REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 90 OF 2011

(From the original conviction and sentence in criminal case no. 1857 of of 2008 the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – PM)

HAROUN MAGATI ….....….....…..……APPELLANT

VERSUS

REPUBLIC.....….....….....…RESPONDENT

JUDGMENT

1. The Appellant herein was a prisons officer based at the G. K. Prison Malindi in the year 2008. On 16th December, 2008 he was jointly charged with another (Joash Onyango Omwancha) with Stealing a motor cycle contrary to Section 278 (A) of the Penal Code. The particulars stated that between the 5th day of December and 6th of December, 2008 at Central Estate in Malindi location within Malindi District of the Coast Province, they jointly stole a motor cycle, Bajaj Sport, Registration No. KBB 151N valued at Kshs. 135,000/- the property of Margaret Mumbua Kyalo.

2. In the alternative, they were charged with Handling Stolen Goods contrary to Section 322(2) of the Penal Code. Particulars of the charge were that on the 11th day of December, 2008 at Majengo Estate in Malindi Location within Malindi District of the Coast Province, otherwise than in the course of stealing, they dishonestly undertook the retention of one motor cycle Make Bajaj Sport Registration No. KBB 151N valued at Kshs. 135,000/- knowing or having reasons to believe it to be stolen.

3. Following a full trial in the Lower Court the two accused were convicted and sentenced to pay a fine of shs. 60,000/- or in default to serve two years imprisonment. Dissatisfied with the outcome, the Appellant through his advocate Mr. Gekanana, filed an appeal against the decision of the learned magistrate. He raised four grounds as follows:

    "1. THAT the learned Honourable Magistrate erred both in law and fact in that she did not properly consider the evidence of the prosecution witnesses and the Appellant's evidence.

2. **THAT the learned Honourable Magistrate erred both in law and fact in that she shifted the burden of proof of innocence on the Appellant**

3. **THAT the learned Honoruable Magistrate erred both in law and fact in that she relied on circumstantial evidence which was not strong enough to prove the Appellant's guilty.**

4. **THAT the learned Honourable Magistrate erred both in law and fact in that she convicted the Appellant on insufficient grounds which did not meet the threshold of proof beyond any reasonable doubt."**

4. The state opposed the appeal. It was agreed that the same be disposed of by way of written submissions.

5. As the first appellate court, this court is obligated to re-evaluate the evidence tendered in the Lower Court and to draw its own conclusions. However, while so doing the court must always bear in mind that the Lower Court had the advantage of seeing and hearing witnesses testify (see **Okeno vs R 1972 EA322**).

6. The prosecution case was as follows. The Complainant Margaret Mumbua Kyalo (PW1) was a resident of Malindi in the material period. She owned a motor cycle registration no. KBB 151N, make Bajaj, purchased from a shop called Mustapha Glass, where Ayub Ochieng Juma (PW3) worked. Having used the motor cycle on 5th December, 2008 the Complainant parked it outside her apartment at Malindi Complex and retired for the night. She did not go out all day the following day. In the evening when she did, she found the motor cycle missing. After unfruitful inquiries with her neighbours she reported to police.

7. She also sent out feelers through several persons, including a friend Mohamed Swaleh Khalid (PW2). She also notified PW3 who, allowed PW2 to take photographs of similar motor cycles at the shop. On 10th December, 2008 PW3 while pursuing his phone with a telephone technician (the 1st Accused in the Lower Court) found a motorcycle without number plates hidden in the house of the said technician. Upon confirming the particulars of the motor cycle as PW1's, PW3 informed PW1 of his findings on 11th December, 2008.

8. PC. Andrew Onyango Okal (PW4) with another officer on receiving the information proceeded to the house of the technician, (other accused) at Majengo on the morning of 11th December, 2008. The said accused refused to open the door forcing police to break into the house where they retrieved the suspect from under a bed. The motor cycle was recovered. It had no number plates and ignition cables appeared severed. The other accused was arrested. Upon interrogation he named the present Appellant, claiming he had taken the motor cycle to his house. Police summoned the Appellant. He too was interrogated. He made several telephone calls and eventually produced the number plates to police. He too was placed in custody and was charged alongside his co-accused in the Lower Court.

9. In his defence the 1st accused in the Lower Court continued to attribute the motor cycle's presence in his house to the Appellant. The Appellant gave a sworn statement and called one witness, Erick Ochieng Achieng CO II Malindi G. K. Prison (DW4). The Appellant stated that he owned a Tuk tuk vehicle registration number KAX 157U, which he gave as security to Gwayo SACCO in January, 2008 to obtain a loan as he needed some cash. One of his guarantors was DW5, a brother to the 1st Accused in the trial. Although the Appellant repaid the loan in the agreed period, a dispute arose over chargeable interest resulting in the seizure of his security. After it was released to him he demanded refund for over payments on the loan. DW5 threatened him of dire consequences, including loss of his job. The 1st accused in the Lower Court, and brother to DW5 was the Appellant's friend. The Appellant had allowed him to borrow a motor cycle he owned, prior to his arrest.

10. On 11th December, 2008 police summoned the Appellant to Malindi Police Station saying that someone had been arrested in connection with a motor cycle he claimed to be his. Believing it was about a traffic offence, he went to the station. When shown the motor cycle the subject of the present case he said it was not his. The motor cycle had no number plates, and at that point, DW5 demanded shs. 100,000 from him or else he would suffer. Police asked him to convince the 1st accused to produce the number plates. Using a telephone number given him by the 1st accused, the Appellant got a third party to bring the number plates to the station. Police however used this

recovery against him. DW4 said the Appellant was assigned on night duty at the Malindi District Hospital during the material period.

11. In the first ground the Appellant faults the manner in which the trial magistrate analysed the evidence and the respective findings relevant to the invocation of the doctrine of recent possession. The trial magistrate clearly understood and correctly applied the legal principles applicable to the case. It is a fact that there was no direct evidence linking the Appellant with the theft of the motor cycle. In the sense that nobody saw him steal it or found it in his possession. His prosecution was based on two pieces of evidence, namely, that he was incriminated by his co-accused and secondly, his possession of the registration plates in respect of the motor cycle a few days after the theft.

12. The trial magistrate made a finding that the 2nd Accused was in possession of and had the number plates delivered to the station after he sent for them. The trial court considered the evidence carefully before arriving at this conclusion. I can find no reason to fault the finding as indeed the court was entitled to disbelieve the Appellant's long-winded explanations. Thus the doctrine of recent possession was properly invoked. The trial magistrate relied correctly, in my view on the decision in **Malingi v R [1989] KLR 226**. In that case Bosire J (as he then was) stated:

> **"The doctrine (recent possession) is one of fact. It is a presumption of fact arising under Section 119 of the Evidence Act... So as applies to the offence of theft or handling, recent possession raises a presumption of fact that one in possession is either the thief or guilty receiver (R V Hassan s/o Mohamed (1948) 25EACA 121). "The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver."**

13. The finding of the trial court as regards the facts of possession can only be faulted by the appellate court where its finding is patently wrong (See **R v Francis Otieno Oyier cr. App. 158 of 1984).** The record of the trial shows that when the Appellant was summoned to the police station, he made a phone call and eventually had the number plates brought to the station by a third party. This is proof that he was knowingly and constructively in possession of the number plates. The fact that he was on night duty on the night of theft and subsequently does not detract from this finding as there is no actual evidence of the precise time of the theft itself whether on the night of 5th December, 2008 or in the day on 6th December, 2008.

14. In the circumstances, the defence complaint that the court shifted the burden of proof to the Appellant is not tenable. The Appellant was found to have been in possession of the number plates missing from the stolen motor cycle at recovery. As was held in the **Malingi Case**;

> **"By application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the item complained of. The doctrine being a presumption of fact is a rebuttable presumption. The accused is called upon to offer an explanation in rebuttal which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.."**

The State has argued correctly that the Appellant failed to give a reasonable explanation of his possession of number plates of a recently stolen motor cycle.

15. The Appellant's explanation was that his friend and (co-accused) together with the accused's brother who is an advocate (DW5) fabricated the evidence against him, arising from a dispute over interest payable on a SACCO loan he had taken. This defence was not canvassed with any of the prosecution witnesses during the trial. And neither were the allegations put to DW5 by the Appellant during the defence hearing.

16. The Appellant was at pains to explain how he ended up voluntarily at the police station. He said

he was summoned ostensibly because his motor cycle which the co-accused had borrowed from him had been involved in a road traffic accident. On arrival police requested him to persuade the 1st accused who was in custody to reveal where the number plates for the motorcycle were. Once more these matters were not put to the prosecution witnesses, especially the investigating officer, PW4 when he testified. But the appellant admitted that he called a 3rd party to bring the number plates to the station.

17. It is rather unbelievable that police instructed a suspect to interrogate another suspect in custody but subsequently turned against him after he had "assisted" them. Equally contrived is the allegation that DW5 and his brother (co-accused) went into all this trouble to fix the Appellant over a loan disagreement.

18. The allegations of the existence or involvement of a second motor vehicle also appear contrived. No records in respect of such motor cycle, or even its registration particulars were given by the Appellant. The evidence on record shows that only one motor cycle – PW1's stolen one-was involved. The Appellant's assertions concerning a second motor cycle is purposely invented to explain his voluntary presence at the police station and to distance him from PW1's motor cycle.

19. DW5 explained in his evidence that the Appellant was lured there ostensibly to "finish" the matter as his co-accused had named him in connection with the stolen motor cycle. And while it is true that accomplice evidence is evidence of the weakest nature, the Appellant's conduct suggests his knowledge and involvement with the stolen motor cycle was as deep as his co-accused's. That is the only reason why he had the number plates in question. He was a principal offender in terms of Section 20 of the Criminal Procedure Code which states:

> **"(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-**
>
> **(a) every person who actually does the act or makes the omission which constitutes the offence;**
>
> **b) every person who does nor omits to do any act of the purpose of enabling or aiding another person to commit the offence;**
>
> **c) every person who aids or abets another person in committing the offence;**
>
> **d) any person who counsels or procures any other person to commit the offence"**

20. The Appellant played a culpable role in the theft of PW1's motor cycle hence his retention of the number plates. His defence was properly rejected. As a member of the disciplined forces, he should have known better.

Reviewing all the evidence I am satisfied that the trial court drew the correct inferences and the Appellant's conviction for the offence charged was justified in the circumstances of this case. This Appeal has no merit and is accordingly dismissed.

Delivered and signed at Malindi this **10th** day of **December, 2013** in the presence of the appellant, Mr. Gekanana for him, Mr Nyongesa for the State.

Court Clerk – John

C. W. Meoli

JUDGE