



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEALS NOS. 88,89 AND 90 OF 2010**

**(Being an appeal from the decision of the Principal Magistrate Hon D. M. Ochenja on 5<sup>th</sup> August, 2010)**

**JAMES LOKOYEN ETIBOR.....1<sup>ST</sup> APPELLANT**

**JOHN MWANGI ALIAS SAMMY DOE.....2<sup>ND</sup> APPELLANT**

**BENARD KIPKORIR CHERUIYOT .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

1. The Appellants appeal to the Court of Appeal was referred for rehearing for the reasons given by the said court on 8<sup>th</sup> November 2018. This therefore shall be fresh appeal.
2. The appellants had been charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence was that on the **6<sup>th</sup> and 7<sup>th</sup> December, 2006 at Milimani Estate in Kitale town within Trans Nzoia district of the Rift Valley province, jointly with others not before court while armed with dangerous weapons namely pangas runigus robbed JOHN DANIEL KIPRUTO some unknown amount of money ,Television set make Sony 21 inch coloured , a three burner cooker , a mobile phone make Nokia 333 S/No. 350885807289237 and a Motor Vehicle Registration Number KAD 731Q make Peugeot 405 valued at kshs. 300,000 and immediately after the time of such robbery killed the said JOHN DANIEL KIPRUTO.**
3. The second count related to the 4<sup>th</sup> accused who was acquitted. When the same came up for hearing, the court directed the parties to file written submissions which the court has perused extensively. It must be noted that though the appellants filed separate appeals, the grounds essentially are similar and therefore this court shall deal with them simultaneously.
4. It is however necessary to summaries the evidence as presented during trial and thereafter analyse the same before reaching the necessary conclusions.
5. **PW1 Sgt. John Lelei** attached to the Scenes of Crime Kitale police station testified that he accompanied the rest of the investigators to the scene of crime at Milimani on the 7<sup>th</sup> December, 2006 where he took several sets of photographs which he identified in court as well as dusting the scene for finger and palm prints. He said that later they went to moisbridge where he also did the same exercise when the deceased Motor Vehicle was recovered.
6. On the 11<sup>th</sup> December, 2006 when his body was recovered at Kiminini river he again when there and took several sets of photos. He said that in total he took 34 photographs which he produced in his evidence.
7. **PW2 Joseph Kipkosgei Bargoiyet** was the driver to the deceased and he described to the court how he worked with the deceased on 4<sup>th</sup> and 5<sup>th</sup> December, 2006. On the following day the deceased was however missing and he learned later in the day that the car had been found at Moisbridge area. He said that the deceased body was found on the 12<sup>th</sup> December, 2006 and he saw it at the hospital.
8. **PW3 CPL. JACOB KASAINI** from Mois bridge police station testified that he was in his usual traffic duties with his colleague PC Abdi Wahab when they saw a car which had its door opened and there was nobody. They checked and found the ignition key as well as a panga and a knife and other assorted items. When they opened the boot they saw blood stains. The same was Reg. No. KAD 713Q. They then

informed the OCS who came with other officers and had the vehicle towed and investigations commenced.

**9. PW 4 Patrick Ngandu** a gazetted fingerprint expert examined the specimens handed over to him by pw1 and concluded that the same were fingerprints of all the appellants. He explained to the trial court how he professionally carried out his investigations which led to his positive conclusion.

**10. PW 5 Samwel Wabuge Soita** testified that he was a taxi driver owning Motor Vehicle Reg. No. KQJ 705 a Datsun. He said that he knew the 2<sup>nd</sup> Appellant who all along has been his customer. He said that on the 6<sup>th</sup> December, 2006 his vehicle had mechanical problems and it was in the garage. The 2<sup>nd</sup> Appellant called him from a mobile line he was not familiar with. This was around 12 a.m. He told him of his predicament and he told him that he could get another means.

11. He went on with his work and in March, 2007 he was called by the police and he narrated to them the incident of that particular day. He stated that he learned that the telephone handset used by the 2<sup>nd</sup> Appellant belonged to the deceased.

**12. PW 6 Joseph Ndwiga Mbogo** who owns a garage identified the deceased motor vehicle at kitale police station and further stated that the deceased was his customer for a long time.

**13. PW 7 Richard Ngoni Mukenya** who works with the Ministry of Livestock stated that on the 19<sup>th</sup> June, 2006 while on his way home and riding his bicycle he was attacked by thugs who stole from him and caused serious bodily injuries. He reported the matter at Wabukhonyi police post. The following day he managed to recover his bicycle but lost several personal effects and documents.

14. While at home on the 2<sup>nd</sup> of July, 2007 police picked him and he accompanied them to the station where he was able to identify several of his mobile phones and other personal effects he had lost during the attack. He was told that the same was recovered from some boys. He said that he did not know the Appellants. He said that he knew the deceased who used to frequent their offices.

**15. PW 8 Shem Kibitok Amaya** the Chief of Kibomet location testified of what he did when they heard of the recovery of the deceased car at Moi's Bridge. He also testified in regard to what he saw at the home of the deceased at Milimani when he went with the police officers. He said that the house was in bad shape as it had been ransacked and things thrown everywhere. The police took out several photos as well as dusting the same for fingerprints.

16. He also said that they went to moisbridge where the car was recovered and saw the bloodstains inside the boot. They looked for the body everywhere but several days later the same was recovered and he viewed it at Cherangany hospital.

**17. PW 9 Geoffrey Sifuna** a clerk at Nzoia auto spares testified that the 3<sup>rd</sup> appellant who was a security officer was his tenant at Lessos paying a monthly rent of Kshs. 1000. He said that he called him on the 7<sup>th</sup> December, 2006 at around 11.00 p.m but he did not take his call. He went the following day and he found his wife who told him the he had left and taken his jacket while telling her that there was a problem. He later learned that he had been arrested.

**18. PW10 Sgt George Otieng** was the investigating officer in the matter. He proceeded to the scene after receiving information from the chief of the area PW9. His centre of focused dwelt on the evidence of PW1 especially finger prints findings. He visited the house where he saw the damage and the blood stains and the exhibits recovered. He also recorded statements from the witnesses which led eventually to the arrest of the Appellants. The said witness eventually produced all the exhibits which had been marked.

19. He stated that the 1<sup>st</sup> Appellant was a security guard at the deceased premises that day and he disappeared thereafter and was arrested several days or months later. The 3<sup>rd</sup> Appellant on his part was the driver who drove the deceased vehicle which was found abandoned at Moi's Bridge. The 2<sup>nd</sup> Appellant was the one who called PW 6 the taxi driver. He was apparently rearrested at the police station having been earlier arrested for an offence of stealing a phone.

**20. PW11 Dr Joseph Imbenzi** from Moi Teaching and Referral hospital produced the post mortem report on behalf of Dr. Koslova who concluded that the cause of the deceased death was severe head injury and stab wounds in the stomach.

21. When placed on his defence the 1<sup>st</sup> Appellant gave unsworn evidence and stated that he went to work on 8<sup>th</sup> February, 2007 along Laini Saba where he has a kiosk. He took stock and went to town to buy other items. At 9.30 am some people came and arrested him on the grounds of not renewing his license. He was arrested and taken to the police station where those who were able to pay Kshs. 6000 were released. He stayed in the cells for two months and later charged in court. He denied ever seeing his co-appellants.

22. The 2<sup>nd</sup> Appellant gave sworn evidence and stated that he was a shopkeeper at his mother's shop by 6<sup>th</sup> December, 2006 till 10<sup>th</sup> December, 2006 when he left for Eldoret till February, 2007. He said that he fought with someone at Makuti Club and in the process he lost his mobile phone. He was arrested and booked at the police station temporarily. He was later released and rearrested for being a robbery suspect and later charged.

23. The 3<sup>rd</sup> Appellant said in his unsworn evidence that he deals with computers. He said that he was arrested on the 19<sup>th</sup> March 2007 while asleep in his house. He was escorted to the station where he was interrogated and later charged.

#### **ANALYSIS AND DETERMINATION**

24. As stated earlier the parties did file written submissions which this court does not intend to reproduce here save to state that the grounds

raised by the Appellants are similar in nature if not in substance.

25. It is evident that there was no eye witness to the incident and thus the trial court heavily relied on circumstantial evidence and specifically the expert witnesses. Save for the 2<sup>nd</sup> Appellant the rest of the two gave unsworn evidence.

26. The only evidence that places the three at the scene were the finger prints which were proved by PW1. The entire process and evidence gathering was not disputed by the appellants. The first appellant was the deceased watchman and he disappeared after the incident. His unsworn evidence did not offer much as his landlord did confirm that he was nowhere that morning when he passed his house.

27. The 2<sup>nd</sup> Appellant was traced through the telephone call he made to the taxi driver using the deceased mobile phone. While cross-examining PW6, he did not deny that he knew him or was his regular customer. He was apprehended while at the police cells after being suspected of another criminal offence.

28. The 3<sup>rd</sup> Appellant was found to have been the driver of the deceased motor vehicle and his fingerprints were found at the said vehicle. His unsworn evidence did not help much.

29. The provisions of Section 21 of the Penal Code Cap 63 Laws of Kenya on common intent by the parties was clearly proved by the prosecution and well captured by the trial court. The fact that their finger prints were found inside the deceased house after the incident was a clear testimony that they were involved in the offence. Other than this what were they doing at the deceased house?

30. Granted that the 1<sup>st</sup> Appellant was a guard at the said house why did he disappear that morning even from his usual place of work till when he was arrested. This clearly leads to one irresistible conclusion that he was privy to what had transpired that night.

31. The 3<sup>rd</sup> Appellant could not as well explain why his fingerprints were in the deceased vehicle. The alibi evidence that he was away in Eldama Ravine could not be substantiated as there was no opportunity of being cross-examined.

32. In **REX VERSUS TABULA YENKA S/O KIRYA & 3 OTHERS (1943) 10 EACA 51**, it was held that

**“To constitute a common intention to prosecute an unlawful purpose.....it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”**

33. Since the only witness was the deceased, it can thus be concluded that the Appellants hatched the plot together and the technological advancement came to aid the deceased. In the absence of the fingerprint evidence it may have been difficult to establish that the Appellants were the suspects.

34. In a nutshell the case against the Appellants as proved by the trial court was established beyond the shadow of doubt and I do not see any reason to disturb it. These appeals by each of the Appellants are therefore dismissed for being unmeritorious. As proved by the post-mortem report the deceased must have met a violent and gruesome death.

**Dated signed and delivered in open court at Kitale this 7th day of August, 2019.**

**H K CHEMITEI**

**JUDGE**

**7/8/19**

**In the presence of:-**

**Mr. Omoria for Respondent**

**1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants present**

**Court Assistant – Kirong**

**Judgment read in open court.**