as observed by the trial court is rampant in the region, the court considers a deterrent sentence appropriate. For this reason, while altering the finding of the court as to the conviction for theft of the goats, to one of handling stolen property, I would maintain the sentence at imprisonment for six years imposed by the trial court having regard to the pre-trial detention of almost one year.

Orders

18. The appellant's conviction for the offence of theft contrary to section 278 of the Penal Code is quashed and substituted with a conviction for the offence of handling stolen property contrary to section 322 (2) of the Penal Code, and for which the appellant is sentenced to serve imprisonment for a period of six years from 29th February 2016 the date of conviction and sentence in the trial court.

Order accordingly.

DATED AND DELIVERED ON 1ST DAY OF AUGUST, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Appellant in person.

Ms. Kitilit, for the Director of Public Prosecutions.