REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 364 OF 1989

BETWEEN

MALINGI KATANA MALINGI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from the Original Conviction and Sentence of the Resident Magistrate's Court at Kilifi (P M Ndungu Esq R M)

in

Criminal Case No 919 of 1989)

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October 13, 1989, **Bosire J** delivered the following judgment.

The conviction of the appellant, Malingi Katana Malingi, of the principal count of stock theft contrary to section 278 of the Penal Code was based on his alleged possession of one goat a few hours after it had been stolen from its owner, Gidion Nguwa, (PW1), from his home at Majajani Village, Mavueni Location of Kilifi District.

The goat in question was one of several goats which PW1 had locked in a shed on the evening of 25th November, 1988. The next morning the goat and two others were missing. The goat had a brand mark which PW1 had made.

At 5 a.m. on 26th November, 1988, the appellant was seen with another person with three goats. The appellant was holding one while his companion had two. They were at Gongoni where the appellant usually waited for a lorry from Vipingo Sisal Estate to pick him up. The appellant was then an employee of the Estate. Justo Adenya (PW2) was the driver of the lorry. Kabuko Mugunya (PW3) was its turnboy. Both testified that they saw the appellant with a goat which was outside the court on the date of trial. He was in the company of another person who had two other goats.

PW3 refused the appellant to board the lorry with the goat. PW2 intervened and allowed the appellant and his companion to load the three goats. The appellant had pleaded with PW2 to allow him and his mate to

board the lorry with the goats. The goats were dropped at a place called Shauri Yako. The appellant did not alight. His companion did and went with the goats. The goat the appellant had was later recovered from that man's residence.

In the instant appeal several grounds have been raised to challenge the propriety of the conviction. These are, that the evidence was at variance with the particulars of the offence, that possession by the appellant of the goats was not established; that the doctrine of recent possession was improperly invoked by the trial magistrate the prosecution having failed to establish certain pre-conditions essential before its application, among those being whether the appellant had knowledge that the goats had been feloniously obtained; that the complainant having retaken possession of the subject goat before the appellant was prosecuted the appellant could not be said to have been in recent possession of it, and lastly that the goat was not positively identified as that of the complainant.

I propose to first deal with the issue of law raised with regard to the doctrine of recent possession. The doctrine in one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:

> "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (*R – v – Hassan s/o Mohamed* (1948) 25 EACA 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.

By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why 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.

Mr Wahome, counsel for the appellant submitted on, principally, the authority of *Jethwa & Another v R* [1969] EA 459, that before the doctrine can be invoked the prosecution must first prove facts which show that the accused either knew or had reason to believe that the article received was stolen or otherwise feloniously obtained. That is so if the offence being considered is handling stolen property. The passage which Mr Wahome quoted to me was quoted out of context. Duffus JA was specific. He was commenting on the doctrine of recent possession as it applied to a receiver not the thief. He stated at p 462 letter I:

> "As it happened the defence called no evidence at all and it was only in his considered judgment that the magistrate found that the witness was not a receiver but was a person in innocent possession of the cassette player. This finding is, as we have pointed out, really a finding of fact, but Mr Kapila for the appellants has endeavoured to attack this finding on questions of law in various respects. He submitted that the trial Court and the first appeal court did not consider the doctrine of 'recent possession' as it applied to the witness Ahashan."

Then followed the passage which Mr Wahome quoted to me. The passage must be read as dealing with the doctrine of "recent possession" as applies to receivers only, which is what Ahashan was.

With the foregoing in mind I must now consider the appellant's case. It was not disputed that he was lifted on the morning of the material date, namely, at 5 a.m. on 26th November, 1988. He was not alone.

There were other workers of the Vipingo Estate. The appellant admitted he went to ork on 26th November, 1988. He called one witness to say he slept at his residence on the night of 25th and 26th November, 1988. The witness Chai Katana (PW1) testified that on the morning of 26th November, 1988, he was with the appellant when he got lifted on the Vipingo Estate lorry. He was not then an employee of the Estate and was merely depending on the appellant to request the lorry driver to offer him a lift.

DW2 said he saw two people with three goats and that the goats were carried in the lorry up to Shauri Yako. It is the place where he also alighted. He did not know the two people who had the goats.

There is, therefore, no doubt that three goats were carried on the Vipingo Sisal Estate lorry on the morning of 26th November, 1988, from Majajani and were dropped off at Shauri Yako. The driver of the lorry and his turnboy testified that it was the appellant and another person who had possession of the goat. The turnboy was emphatic that he personlly had declined to take the goats onto the lorry until the driver asked him to take them on. The driver said that he allowed the goats onto the lorry at the request of the appellant.

On the other hand the appellant's witness testified otherwise. He stated that two people known to him had the three goats.

The trial magistrate saw and heard the witnesses testify. He preferred the story of the driver and his turnboy, but rejected that if the appellant and his witness. He found as fact that the appellant and another person had the three goats one which the complainant identified as one of his three stolen goats. That was a finding based on credibility of witnesses. Such a finding can only be assailed by an appellate court where it is clear that no reasonable tribunal could make such a finding or the finding is clearly wrong (see *R v Francis Otieno Oyier,* Cr Appeal No 158 of 1984).

In the instant case I have no basis for interfering with the finding that the appellant had possession of one of the three goats at 5 a.m on 26th November, 1988. The possession was only a few hours after the complainant's goats had been stolen. The duty was on the appellant to offer a reasonable explanation to rebut the presumption of fact raised by that possession that he was either the thief or a guilty receiver.

The appellant denied possession and put forward an alibi. The trial magistrate rejected it, properly so, in my view, because the evidence was clear that he had one of the three goats. The evidence of possession displaced the alibi defence.

There was one other legal point raised. Mr Wahome submitted that the exhibited goat was not properly identified by the complainant as his. There was clear and uncontroverted evidence, which the trial magistrate accepted, that the goat had two different marks on its body; the first which had been affixed by the complainant, and the second, by the thief. The complainant saw the recovered goat long before the trial date and satisfied himself and the police that the goat was his. His identification of the goat was not challenged at the trial. Had it been he would have demonstrated further why he said the goat was his. It was no derogation to say that the goat he had identified was outside court. It was made available just in case the appellant and indeed the trial magistrate should want to see it and be shown identification marks. They did not wish to see those marks, and so the complainant should not be blamed for it.

Was the appellant an innocent possessor of the goat he was seen with? The goat was seen with him only a few hours after it was stolen. He was not alone. He was with another man who had two other goats. The only inference to draw is that the appellant was either the thief of it or an accomplice. The evidence shows he was the principal. Consequently I come to the conclusion that he was properly convicted as the thief.

Another legal point was the contention that the evidence was at variance with the particulars as regards the number of goats stolen. As rightly pointed out by Mr Metho, the learned Principal State Counsel, the appellant was not charged alone. He was charged jointly with others not before the court. That being so, there is no variance at all between the evidence and the particulars of the charge. I affirm the appellant's conviction and dismiss his appeal in that regard.

As regards sentence, 20 months cannot be said to be excessive by any measure. It should be recalled that until November, 1987, stealing stock carried a minimum sentence of 7 years imprisonment. In the instant case three goats were stolen. The appellant had an accomplice. Two of the goats were not recovered. Clearly the sentence was merited. The appellant's appeal against sentence must also fail. It is dismissed. The result is that the appellant's appeal fails in its entirety.

Order accordingly.

Dated and delivered at Mombasa this 13th day of October 13, 1989

S.E.O BOSIRE

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR