



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 41 OF 2014**

**GODANA ADANO ..... 1<sup>ST</sup> APPELLANT**

**GUYO ELLE ..... 2<sup>ND</sup> APPELLANT**

**GALGALLO GUYO ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case no. 759 of 2012 of the Chief Magistrate's Court at Isiolo – J.M. Irura – PM)*

**R.P.V. WENDOH AND J. A. MAKAU JJ**

**JUDGMENT**

The Appellants **GODANA ADANO**, **GUYO ELLE** and **GALGALO GUYO** (1<sup>st</sup> to 3<sup>rd</sup> appellants) were charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code CAP 63 of the Laws of Kenya.

The particulars of the offence were that on 19<sup>th</sup> January 2012 at Daballa Kurkura area in Maikona Location in Marsabit North District of Eastern province, the appellants, jointly while armed with dangerous weapons namely *rungus* and knives, robbed **WAKO GUYO** of 57 goats, 13 sheep and one donkey all valued at Kshs.518,000/= and at immediately before or immediately after the time of such robbery killed the said Wako Guyo.

The particulars in count two were that the appellants on 19<sup>th</sup> January 2012 at Damballa Kurkura area in Maikona Location in Marsabit District within Eastern Province while armed with dangerous weapons namely *rungus* and knives jointly robbed **NASIBO GUYO** 4 goats valued at Kshs.32,000/= and at or immediately before or immediately after the time of such robbery killed the said Nasibo Guyo.

The appellants further faced an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code CAP 63 of the laws of Kenya.

The particulars of the offence were that on 31<sup>st</sup> May 2012, at Burgabo area in Marsabit North District within Eastern Province otherwise than in the course of stealing, the 1<sup>st</sup> appellant, 2nd appellant and 3<sup>rd</sup>

appellant respectively dishonestly received or retained 18 goats and 5 sheep, 5 goats, 1 sheep and 1 donkey and 5 goats and 1 sheep knowing or having reason to believe them to be stolen goods.

The Appellants were tried and at the end were convicted and sentenced to death. The Learned Trial Magistrate however did not make a finding on the alternative counts and there being two counts of robbery with violence left the second count in abeyance. The Appellants were aggrieved by the conviction and sentence and therefore filed this appeal setting out the following grounds of appeal:

- 1. THAT the trial Magistrate erred in law in convicting the appellants when there was no sufficient evidence tendered against the appellants thus a miscarriage of justice was occasioned;**
- 2. THAT the trial Magistrate erred in law and fact in relying entirely on circumstantial evidence as there was no eye witness and thus a miscarriage of justice was occasioned;**
- 3. THAT the trial Magistrate erred in law and fact in failing to analyze the evidence as the alleged offence was said to have been committed in the forest long before the bones were found more than five months later and cannot be said to be free from error;**
- 4. THAT the trial Magistrate erred in law and fact in convicting the appellant for an offence of robbery with violence when the ingredients of the offence were not satisfactorily proved against the appellant;**
- 5. THAT the trial magistrate erred in law and fact in relying on the doctrine of recent possession which was not satisfactorily proved;**
- 6. THAT the learned magistrate erred in law and fact by relying on the alleged confession to the investigating officer which alleged confession was not made within the law;**
- 7. THAT the learned magistrate erred in law and fact by disregarding the accused defence which created a reasonable doubt on the alleged confession to Chief Inspector Macharia;**
- 8. THAT the learned trial magistrate failed to appreciate that the proceedings before him were tainted with extraneous matters resulting in a wrong decision;**
- 9. THAT the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant;**
- 10. THAT the learned trial magistrate erred in law and fact**
- 11. THAT the learned trial magistrate erred in law and fact by failing to note that the accused persons were not represented by a person of their choice in the alleged confession;**
- 12. THAT the learned trial magistrate erred in law and fact by insinuating that the accused persons could understand the language of the investigating officer;**
- 13. THAT the learned trial magistrate erred in law and fact by completely failing to consider the defence/applicants case and give it the probate value it deserved;**
- 14. THAT the learned trial magistrate erred in law and fact by failing to appreciate the prosecution case was full of contradictions with each witness giving a different account of events especially the evidence surrounding the alleged confession;**
- 15. THAT the learned trial magistrate erred in law and fact by failing to observe that a key witness who was stood down was not recalled, one Yattan Dakato;**
- 16. THAT the learned trial magistrate erred in law and fact by failing to appreciate the expert**

**witness's evidence that the cause of death was unknown;**

**17. THAT the learned trial magistrate erred in law and fact by failing to observe that the prosecution did not connect the accused hands to the causation of the death of the two deceased persons.**

Before we proceed to consider this appeal on its merit or otherwise we wish to observe that this case has had a rather peculiar history. Its genesis was as follows: the appellants were initially charged at Marsabit law courts before Hon Mogute with two counts of robbery with violence contrary to section 296 (2) of the Penal Code. The appellants further faced an alternative charge with respect to count 1. The charges were read to the appellants and they each pleaded not guilty to the charges in count 1 and 2 but pleaded guilty to the alternative charge to count one whereupon they were convicted and sentenced to serve four years imprisonment with respect to the alternative charge. The trial magistrate (Hon. Mogute) then stated that since he had sentenced the appellants to serve four years imprisonment in respect to the alternative charge in count one and for other personal reasons, he would disqualify himself from handling the case and that since there was no competent court to hear the said case at Marsabit Law Courts he would forward the file to Isiolo Law Courts for further directions. As a result of this serious procedural defects, the complainants family bitterly complained about the manner in which the matter had been handled by Hon Mogute prompting the then Isiolo Chief Magistrate Hon. Rosemelle Mutoka to refer this case to the High court in Meru for revision by dint of section 363 of The Criminal Procedure Code. The High Court sitting in Meru (Apondi J) on 14<sup>th</sup> December 2012 was not satisfied with the manner in which the case was handled and thereby set aside the conviction and sentence of four years relating to the alternative charge and directed that the appellants be charged afresh before Isiolo Chief Magistrate's court on 19<sup>th</sup> December 2012. The appellants were subsequently charged with the current offences at Isiolo Law courts whereupon the learned trial magistrate convicted them of the main count and sentenced them to death thus provoking the instant appeal. When the appeal came before us the appellants' Counsel were alleging that the appellants had already served sentence. As a result, we summoned officers to establish whether or not the appellants ever served sentence on the alternative charge and therefore, suffered double jeopardy. We summoned EO Marsabit Court; officer in charge of Marsabit Prison; Officer Marsabit Police Station; EO Isiolo; Officer in charge, Isiolo Prison. They produced documents in relation to the appellants which clearly show that the appellants were not tried for the same offence twice. By the time the trial commenced at Isiolo Court, J. Apondi had set aside the judgment of Hon. Mogute convicting the appellants on the alternative count. The appellants therefore, never served any other sentence except that meted by Isiolo Court on 4/4/2014 by Ag. PM, Irura.

Mr. Mungai Learned Counsel for the State did not seem to oppose the appeal. He submitted that the confession was taken by the investigating officer which was irregular in accordance with the Evidence Act; that the doctrine of recent possession was not proved as there was no conclusive proof that the stolen animals belonged to the complainants. He left it for the court to decide.

Mr. Omari, Counsel for the appellants, on the other hand submitted that the case was entirely based on circumstantial evidence and that the same was not free from possibility of error. He further submitted that **Section 25A (1) of the Evidence Act** was contravened since a confession under that section is not admissible unless the same is made before a judge, Magistrate or a police officer of the rank of Chief Inspector of Police (CIP) and above other than the investigations officer. Consequently he urged the court to allow the appeal.

Being the first appellate court, we shall subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and draw our own conclusions. We are alive to the fact that we neither saw nor heard any of the witnesses and so cannot comment on their demeanor. We are guided on the duties of a first appellate court by the Court of Appeal decision of *Kiilu and Another v R (2005) 1 KLR 174* on what the duties of the first appellate court entail.

The prosecution's case was as follows; **PW1 FATUMA JATTANI** testified that she comes from Diriba area of Marsabit district and that towards the end of the year 2010 it was very dry in Diriba area and her husband (the deceased) accompanied by their daughter one (Nasibo) also deceased left for Charbi with

their animals for pasture. On 4<sup>th</sup> January 2012 her husband came back to visit and went back to the grazing area and told her that since there was rain, he would try and come back if the roads were accessible; that he had been employed by one Galgallo to graze for him. On 3<sup>rd</sup> May 2012, some people came for a seminar at Marsabit from Charbi where her husband had moved to and she sent them to Galgallo to ask her husband to call her through a certain ladies' mobile number by the name Mama Rahma. Later on, Chief Bika Godana from Marsabit informed her that the people he had sent a message to her had gone missing and that they had been killed. On 28<sup>th</sup> May 2012, she got confirmation of the death of both her husband and daughter from the area chief and some elders. She was further informed that their goats would be looked for and if they were found, they would be brought to her. She later received a report that some clothes and bones had been found and that they belonged to her deceased husband. She was also shown another set of clothing which she was told was her daughter's and she was able to identify them which included a skirt, a blouse, headscarf, a pair of petticoat and shoes belonging to her daughter. She was also able to identify a *kikoi*, a shirt, a coat, one shoe, four sheets, 1 donkey and 30 goats. She indentified the goat as hers since they had a branded mark on the side and both ears had been cut. She later recorded her statement at Marsabit police station and was shown the appellants and told that they were the ones who had killed her husband.

**PW2 GUYO ELLEMA** the Chief of Maikoma Location testified that on 26<sup>th</sup> May 2015, he received a report that there were four suspects who had stolen some goats and that there was a herdsman from Diriba who had gone missing together with his daughter. He started gathering information on who could have known the said missing persons and he gathered that one Guyo Elle, Galgalolo Mamo and Dokota Mamo were the deceased's neighbours which information he gave to the D.O Maikona and then proceeded to Maikona where he found the OCS North Horr and his officers at the DC's office whereby they together proceeded to the suspects homes and recovered 13 goats from Ukur Guyo, 13 from Galgallo Mamo and 2 others from Dokato Mamo. He demanded that they produce the goats belonging to a certain herdsman who had been their neighbor and who had gone missing. After the suspects produced the goats, they escorted them to Maikoma DC's office whereupon the 2<sup>nd</sup> and 3<sup>rd</sup> appellant informed them that they were with the 1<sup>st</sup> appellant and that he also had other goats. They then sent four Kenya police reservists to go and recover the goats that were with the 1<sup>st</sup> appellant whereupon on interrogation, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants agreed to take them to the place where they recovered the clothes availed in court as exhibits which were said to belong to the deceased and his daughter. They also recovered a pair of *Akala* shoes belonging to the deceased's daughter and one *Akala* shoe for the deceased. They also collected some bones at the said place which bones were of human beings. On 29<sup>th</sup> May 2012 they went and collected the 1<sup>st</sup> appellant who had been arrested by the Kenya police reservists whom they had sent. The 1<sup>st</sup> appellant told them that his goats were at Bulgabo where they went and recovered the goats that were with the 1<sup>st</sup> appellant and which he had given to other people to graze for him. According to him, the goats they recovered from the 1<sup>st</sup> appellant had similar marks like those recovered from the 2<sup>nd</sup> and 3<sup>rd</sup> appellant. After they recovered the said goats, they delivered them to the DC's office and thereafter took them to the chief Dirib Location where they gave them back to the deceased's wife together with her elders. They also handed over the bones they had recovered to the Officer Commanding Station.

**PW3 GALGALLO BARAKO** a teacher in charge of Maikona District Education Office testified to having employed Wako Guyo (the deceased) on 7<sup>th</sup> December 2011 as a herdsman. Sometimes in January 2012, the deceased requested PW3 to allow him to go back home so that he could farm in his shamba, a request which PW3 acceded to. Later on, he learnt that the deceased did not reach home as his wife sent someone to PW3 asking him to ask her husband to send back the daughter home if he did not want to come back. He then called the chief of Diribi location informing him that the deceased had left for Marsabit four months earlier. On 28<sup>th</sup> May 2012, he went with the chief Maikona location to the D.O's office where they reported about the suspects who could have killed the deceased and his daughter as Godana Lige, Ukur and Galgallo whom they thereafter arrested and escorted to the AP camp after which he recorded his statement.

**PW4 ROBA GUYO** testified that on 20<sup>th</sup> May 2012, he was called by the chief of Maikona location so that they could look for some people namely Ukur Guyo and Galgallo Mamo the 2<sup>nd</sup> and 3<sup>rd</sup> appellants

herein. They first went and arrested Galgallo Mamo and later Ukur Guyo whom they found grazing his goats. The following day the police recovered 1 sheep and 5 goats from Galgallo Mamo; 1 donkey, 5 goats and 1 sheep from Ukur. They also recovered 2 sheep from Dokato Mamo. They later proceeded to look for the 1<sup>st</sup> appellant accompanied by one Wato through a bush to a place between Maikona and Bubisa whereupon they found the 1<sup>st</sup> appellant grazing his goats. They arrested him and took him to Maikona the following day. The 1<sup>st</sup> appellant then took them to Burgabo where they recovered 16 sheep and goats which were indentified from others by the 1<sup>st</sup> appellant. They then recorded their statements and handed them over to police officers.

**PW5 WATO MAMO** a herdsman testified and corroborated PW4's evidence by testifying having accompanied PW4 Mawalimu Galgallo (PW3) and the chief in arresting the appellants and recovering the goats and sheep that had been stolen. He further testified that he did not note the marks on them.

**PW6 ROBA GUYO** testified that on 17<sup>th</sup> January 2012, he went with Guyo Wako (deceased) from Maikona to where the goats were grazing; that the following day, the deceased moved with his goats and young daughter. He testified that he saw him leaving for Marsabit while wearing a shirt, coat and *kikoi* and tyre shoes while the daughter was wearing a pink skirt, a pink top and a headscarf. In the month of May 2012, he learnt that the said Wako had been killed and on 31<sup>st</sup> May 2012, was told to go and indentify some clothes that had been recovered to see to whom they belonged. He was able to identify the clothes in court. He further testified that he knew the appellants and that it was alleged that they are the ones who killed the deceased.

**PW7 OMAR DUBA** a volunteer teacher at Dirib Gombo testified to having received a report on 12<sup>th</sup> June 2012 that his uncle and daughter having been killed. He was called and proceeded to Marsabit police station and later to the mortuary where he was shown some bones which had dried up and was told by a doctor present that those bones were of his relatives who had been killed. He was also shown an assortment of clothes and *akala* shoes. He further testified that his uncle had moved to Maikona in search of pasture and that he had been living with the deceased in Marsbit before he moved to Maikona.

**PW8 EDWARD LEPIRE** testified that 28<sup>th</sup> May 2012 he accompanied the OCS, North Horr to Maikona on an inquiry of a robbery with violence case where the deceased and his daughter had been killed while migrating from Maikona to Marsabit. They found that three people had been arrested who included the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and one Dokato Mamo; that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants disclosed that they had some goats somewhere; that they were grazing with the 1<sup>st</sup> appellant and that it is the 1<sup>st</sup> appellant who had killed the deceased by beating them with wooden sticks until they died. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants then led them to a scene where the offence was allegedly committed where they recovered some worn out clothes, *akala* shoes, wooden grazing stick and some human being bones. They then proceeded to Burgabo where they recovered 18 goats and 5 sheep. He further testified that it was the 1<sup>st</sup> appellant who led them to where the goats were being grazed.

**PW9 DANIEL MACHARIA** a former officer commanding police station North Horr testified how on 28<sup>th</sup> May 2012, he was directed by the OCPD North Horr to go to Maikona to investigate an incident where 2 persons were reportedly missing. He proceeded to the area and arrived in the evening and went to the DC's office whereupon after a short while the area chief arrived with 3 suspects 2 of them being the 2<sup>nd</sup> and the 3<sup>rd</sup> appellant's. He interrogated the 2 and they informed him that the 1<sup>st</sup> appellant was the one who had killed the deceased and that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were present when he did it. He further testified that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants told him that the 1<sup>st</sup> appellant gave each of them 5 goats and a sheep and that they in turn gave 1 sheep each to one Halake who had taken water to them. It was his evidence that from the 2<sup>nd</sup> appellant they recovered 5 goats, 1 sheep and a donkey while from the 3<sup>rd</sup> appellant they recovered 5 goats and 1 sheep. Thereafter the suspects led them to the scene of the killing where they found 2 shallow graves containing clothes of a female in one grave and those of male in another. They also saw some bones which appeared to have been eaten by wild animals and they sent some Kenya police reservists to go and arrest the 1<sup>st</sup> appellant from a place far from where they were. He

further testified that the 1<sup>st</sup> appellant told them that he had killed the deceased whereas the deceased's daughter was killed by the 2<sup>nd</sup> appellant. After the recovery, they proceeded to Marsabit on 12<sup>th</sup> June 2012 where they brought the recovered bones for purposes of post mortem. It was his evidence that the clothes which were recovered from the shallow graves were positively identified by the relatives of the deceased and thereafter he charged the appellants with the current offences. It was his further evidence that after post mortem, the doctor stated that it was difficult to indicate the cause of death as the bones had been exposed for over four months whereupon the same were forwarded to Nairobi for further investigations.

**PW10 JOHN MWANZIA** a medical officer attached at Marsabit General Hospital testified how on 12<sup>th</sup> June 2012 two sets of bones were taken to him by CID officers and he was required to identify the bones and fill in the post mortem form. The 1<sup>st</sup> set of bones were said to be of Wako Guyo and he found several vertebral bodies and the budge was missing but the skull was present and in piece. Two vertebral bones, five ribs, bones of the upper and lower limbs, clavicle, two scapular bones and bones of the scalp (in pieces) were also found. The 2<sup>nd</sup> set of bones was in respect of one Nasibo Guyo. On examination he found three ribs, multiple pieces of the long bones, three foot bones whereas the upper jaw had five pieces of teeth not attached to the jaw. It was his conclusion on examination that in respect of both set of bones it was inconclusive to determine the cause of death since only a few skeleton bones were found. He further testified that there was a possibility that the deceased was killed and eaten by wild animals whereupon he recommended that it was necessary for more examination to be done to match the bones for DNA. He later filed in the post mortem forms which he produced in court as an exhibit.

**PW11 SYLVESTER MAINGI** a government pathologist based at Embu provincial hospital testified how he was on 25<sup>th</sup> July summoned to go to Marsabit to examine the remains of two people alleged to be that of Halakhe Guyo and Nasibo Guyo aged about 50 and 14 years respectively. He testified having performed the post mortem on 25<sup>th</sup> July 2012 and on the autopsy table he was able to arrange the bones present but not all of them were available and there was multiple fractured bones which were for an adult he was also able to identify the left clavicle, vertebral bones, fractured limbs, several fragments of lower and upper limbs, and scapular. He however testified that the cartridge was missing; that there were multiple bone fragments which was difficult to identify their original sites and that he was not able to examine any internal organs. Using the relative history and report from the police, he formed the opinion that the remains were of an adult and the cause of injury was multiple bodily injuries in the head due to the fractured skull, chest and limbs. He also considered that there was effect of wild animals some of which are known to eat parts of the body and that the injury could also have been caused by adverse weather. He testified that since he could not be able to identify the bones to be that of Wako Guyo he took samples from the deceased's living daughter to the government chemist. He further testified that the wife of the deceased identified a piece of clothing which the deceased wore before he left and he considered the same to be positive identification. With regard to the alleged remains of Nasibo Guyo, he testified that he was able to arrange her remains on the autopsy table and identified them as skull bones, fragments of lower limbs being tibia and fibula, two metatarsal bones, fractured lower and upper jaw bones with teeth intact and that the last molar had not erupted, and fragmented rib bones. From the examination he formed the opinion that the cause of death was injuries to the head and also observed that wild animals and adverse weather could have also contributed to the scenario in the bones. He also collected specimens for DNA examination to identify that the remains belonged to a human being and to match the DNA with that of the father and the mother. He later signed the post mortem report and produced the same in court as an exhibit.

**PW12 PAUL WAWERU KANGE'THE** an employee at the government chemist in Nairobi testified to having received the following items from PC George Kamande of CID Marsabit:

1. Item marked AI teeth and bones indicated as one of Nasibo Guyo.
2. Item BI bones of one Wako Guyo
3. Item CI cotton swabs indicated buccol swabs of one Halima Wako.

4. Item DI cotton swab indicated as mucosa swab of one Fautuma Yattani.

He further testified that the said items were accompanied by a police memo form requesting for DNA comparison between the items. They carried out analysis on the items and after several attempts to generate DNA it was not possible to generate DNA profiles which could have been caused by adverse exposure to nature. The bones were then passed through liquid nitrogen gas to crush them into powder and the process was said to be destructive and there was nothing that remained that could have been brought back to court. He later made a report on 13<sup>th</sup> September 2013 and produced the same in court.

**PW 13 GEORGE KAMANDE** testified to having received intelligence report on 21<sup>st</sup> January 2012 that some livestock had been stolen and that the suspects were within Maikona area. He circulated the said information within police stations in Marsabit but he did not get a report of the occurrence of such nature. Later on, he received a report on 12<sup>th</sup> May 2012 that the deceased and his daughter had gone missing and that they had left Maikona on 17<sup>th</sup> January 2012. He connected the said report to the intelligence report of 21<sup>st</sup> January 2012. He then passed the information to DO Maikona and the officer commanding station North Horr and later learnt that suspects had been arrested and some stolen animals recovered. He testified that the suspects who had been arrested were brought to his office on 12<sup>th</sup> June 2012 whereupon he prepared post mortem forms for the remains of the two deceased persons that had been recovered by the officer commanding station North Horr which included bones and personal effects of the deceased persons. It was his evidence that the 1<sup>st</sup> post mortem result was not conclusive prompting him to seek a second opinion from government pathologist one Dr. Maingi of Embu provincial hospital. He further testified that Dr. Maingi obtained samples from the remains of the deceased and those of their relatives for purposes of DNA examination and then prepared an exhibit memo form and forwarded samples to the government chemist after which he received a report from the government chemist. He further stated that he only recorded a few statements from the witnesses as other investigations had been conducted by Chief Inspector Macharia and that he did not participate in the recovery of the livestock and the arrest of the appellants.

At the end of the trial, the learned trial magistrate found the appellants to have a case to answer and placed them on their defence. The appellants denied having committed this offence and opted to give sworn evidence.

**DW1 GODANA ADANO** testified that he was a herdsman from Maikona and that in the month of January 2012, he moved to Bulla Korkora in search of pasture; that he did not know the deceased or his daughter; that he did not see them on 19<sup>th</sup> January 2012; that he was arrested by police officers who were in the company of home guards. He denied having violently robbed the deceased and his daughter first saw their remains in court; that the goats which were taken from him and which he was grazing were his.

**DW2 GUYO ELLE** testified that he was a herdsman from Maikona and denied having known the deceased persons. He denied that he was at Gotu Tula at the time of his arrest and denied knowing the reason of his arrest or having violently robbed the deceased persons; that he was not interrogated and he was not told why he was being charged and that he met the other appellants at Maikona.

**DW3 GALGALLO GUYO** testified that he was a herdsman from Maikona and that he did not know why he was being charged; that that he used to see the other appellants and stated that he did not know Daballa Kurkura; that he grazes animals at Ramata and that he was alone at the time of arrest; that he was not arrested with anything and did not understand the language of the investigating officer (PW9).

We have carefully considered and reevaluated the evidence on record and the submission by Mr. Omari, Counsel for the appellants and Mr. Mungai, Counsel for the State as is required of us. The appellants face a charge of robbery with violence contrary to **Section 296 (2) of the PC**. To prove the said offence the prosecution has to establish the following;

**“(a) the offender is armed with any dangerous and offensive weapon or instrument or;**

**(b) the offender is in company of one or more person or persons; or**

**(c) At or immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person”.**

See *Oluoch v Rep (1985) KLR 549*. The prosecution only needs to prove only one of the above conditions. *See Mohammed Ali v Rep (2013) KLR*.

In the instant case, it has not been established how, if at all, the deceased met their death. We say so because there was no conclusive evidence as to whether they were killed by wild animals or they were murdered.

**PW10 DR. MWANZIA** was the first to examine the recovered bones and was unable to establish the causes of death since only a few bones were recovered.

**PW11 DR. MAINGI**, examined the bones that were recovered and he tried to arrange them together. He was of the view that one of the set of bones were for a human adult but was unable to determine whether the smaller bones were for a human being. PW12, the Government Analyst also analysed the bones and sought to extract ‘DNA’ for comparison with PW1 and the other child of the deceased but was unable to generate any DNA profiles because the bones had been exposed to nature (i.e. sun, heat, rain, soil etc) which degenerate DNA. Even after the bones were passed through nitrogen gas, the results were negative. PW12 further said that he could not tell whether the bones were for a human being or not.

This case wholly depends on circumstantial evidence. The law is well settled in cases which entirely depend on circumstantial evidence. The court in *Mohamed & 3 Others v Rep (2005) 1 KLR 772* defined circumstantial evidence to mean:

***“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved”.***

In *Sawe v Rep (2003) KLR 354* the Court of Appeal held as follows:

***“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.***

***2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***

***3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***

***4. ...***

***5. ...***

***6. ...***

***7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

Our duty is to consider whether the evidence on record satisfies the three requirements set out in the Sawe’s case.

The disappearance of the deceased was noticed after PW1, the wife of Wako Guyo (deceased) on 3/5/2011 tried to get in touch with him through the deceased's employer, **PW3 BARAKO** who then disclosed that the deceased had left for his home about 17/1/2012. The disappearance of the deceased was therefore, discovered about 5 months after they were last seen by PW3. It is PW3 who made further enquiries and having established that the deceased did not reach their home in Marsabit made a report to the Chief of Maikona after which investigations started about 28/5/2011.

The arrest of the appellants started with PW3 suspecting them to be the culprits. PW3 did not disclose the reasons for suspecting the appellants. **PW2 GUYO ISAACKO**, the Chief of Maikona did not tell the court why he suspected the appellants before he made the report to the DO's office before they swung into action of arresting the appellants, together with the police. He alluded to there having been a report of missing persons in January but said no more. It is PW13, PC Kamande who testified that Marsabit Police received an intelligent report stating that some animals had been stolen within Marsabit on 21/1/2012. It was not until May that the report of missing people was received. It is not clear how the prosecution came to know that robbery took place on 19/1/2012.

PW2 was one of those who was allegedly taken to a scene where some clothes were recovered and 3 *Akala* shoes (made from tyres) by the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. PW2 was not present when the two appellants were interrogated. PW1 identified the clothing as those of her deceased's husband and daughter. The evidence of PW8 was that the recovered clothes were worn out, torn and faded. The question that needs to be answered is whether PW1's identification of these items was fool proof taking into account their condition. Since the appellants denied knowing anything about the allegations against them, the only link to the offence is the allegation by PW2, PW8 and 9 that it is the 2<sup>nd</sup> and 3<sup>rd</sup> appellants who led them to the place where they recovered the skeletons and clothing. In our considered view, having heard PW8's evidence the court should have commented on the state of the clothes that were recovered and if they were easily identifiable even in the state they were in. The trial court did not do that.

**PW9 CIP MACHARIA** who was the then OCS North Horr Police Station and the Investigation Officer testified in detail how the appellants confessed to him that the 1<sup>st</sup> appellants committed the murder and led to the recovery of the bones and clothing that were produced in court. However, being the Investigation Officer, PW9 was not qualified to take confessions from the appellants. **Section 25A of the Evidence Act** provides that confessions are generally inadmissible except in certain circumstances. The section stipulates as follows:

*“25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice”.*

Clearly, a confession cannot be made to a police officer who is the investigation officer even if he is of the rank of Chief Inspector. In this case, PW9 was the investigation officer and should have therefore invited another officer of the rank of Chief Inspector of Police and above to take a confession from the appellants or sent them to the court for a magistrate or judge to take the confession. Besides, even if PW9 had been a person authorized to take a confession from the appellants, he did not follow the correct procedure under the **Judges Rules (POLICE ACT)**. PW9 did go to a great length to obtain evidence in this case but employed the wrong method in doing so. The evidence of PW9 does not therefore, amount to a confession.

The trial court seemed to rely on the doctrine of recent possession in convicting the appellants. That doctrine is only applicable where the prosecution establishes that:

- (1) **The property was found in possession of the accused;**
- (2) **That the property was positively identified by the complainant;**

**(3) That the property was recently stolen from the complainant.**

PW1 purported to identify the recovered goats, sheep and donkey using a mark on the animals. In the instant case, we find that a mark on part of the animal, unless it is so special that no other person could have made it on their own animal, is not sufficient proof that they were the deceased's goats and sheep. PW1 who purported to identify them had not seen these goats and sheep for a long time since the deceased had left home in 2010 and she next saw the sheep and goats in mid 2012. The identification of the sheep and goats was not positive and full proof.

The deceased are suspected to have been robbed about 19/1/2012. The goats were recovered in May, 2012. The 1<sup>st</sup> appellant claims that the goats taken from him were his, while the others deny that anything was found with them. The recovery was made 5 months after the alleged robbery. Whether or not the period is recent would depend on how fast an item can change hands. Some items do not change hands easily. In this case, 5 months is quite a long time and this court cannot find with certainty that the appellants were in recent possession of the goats/sheep. PW2 and 8 did admit that they never enquired from the appellants how they got the goats/sheep.

As respects the recovery of the clothing and bones, PW9 told the court that the appellants led them to the scene. Curiously however, PW9 testified that when going to the scene, they divided themselves into two groups which took two directions. If that is the case, did it mean they were on a search or they were being led to the scene by the appellants? The fact of dividing the search team into 2 groups does raise questions as to whether the appellants indeed led them to the scene where a recovery of the clothes and bones was made. Despite the recovery of the deceased's clothing, yet as earlier found in this judgment, there is no conclusive evidence that the bones that were recovered belonged to human being, leave alone the deceased persons.

Mr. Omari submitted that the prosecution failed to call a witness by the name Yattani to complete his testimony because he was stood down and that his evidence tended to be adverse to the prosecution evidence. We have had look at the proceedings of 30/5/2011 and have found no such name of a witness who having commenced his testimony, was stood down. Before PW4 testified, the prosecutor only mentioned that his next witness was a juvenile but he had other witnesses. May be that is the one the Counsel was referring to. That witness never testified. He was never stood down as alleged. The Counsel never alluded to the adverse evidence that the said witness may have adduced.

All in all, having given due consideration to all the evidence before the trial court, we are convinced that the appellants are prime suspects in this case but there remain many doubts as to whether what was recovered were the remains of the deceased, and how they met their death, if at all; there were also doubts as to whether the recovered animals belong to deceased. Further the recovered bones were not proved to belong to the deceased or to human beings. As held by the Court of Appeal in Sawe's case, suspicion alone, however strong cannot be a basis for a conviction. For all these reasons, we give the benefit of doubt to the appellants. The convictions are unsafe. We quash the convictions and set aside the sentences. The appellants are set at liberty forthwith unless otherwise lawfully held.

**DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF OCTOBER, 2015.**

**R.P.V. WENDOH J. A. MAKAU**

**JUDGE JUDGE**

**In the presence of:**

Mr. Mungai for State

Mr. Omari for Appelants

Ibrahim/Peninah, Court Assistants

