



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO 14 OF 2019

FREDRICK KARISA CHARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the state

J U D G M E N T

1. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with Section 296(2) of the Penal Code.
2. The particulars of the offence were that on the 28th November 2015 at around 9.15 P.M at Mwisho wa Lami village of Watamu location within Kilifi County, jointly with others, robbed **Rita Fossa Caca** her iPad, gold ring, a bag with assorted clothing and unknown amount of money all valued at Kshs.200,000/= and at the time of such robbery, they shot dead the said Rita Fossa Caca.
3. He pleaded not guilty. After a full trial, he was found guilty as charged and convicted and sentenced to serve twenty (20) years imprisonment.
4. He has now appealed against both conviction and sentence. The appellant's case is founded upon the following grounds:
 - i. *The trial magistrate erred in law and fact by convicting him on mere assumptions and speculations.*
 - ii. *That the trial magistrate erred in law and fact by not seeing that the prosecution largely failed to prove the entire case beyond all reasonable doubt.*
 - iii. *The trial magistrate erred in law and fact by not considering the social and personal circumstances of the appellant.*
 - iv. *The trial magistrate erred in law and fact by not appreciating the appellant's defence*

Appellant's Submissions

5. On the first ground of appeal, the appellant through his submissions admitted that he was indeed an employee of the deceased and that on the material day he was at work. He however submitted that he did not commit the crime and that there exists no iota of evidence linking him to the crime. It was his point that the investigations die not indicate that he had been communicating with the robbers either physical or through mobile phone and that he had no criminal records prior to the crime. He made refence to the fact that the trial magistrate observed in her judgement that the evidence with regard to the 2nd accused (appellant herein), was circumstantial in nature. The appellant thus submitted that the evidence relied upon was largely circumstantial and that the same was unreliable and unsatisfactory and should therefore not stand.
6. Furthermore, the appellant submitted that he was at the dining table at the time of the crime. He thus questioned the proposition that prior to the dinner, he had been placing a ladder on the wall that was ultimately used by the robbers to scale the wall and rob and kill the deceased **Rita**. It was his submission that he was at the toilet and came back shortly. He thus questioned how the court came to rely on 20 minutes as the time that the appellant was away considering that it came from only one witness, (**PW7**) and that there were contradictions over the same. In any case, the appellant submitted that since the ladder was inside the compound, the court should have ascertained how the robbers

climbed into the compound in the first place. Furthermore, the appellant observed that no one actually saw him put the ladder against the wall.

7. Finally, the appellant contended that had he been interested in stealing from the deceased, some signs would have existed way before the occurrence of the crime and in the absence of the same, there cannot be any link between him and the crime.

8. He thus urged court to allow the appeal.

Analysis and Determination

9. The above grounds of appeal can easily be condensed into a single issue for determination and that is whether the trial court erred in convicting the appellant based on circumstantial evidence.

10. Taking into account that this is a first appeal, it is the duty of this court as the first appellate court, to reconsider the evidence, evaluate it anew and draw its own conclusions or findings in order to satisfy itself that there is no failure of justice. This is trite law. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions. The aforesaid duties of the first appellate court were clearly set out in the Court of Appeal case of **Okeno vs Republic Criminal Appeal No. 32 of 1972 EA. LR.**

11. Appraising the facts before court, **(PW1), Mgani Mboko**, a pathologist, testified on the 1/8/17 and produced the post-mortem report confirming that the deceased Rita Fossa ceca died as a result of excessive bleeding from the vital organs as a result of a bullet that went through her chest.

12. **(PW2), Jackson Musaji**, a watchman, also testified on the same day that on the material day at about 8.15PM, he was called to dinner by the deceased and her family members and sat at the table on the verandah. At the time, he testified that the appellant had not arrived but joined them about 2 minutes later. It was his testimony that after three minutes, they heard some noise from the smaller house and thought that it was a cat. It was his testimony that immediately thereafter, six men appeared wearing black clothes with their faces visible and he noted that he identified the one with the pistol who shot the deceased. He further testified that the other men had pangas and rungas and beat up the rest of the Italians and led one of them to a room where they stole other items before leaving through the gate. **(PW2)** also testified that when the police came, he took them round the compound and they found a ladder outside the compound that they suspected the robbers used to access the compound. On cross, **(PW2)** testified that at the time of the crime, the appellant was with them and that he came later. Further, he noted that the appellant was not from the toilet. He also noted that he saw the 2nd accused very well saying '*toa pesa*' and also testified that the appellant had the gun.

13. **(PW3), CPI Erick Mogendi** from the DCI only testified as regards taking photographs of the crime scene. He did not have any testimony as regards the appellant.

14. **(PW4), IP Victor Lebo**, conducted the identification parade and testified that **(PW2)** identified the other accused person by voice recognition and physical appearance and further testified that the other accused and **(PW2)** were not in the cell together but different ones.

15. **(PW5), IP Elisha Kiptoo** testified as regards the other accused person and not the appellant.

16. **(PW6) CPL Ryan** Israel also testified as regards the other accused person and not the appellant.

17. **(PW7), Monica Zane Letto** testified in Italian but there was an interpreter. She testified from Italy and **Lara Leonardo** the interpreter, interpreted the same from English to Italian. **(PW7)** testified that on the 14th of November 2015, she and six others left Italy for Kenya and on landing in Mombasa, they proceeded directly to Watamu where there was an Italian Charity for orphans called **Poline**. She testified that after the days activities, they settled down for dinner together with staff at the house. It was her testimony that when they were ready to eat, the appellant was not there and they had to send someone to get him. He arrived noting that he was in the bathroom before they began eating. It was her testimony that while eating, they had some noise and thought it was a cat only for about 5 people to show up and started beating them ordering them to lie down. **(PW7)** further testified that one had a gun and the other had rungas, corroborating the evidence of **(PW2)**. She also confirmed that the lighting was proper and she could see the attackers but not their faces as they had covered them except one who stole **(PW7)** wedding ring. She testified that the appellant also lay down as ordered and that at this point one of the robbers shot the deceased Rita. Further, she testified that the attackers asked for money and that she, **(PW7)**, decided to take them to her room and give them everything she had. She testified that when the police arrived, they found a ladder inside the compound against the swimming pool, which was not there earlier on. This contradicts the testimony of **(PW2)** who testified that the same was outside the compound. **(PW7)** testified that one of the attackers was the appellant and noted that she thought that he was the one that put the ladder against the wall. She testified that the reason she believed so was because the appellant went missing for 20 minutes and also because he wanted money to buy a plot and house. Further, it was her testimony that on the material day, the appellant and the deceased had argued and that the appellant had requested money only for **Rita** to decline the same. On cross, **(PW7)** testified that she did not see the appellant place the ladder on the wall and that everyone could access the area where the ladder was placed against the wall. Further she testified that she did not see the appellant arguing with the deceased and that the appellant had been away for at least 20 minutes. On re-examination, she testified that she did not see the appellant for about 20 minutes but noted that she did not have her watch but that it's the same time it takes to cook pasta.

18. **(PW8), Paola Lenchini** testified that the appellant had worked as an employee for them and that he worked well for sometime and thereafter he started asking for money from the deceased. She noted that this troubled them since it was his first time asking for the same. It was her testimony that the deceased confided in her that she carried her handbag along because she was afraid that the money would be stolen but that the deceased noted that the appellant could not do anything. She corroborated the testimony of **(PW7)** that while eating they saw six men appear from the swimming pool direction and started shouting and beating them. It was her testimony that they all lay down under the table and that they took her wedding ring before taking her **(PW8)** to every part of the house trying to steal but they found nothing

from the witness. **(PW8)** further testified that **(PW7)** asked them what more they wanted and they noted that they wanted euros and they took **(PW7)** to her room and stole the euros and other items. Finally, **(PW8)** testified that the appellant worked with them when they had big groups around.

19. **(PW9) Michelina Di Lella**, corroborated the evidence of **(PW7)** and **(PW8)** that they left Italy for Kenya and proceeded directly to Watamu. Further, she corroborated the evidence of **(PW2)**, **(PW7)** and **(PW8)** that on the material day, they had children at their house and the children ate and left. At about 8.00pm, she noted that they were cooking dinner and the appellant was not there but called him and he arrived after a while. **(PW9)** testified that after a while, they heard a noise and thought it was a cat only for about five to six attackers to arrive, steal and shoot the deceased. It was her testimony that they all lay down on the floor including the appellant. She thus testified that the attackers stole from her and the others before escaping. She admitted that she did not know how long **Fredrick** was away. On cross, she noted that the appellant came after a while and that it could have been five minutes but couldn't clearly recall. Finally, she testified that the appellant had said he had gone to the toilet when asked where he had been.

20. **(PW10) Giovanni Folasesa** also corroborated that he left Italy for Kenya and proceeded directly to Watamu. **(PW10)** also testified that on the material day, while preparing and setting up dinner, the appellant was not present. On inquiry, **(PW10)** testified that the appellant was in the garden but that he came and sat at the table. Shortly, they saw the attackers coming from the back with machete and their faces covered. They proceeded to beat **(PW10)** and as a result broke his shoulder. **(PW10)** testified further that they shot her daughter and at this point he fainted and woke up when the police arrived. He further testified that after repairing the ladder, he put it where it used to be placed. He further testified that he did not know who put the ladder where it was found against the wall. On cross, **(PW10)** testified that the appellant was not at the dinner table during dinner but came after being called and claimed that he was in the toilet. However, he testified that the appellant came from the opposite direction of where the toilet was located. Finally, he testified that the appellant had assisted him in repairing the ladder.

21. **(PW11) Luigi De Mella**, corroborate the evidence of **(PW7)**, **(PW8)**, **(PW9)** and **(PW10)** confirming the chronology of events leading up to the killing of the deceased. **(PW11)** also reiterated the fact that the appellant was not at the dinner table but came after being called and claimed he was in the toilet. **(PW10)** also confirmed that the attackers robbed them all. On cross, **(PW11)** testified that it took the appellant 2 minutes before coming back. He however testified that the appellant was absent when they were cooking and a lot of time had passed. When asked about this time, he said 5 minutes at most. He also testified that the appellant came from the side of the door of the kitchen where the toilet is behind the kitchen and the rooms.

22. Finally, **(PW12) CPL Erick Kathurima** from DCIO Watamu testified that he was the investigating officer in the case. He testified that on the material day he proceeded to scene and found that the attackers had gained entry into the compound by climbing the perimeter wall. He further testified that he interviewed the witnesses and found that the appellant had been pestering the deceased about money. Further he testified that at dinner they converged to take dinner but the appellant was not present but came back and informed them that he was in the toilet. It was his testimony that after a few minutes, they heard from the pool area some noise and they thought it was a cat only for attackers to come in and start beating them and stole from them before killing the deceased. He testified that he charged the appellant because of mistrust and the fact that he used to disturb the deceased for money.

23. On cross, **(PW12)** testified that the robbers gained entry by scaling the walls and that the ladder was lying next to the guest house about 3-4 meters from the pool. On re-examination, **(PW12)** testified that the robbers were assisted from the inside the compound to get in without the visitors hearing the commotion.

24. The trial magistrate after submissions of the prosecution put the accused persons to defence. The appellant in this regard testified on the 5/9/18 that he was an employee of the deceased. He testified that on the material day after preparing dinner for the guests, he went to the toilet and came back. After 5 minutes, he testified they heard a thud noise and they all thought it was a cat only for robbers to come in and order them to lie down. It was his testimony that the robbers started beating them up and stole from them. The appellant noted that he lost his phone in the process. It was his testimony that he was taken to Watamu police and placed in cell together with **Maitha** and **Jackson**. He noted further that they were taken to court and he alone was removed from the cell and thereafter taken to an office where he testified, he was beaten by 6 investigators who claimed he was the one who knew what happened and should thus come out. He however protested his innocence and was taken back to the cell where he found **Maitha** and **Jackson** had been released. On cross, the appellant testified that the deceased was his employer and that they were well conversant with each other. On re-examination, the appellant testified that the wall was already broken and that he assisted **(PW10)** to fix the ladder. He further testified that he asked money from **Rita** because she had taken time to pay him and were leaving that night so he demanded his money. Finally, the appellant testified that at the time of the crime, he was lying next to **Maitha** and **Jackson**.

25. Having appraised the facts above, it is clear that the following facts remain undisputed:

- 1. That the deceased received visitors on the 14th of November 2015 from Italy who proceeded to Watamu directly.*
- 2. That on the material day, there were children at the deceased house i.e Serena Homes whom the deceased had hosted due to her charity work.*
- 3. That the robbers entered the compound and proceeded to rob the visitors and ultimately fatally shooting the deceased Rita.*
- 4. That the said robbers were armed with a gun, rungas and pangas.*
- 5. That the appellant was away prior to the dinner but was called and came.*
- 6. That the robbers came a short while after the dinner began.*

26. There is however dispute as regards the following issues:

1. **How did the robbers gain entry to the compound? Was it by scalling the wall or through the wall that the appellant noted was broken?**
2. **Who put the ladder against the wall?**
3. **Was the ladder inside or outside the compound?**
4. **How long did the appellant take to come back to the table after being called?**
5. **How long was the appellant away from the table?**

27. The above questions are critical because there is inconsistency as regards their details. This is because, all witnesses confirmed that they are not aware who put the ladder on the wall. None saw the appellant put the ladder there. It is only (PW7) who testified that she thought the appellant put it there. (PW12), the investigating officer was also not sure who put the ladder there. It would thus be difficult to say to legal certainty that it was the appellant who put it there. Whereas it is clear that the appellant assisted (PW10) to repair the ladder, there is no evidence to suggest that he put the ladder there.

28. Secondly, all witnesses especially (PW2), (PW7), (PW8), (PW9), (PW10) and (PW12) testified that they had noise from the direction the attackers came from and assumed it was a cat. What was this noise? The appellant testified that the noise was a thud. Could it be that the attackers climbed the wall and fell into the compound or at least one of them did fall hence the noise that the witnesses heard?

29. Third, whereas (PW2) testified that the ladder was outside the compound, (PW10) and (PW12) testified that the ladder was inside the compound. In fact, (PW12) testified that someone from the inside assisted them. This in my view is contradictory and conflicting evidence that cannot be relied upon.

30. Fourth, there is dispute as to how long the appellant was away from the table. (PW7) testified that it was about 20 minutes but admitted that she did not have a watch. On the other hand, (PW9) testified that the appellant must have been away for at most 5 minutes but also testified that she did not know how long the appellant was away. (PW11) on the other hand testified that (PW11) was away for 2 minutes. Taken altogether, it is clear that there is no time indication as to the amount of time the appellant was away since the witnesses heavily contradicted themselves and thus, I find their testimony to be inconsistent. In this regard, I am guided by the decision of court in **Phillip Nzaka Watu vs. R [2016] eKLR**, where it expressed;

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.” (emphasis supplied)

31. In the instant case, though appreciating that the witnesses mentioned above were relatives to the deceased and were burying another relative when this incident happened and thus may not have been in a very lucid mind frame where they could follow the sequence of events that happened so abruptly and unexpectedly, and narrate them later with scientific exactitude, I note that the time difference is too huge to be ignored by this court. 20 minutes is too far from 5 minutes as it is from 2 minutes.

32. In addition, there is no evidence that was tendered by the prosecution to show that the accused participated directly in the crime or that he personally committed these acts. This was in fact recognized by the trial court in its judgement. In fact, (PW2), (PW7), (PW8), (PW9), (PW10) and (PW11) all confirmed that at the time of the crime, the appellant was present. It was also not contested that the appellant lost his phone during the crime. The only evidence relied on by the prosecution and ultimately the trial court was the fact that the deceased had told the witnesses and in particular (PW7), (PW8) and (PW9), that the appellant had asked her for money and she was thus apprehensive that he would steal from her. However, on cross examination for example, (PW7) testified that she never witnessed any argument between the appellant and the deceased over money. In fact, the appellant himself admitted on defence that he demanded the money since the deceased owed him money and was departing that night. This evidence was never contested by the prosecution nor rebutted.

33. It is thus clear that there was no direct evidence linking the appellant to the crime and the robbery. Admittedly, the prosecution case against the appellant primarily rested on circumstantial evidence. In fact, (PW12) testified that the only reason he charged the appellant was due to mistrust and the fact that he used to disturb the deceased for money.

34. The question therefore is whether the circumstantial evidence was sufficient enough for the trial court to convict the appellant. After all, it is not uncommon for legal practitioners to attack and deride circumstantial evidence in criminal cases, almost suggesting that it has little probative value or at the best, rate such evidence as weaker, in comparison to direct evidence.

35. In **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, the Court of Appeal had this to say on this point:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

36. The Court proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction stating that: -

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;***
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;***
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.***

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

37. In the instant case the question is whether the evidence of (PW7-PW11) connect the appellant to the offence of robbery with violence. In particular, the circumstances as highlighted above and which were highlighted by the trial court are that:

- 1. The appellant demanded money from the deceased which he himself admitted***
- 2. Knew the ladder was functioning and had the opportunity to place the ladder against the wall***
- 3. Was absent from the eating table for an unknown period of time***
- 4. Emerged from the same direction that the robbers emerged from the same direction***
- 5. Knew that the deceased had money and the other witnesses had valuables***
- 6. The robbers went to the deceased room and broke into her suitcase and stole items that they did not do to any of the other witnesses an indication that they were aware what they were looking for and where to find it***

38. The trial magistrate held that the above circumstances lead her to an inference of guilt of the appellant and no other person. She further held that the target clearly was the deceased and the money and was thus satisfied that the appellant let the robbers into the compound and not the other staff of the house.

39. Having said that, it is my considered view that the magistrate erred in holding that the above circumstances lead to an inference of guilt on the part of the appellant and here’s why.

40. First, whereas it is true that the appellant demanded money from the deceased, there is no indication that he threatened the deceased or made her feel threatened or that her life might have been in danger. This is supported by the fact that (PW8) testified that despite being worried that the appellant would steal the money, the deceased admitted that the appellant wouldn’t do anything.

41. Secondly, whereas the appellant knew that the ladder was functioning and he had an opportunity to place the same against the wall, there is every indication that no one saw him do that and secondly, there is the fact that the perimeter wall was broken as visible in **Dext 2(b) and (c)**. There is thus the possibility that the robbers could have accessed the compound using these openings on the wall.

42. Third and as already discussed above, there is inconsistency and contradiction in terms of the time that the appellant was away from the table. In **Dickson Elia Nsamba Shapwata & Another vs The Republic, Cr. App. No. 92 Of 2007**, the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view I respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or

whether they go to the root of the matter.”

43. In my humble view, these inconsistencies on time go to the root of the matter. This is because, it is assumed that this is the period the appellant used to place the ladder against the wall. Thus, could it be done in 2 minutes? 5 minutes or even 20 minutes? In the absence of conclusive approximate time, it is difficult to apportion criminal liability on the appellant where there is doubt as to the time, he was away allegedly assisting the robbers. The Uganda Court of Appeal in **Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** which was quoted with approval by the Court of Appeal of Kenya in **Erick Onyango Ondeng’ vs Republic [2014] eKLR**, the court held that:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

44. In the present case and as regards the time the appellant was away, I find that the contradictions were grave and not satisfactorily explained and thus I reject the same.

45. Fourthly, there is also inconsistency as regards whether the robbers came from the same direction as the appellant. **(PW8)** testified that the robbers appeared from the swimming pool direction which was the same direction the appellant came from while **(PW11)** testified that the appellant came from the direction of the kitchen and that the toilet was behind the kitchen and rooms. Once again, this inconsistency is too glaring to be overlooked. Did the appellant assist the robbers and used a different route or did they follow him, that is he led them? There is no clear answer to either in which case, reasonable doubt is created.

46. Lastly, I find it odd that the magistrate noted that the appellant knew the deceased had money and where she kept it. I also find it odd that the magistrate provided a wrong account of the evidence that the robbers went to the deceased room and broke into her suitcase and stole items that they did not do to any of the other witnesses. The opposite is actually correct. There is no indication that the appellant knew where the deceased kept money or other valuables. In fact, it is clear that the deceased was not a regular employee but was hired when guests/visitors were many and around. She couldn’t therefore know where the deceased kept her valuables. There is further no indication that the deceased had notified the appellant where she kept her valuables.

47. In addition, it is not true that the robbers targeted the deceased alone. On the contrary, it is clear that the robbers harmed and injured other people including **(PW10)**, **(PW9)** and **(PW7)**. Furthermore, it is clear from the evidence that the robbers stole from **(PW7)** and **(PW8)** wedding rings. Furthermore, **(PW8)** testified that the robbers took her everywhere trying to steal but they found nothing from the witness. Moreover, **(PW8)** further testified that **(PW7)-Monica** asked the robbers what more they wanted and they noted that they wanted euros and they took **(PW7)** to her room and stole the euros and other items. They thus went to **(PW7)** room and not the deceased room. Thus, it cannot be said that the robbers knew where the valuables were and that they targeted the deceased.

48. Taken altogether, it is my considered view that the circumstances of the case do not in any way infer guilt on the appellant, are not definite and do not therefore form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the appellant and none else.

49. On the contrary, I find that the prosecution never discharged their burden of proof -beyond all reasonable doubt and thus conclude that the trial magistrate erred in convicting the appellant solely on circumstantial evidence.

50. In the result I find the appeal is merited and is hereby allowed. The conviction and sentence by the trial court are hereby nullified and set aside. The appellant be set free unless otherwise lawfully held.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF DECEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state

2. The appellant