



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 88, 89 AND 90 OF 2010**

**JAMES LOKOYEN ETIBOR .....}**

**JAMES MWANGI *Alias* SAMMY DOE.....}**

**BERNARD KIPKORIR CHERUIYOT .....} APPELLANTS**

**VS**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising from the decision of Hon. D. M. Ochenja - PM, in Kitale Chief Magistrate's Court in Criminal Case No. 1065 of 2007)***

**J U D G M E N T**

The three appellants, **James Lokoyen Etibor**, **John Mwangi *Alias* Sammy Doo**, and **Bernard Kipkorir Cheruiyot**, were in a group of four people who appeared before the Principal Magistrate at Kitale charged with robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the night of the 6th/7th December 2006 at Milimani Estate Kitale Town, jointly with others not before Court while armed with dangerous weapons namely pangas and rungus robbed John Daniel Kipruto Some, of unknown amount of money, a Television set make Sony 21”, a cooker, a mobile phone make Nokia 3330 and a motor vehicle registration No. KAD 731 Q Peugeot 405 valued at Kshs. 300,000 and immediately after the time of such robbery killed the said John Daniel Kipruto Some.

After a full trial, the three appellants were convicted and sentenced to death. Their co-accused was acquitted.

Being dissatisfied with the conviction and sentence, the three appellants filed separate appeals which were herein consolidated and heard together as one. The grounds of appeal are more or similar and are contained in the respective petitions of appeal.

At the hearing of the appeal, the first and second appellants appeared in person and each presented written submissions in support of their case.

**Mr. Michael Wafula**, Learned Counsel, appeared for the third appellant and made oral submissions to the effect that the third appellant was convicted on the basis of fingerprints found at the scene yet the Learned Trial Magistrate did not specify at which place the fingerprints were found given that Pw 1 dusted the scene and the motor vehicle for fingerprints. That, Pw 5 produced fingerprints impressions alleging belonging to the third appellant but he did not particularize the sixteen (16) characters. That, the evidence of Pw 5 ought not have been believed without proper description of the lifted fingerprints and the scene of crime. That, Pw 1 gave vague description of fingerprints lifted from a kitchen and the entry

to the kitchen. That, Pw 5 could not tell whether the lifted fingerprints were of the right or left palms thereby causing the Trial Court to misdirect itself in that regard.

Learned Counsel, relied on the decisions of the Court of Appeal in **Kinyanjui Vs Republic [1989] KLR 491**, and **Njoroge Vs. Republic [1989] KLR 313** to contend that the Trial Court misdirected itself with regard to the two decisions. The Learned Counsel therefore urged this Court to allow the appeal.

**Mr. Chelashaw**, Learned Prosecution Counsel, opposed the appeals on behalf of the State/Respondent by submitting that the circumstantial evidence adduced by the Prosecution was sufficient to convict the appellant. That, the appellants were convicted on the basis of their fingerprints which were lifted from the scene of the offence and when they were arrested much later, their fingerprints matched with those lifted from the scene of the offence. That, there was proper comparison by Pw 5 of the prints lifted from the scene and those obtained from the appellants. That, the evidence of Pw 5 remained unshaken and together with that of Pw 1 was believed by the Trial Court. That, the second appellant was arrested by Pw 6 after being found using a mobile phone stolen from the deceased victim of the offence. That, after his arrest, the second appellant led to the arrest of appellant three whose fingerprints were found at the scene. That, the first appellant worked at the home of the deceased victim but disappeared after the offence and his fingerprints were also found at the scene.

The Learned Prosecution Counsel contended that the Trial Court relied on the authorities cited hereinabove but added that the fingerprints were corroborated by the manner in which the appellants were arrested. That, the appellants could not explain how their fingerprints were found at the scene of the offence and therefore, the aforementioned authorities as relied by the third appellant were irrelevant.

The Learned Prosecution Counsel urged this Court to dismiss the appeals.

In response to the submissions by the Respondent, the first appellant contended that there was no evidence to prove that he was employed by the deceased or that he disappeared from the scene.

The second appellant contended that it was untrue that he was arrested on a first and second occasion. Learned Counsel for the third appellant contended that there were two scenes i.e. at the house and the place where the motor vehicle was recovered yet the Trial Court did not distinguish them.

The duty of this Court after having considered the submissions of both sides is to re-visit the evidence and draw its own conclusions bearing in mind that the Trial Court had the advantage of seeing and hearing all the witnesses.

In brief, the case for the Prosecution was that the late John Daniel Kipruto Some, was a businessman in Kitale. He lived in Milimani Estate and Naisambu. On 7th December, 2006 in the morning hours, **Shem Kibitok Amaya (Pw 9)**, a Chief at Kibomet Kitale, received a phone call from Moi's Bridge informing him that a vehicle belonging to the late John Daniel Kipruto Some had been sighted in the area in circumstances which were suspicious. The Chief made attempts to contact the deceased on his phone but failed. He then contacted a son of the deceased who indicated that the deceased had left home the previous night and had not returned. The Chief mobilized a group of people and all went in search of the deceased who could not be traced anywhere. A report was thereafter made to the Police that the deceased was missing.

The Chief in the company of Police Officers proceeded to the home of the deceased in Milimani Estate and discovered that a robbery had taken place. The home was deserted, there were blood stains in the house and some household goods were missing. It appeared that a struggle had occurred at the scene and that motor vehicle had been driven away in a hurry.

The Police photographed the scene and thereafter, the Chief (Pw 9) accompanied them to Moi's Bridge Police Station where the deceased's vehicle was taken. The vehicle had blood stains in the boot but no signs of the deceased. Intense efforts were made in search of the deceased but all in vain. Several days passed before the dead body of the deceased was found in Kiminini.

**Sgt. John Lelei (Pw 1)**, of the scenes of crime Kitale, took photographs at the home of the deceased on the 7th December, 2006 at about 10.00am after it was discovered that an act of robbery had taken place there. He also dusted the scene for fingerprints and in the process lifted both finger and palm prints at the entrance to the kitchen and in a bedroom. Thereafter, he proceeded to Moi's Bridge Police Station where he took photographs of the deceased's motor vehicle and also dusted it for fingerprints. He managed to lift finger and palm prints from the vehicle.

Sgt. Lelei (Pw 1) also proceeded to Kiminini river in Kiminini on the 11th December, 2006 when the body of the deceased was found floating in the water. He took several photographs of the scene and the body of the deceased. He took additional photographs of the body of the deceased prior to post mortem.

**Joseph Kipkoskei Bargoyiet (Pw 2)**, was employed by the deceased as a driver. He was with the deceased on 6th December, 2006 at a garage where his (deceased's) lorry had been taken for repairs. They parted at 1.00pm with the deceased saying that he was headed for his farm at Lolkeringet. He (Pw 2) remained at the garage upto 6.00 pm when he went to his home at Kibomet and on the following day heard that the deceased was missing and that his vehicle registration No. KAD 731 Q was found at Moi's Bridge. He went to Moi's Bridge Police Station and viewed the vehicle. He noticed that inside the boot there was blood stains, a panga and a knife.

**Cpl. Jacob Kisaine (Pw 3)**, of Moi's Bridge Police Station, was on duty performing traffic work when he spotted the deceased's motor vehicle parked on the side of the Moi's Bridge/Cherangany road on 7th December 2006 at about 10.00am. He was with a colleague P.C. Abdi Wakabi. They noted that the vehicle's doors were all open. They went closer and noted that the ignition keys were intact and personal documents were scattered inside. They saw a panga, a sword, a knife and a broken rungu (club) in the vehicle and concluded that the vehicle had been abandoned and made arrangements for it to be towed to the Police Station.

**Patrick Ngandu (Pw 5)**, a fingerprints expert attached to the C. I. D. headquarters with 25 years experience in identification of persons by means of fingerprints, palm prints and sole prints, examined the finger and palm prints lifted from the scene of crime by Sgt. Lelei (Pw 1) and compared them with finger and palm prints impressions obtained from the first, second and third appellants and concluded that they were all identical.

**Samuel Wabuge Soita (Pw 6)**, was a taxi operator in Kitale town at the material period. His taxi cab was registration No. KQJ 705 Datsun and on the 6th December 2006 he was on duty at Rock Hotel when the vehicle developed mechanical problems and he took it to Samken Petrol Station opposite Club Villa. He thereafter attended to his customers by using his colleagues vehicles or asking any of his colleagues to collect them. At about 11.00 pm to 12.00am, he received a call from a customer who wanted to be picked from Pavilion Hotel within the show ground. The name of the customer was Sammy Doe. He (Pw 6) indicated to the customer that he would arrange for him another vehicle but he (customer) indicated that he would call another driver. The customer used a mobile phone with a Kencell line to call him (Pw 6). He (customer) again called him (Pw 6) on the following day at about 11.00am using the same line.

Later, in the month of March 2007, he (Pw 6) was called and questioned by the Police. He handed over to them the phone number which had been used to call him. He learnt that the owner of that number had been murdered in December 2006 and that it was the deceased herein. He was then asked to record a statement. He gave the mobile phone number as 0733883413. He said that the Sammy Doe who called him using that number was his regular customer who had another phone number belonging to Safaricom and was the second appellant.

**Joseph Ndwiga Mbogo (Pw 7)**, operated a garage known as Ndwiga Auto Garage. He confirmed that the deceased was his customer and that he normally serviced his motor vehicle registration No. KAD 731 Q Peugeot 405 saloon. He saw the vehicle at Moi's Bridge Police Station and identified it.

**Richard Ngoni Muhanya (Pw 8)**, was attacked by thugs on 19th June, 2006 and in the process lost his personal documents. Two suspects were later arrested and charged in a Webuye Court but none of them

was any of the appellants herein.

**Geoffrey Sifuna (Pw 10)**, was a landlord to the first appellant. He indicated that on 6th December 2006 at 11.00pm, the first appellant called him on his mobile phone but he was asleep. On the following morning, the first appellant's wife informed him that the first appellant had indicated during the night that there was a problem at his (first appellant's) place of work. Later he (Pw 10) learnt that the first appellant had been arrested. He (Pw 10) was then asked by the Police to record a statement.

**Sgt. George Otieno (Pw 11)**, of C. I. D. Kitale, investigated the case and thereafter preferred the present charge against the appellants. He indicated that the finger and palm prints lifted from the scene of the offence belonged to the appellants as per the report of the fingerprints expert. He also indicated that the first appellant was employed as a watchman assigned at the Milimani home of the deceased and that he absconded duty and disappeared after the offence upto the time of his arrest in January 2007. He (Pw 11) indicated that the second appellant was the person who had used the phone number of the deceased to call the taxi driver (Pw 6) and that he went by the name Sammy Doe. He (Pw 11) indicated that the third appellant was arrested following information obtained from the second appellant and that he was the one suspected of having driven the deceased's vehicle to where it was found abandoned.

**Dr. Joseph Embenzi (Pw 12)**, based at Moi Teaching and Referral Hospital, produced a post mortem report form prepared and signed by his colleague Dr. Koslova after a post mortem examination of the body of the deceased.

The report indicated that the deceased died from severe head injuries and stab wounds in the abdomen.

After being charged, the appellants denied the offence.

In his defence, the first appellant (**James Lokoyen Etibor**), said that he was a kiosk operator at Laini Moja Kitale town. He opened his kiosk on 8th February, 2007 but at about 9.30 am he was confronted by three people who arrested him for trading with a licence which had expired. He was taken to Kitale Police Station only to be later charged with the present offence which he did not commit and neither did he know the other two appellants.

The second appellant stated in his defence that he worked at his mother's shop and was there from 6th December 2006 to 10th December 2006 when he left for Eldoret. He returned to Kitale in February 2007 and on 17th March 2007 while at Makuti Club, he fought with his friends and one lost a mobile phone. He was arrested and taken to Kitale Police Station where he was booked for stealing. His friends forgave him and he was temporarily cleared only to be re-arrested and later charged with the present offence which he did not commit.

As for the third appellant, he stated in his defence that he dealt in computers and was in his house on 19th March 2007 at around 10.00 pm when Police Officers went there and arrested him. He was ordered into a vehicle and driven to a forest where he was thoroughly beaten and asked whether he knew one by name John Mwangi. He answered in the negative and was taken to Kachibora Police Station and thereafter to Kitale Police Station. Later, he was charged with the present offence which he denied and said that in the year 2006, he was at his home in Eldama Ravine.

After considering the entire evidence in its totality, the Learned Trial Magistrate concluded that the Prosecution had established its case against the three appellants beyond any reasonable doubt. As a result, the three appellants were convicted and sentenced accordingly.

The Learned Trial Magistrate observed that :-

***“In the present case, there is no evidence on record that the fingerprints were obtained from the 1st, 2nd and 3rd accused oppressively. The evidence of Pw 1 and that of Pw 5 shows that the 1st, 2nd and 3rd accused left some fingerprints at the scene of crime i.e. the deceased's house. The fingerprints show that the said accused persons had been in the deceased's house moments before he went***

***missing. They have failed to explain why they went to the deceased's house. It can safely be concluded that the 1st, 2nd and 3rd accused were part of the gang that robbed and killed the deceased."***

From the foregoing observing, it was apparent that the Learned Trial Magistrate relied heavily on the fingerprints evidence to convict the appellants. He was however alive to the precaution that where finger print evidence is the only basis for a conviction it is unsafe to convict unless the circumstances point to the guilt of the accused to the exclusion of any other reasonable hypothesis.

We agree that the fingerprints evidence provided sufficient armour for the conviction of the appellants since there was nobody who witnessed the offence other than the deceased who was its victim. It was established without any dispute that the offence indeed occurred on the night of the 6th/7th December 2006 and that the deceased may have been alone in the house at the material time.

Sgt. Lelei (Pw 1) lifted finger and palm prints from inside the house and when these were examined by an expert (Pw 5), they revealed the presence of the three appellants in the house at the time of the offence thereby indicating that most likely than not they were the persons or some of the persons who attacked, robbed and killed the deceased. This fact was duly corroborated by the fact that the first appellant was a watchman assigned to guard the deceased's home. He disappeared after the offence was committed. His fingerprints were found inside the house of the deceased yet his work assignment did not entail his entry into the house of the deceased.

The second appellant was found to have been using the deceased's mobile phone number after the offence had been committed. His fingerprints were also found inside the house of the deceased and during his interrogation by the Investigating Officer (Pw 11) he implicated the third appellant whose fingerprints were also found inside the house of the deceased.

It was clear that apart from the fingerprints, there was other evidence as indicated hereinabove that pointed to the fact that the appellants were in the group of people who committed the material offence.

The Prosecution evidence against them was cogent and credible to the extent that it completely destroyed the defence raised by each of the appellants and reduced it into afterthoughts.

The evidence by Sgt. Lelei (Pw 1) and the fingerprints expert (Pw 5) pertaining to the lifting of the fingerprints from the scene of the offence and to the examination and comparison of the said prints with similar impressions obtained from the three appellants was cogent and credible enough for the conviction of the three appellants alongside other strong circumstantial evidence against them.

There was no scintilla of evidence to suggest that finger and palm prints impressions obtained from the appellants were obtained unlawfully or oppressively.

In the end result, we find that the appellants' conviction by the Learned Trial Magistrate was sound and proper. We uphold the conviction with the result that the present appeals are dismissed for want of merit.

**Delivered and signed this 19th day of November 2013)**

**J. R. KARANJA**

**JUDGE**

**E. OBAGA**

**JUDGE**

**In the presence of:**

**Appellants:** .....

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**Respondent:** .....

**Court Clerk:** .....