



**IA Alias A & another v Republic (Criminal Appeal 19 of 2020)  
[2023] KEHC 2032 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2032 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL 19 OF 2020  
F GIKONYO, J  
MARCH 2, 2023**

**BETWEEN**

**IA ALIAS A ..... 1<sup>ST</sup> APPELLANT**

**BASHIR IBRAHIM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 568 of 2016, Judgment on conviction was delivered on 17/12/2019 and sentence on 18/12/2019)*

**JUDGMENT**

1. The 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant herein were 3<sup>rd</sup> accused and 2<sup>nd</sup> accused persons respectively in the trial court.
2. The 1<sup>st</sup> appellant, 2<sup>nd</sup> appellant, and 1<sup>st</sup> accused(subject) were charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the penal code.
3. The particulars of the offence are that on the night of 14<sup>th</sup> and 15<sup>th</sup> March 2016 at Total area in Narok North sub-county of Narok County, jointly robbed Richard Simiren Kumomoru of a motor vehicle registration number KBNxxxP, a Toyota Premio, valued at Kshs. 1,200,000/= the property of Yiapan Edgar Karsis, one Samsung galaxy mobile phone valued at Kshs. 15,000/= the property of Richard Simiren Kumomoru, all valued at Kshs. 1,215,000/= and at the time of such robbery killed the said Richard Simiren Kumomoru.
4. The 1<sup>st</sup> accused -Solomon Ndiru Njeri pleaded guilty, and maintained the guilty plea several times. The 1<sup>st</sup> accused was convicted on his own plea of guilty on 17/05/2016 and on 16/06/2016 he was sentenced to three years at Shikusa Borstal institution.



5. On 17/12/2019 both appellants were convicted and on 18/12/2019 they were sentenced to death.
6. Being dissatisfied with the said conviction and sentence they preferred an appeal. The 1<sup>st</sup> appellant has raised 12 grounds and the 2<sup>nd</sup> appellant 13 grounds of appeal in their respective memorandum of appeal.
7. The 1<sup>st</sup> appellant's petition of appeal dated 24/09/2020 sets out the following grounds of appeal;
  - i. That the learned trial magistrate erred in law and in fact by convicting the appellant whilst ignoring the fact that the appellant was not at the scene of crime.
  - ii. That the learned trial magistrate erred in law and in fact in convicting the appellant for the offence charged when there was no sufficient evidence to prove the charge.
  - iii. That the learned trial magistrate erred in law and fact in convicting the appellant solely on account of harbouring the 2<sup>nd</sup> accused person.
  - iv. That the learned trial magistrate erred in law and in fact in convicting the appellant when the weight of the evidence does not support the conviction.
  - v. That the learned trial magistrate erred in law and fact in failing to take into consideration that there was no identification parade conducted.
  - vi. That the learned trial magistrate erred both in law and fact as she relied on her own conjectures thus arriving at a wrong decision.
  - vii. That the learned trial magistrate relied solely on the alleged confession of the 1<sup>st</sup> accused person, Solomon Ndiru Njeri without any corroboration whatsoever.
  - viii. That the learned trial magistrate erred both in law and in fact in convicting the appellant whilst failing to take into account the prosecution witnesses who were arrested with the 1<sup>st</sup> accused person.
  - ix. That the learned trial magistrate erred in law and fact in the circumstances of the case and handing down a manifestly excessive sentence which has since been outlawed by the judiciary.
  - x. That the learned trial magistrate erred in law and fact when she shifted the burden of proof to the appellant.
  - xi. That the learned trial magistrate erred in law and in fact by relying on conjuncture to fill gaps in the prosecution case.
  - xii. That the learned trial magistrate erred in law and fact by ignoring the fact that there was no evidence of any DNA of the appellant found in the exhibits produced by the prosecution.
  - xiii. That the learned trial magistrate did not take into consideration the alibi presented to court by the accused witnesses.



8. The 1<sup>st</sup> appellant pursuant to section 350(2)(v) of the CPC filed a supplementary ground of appeal received in court on 30/3/2021;
  - a. That the learned trial magistrate erred in law and fact by convicting the appellant and fail to note that his defence was truthful as the prosecution failed to avail the Safaricom data to prove their case beyond reasonable doubt.
9. The 2<sup>nd</sup> appellant filed an Amended petition of appeal dated 14<sup>th</sup> July 2020
  - i. That the learned trial magistrate erred in law and fact in convicting the appellant on the basis of a duplex charge sheet in that the appellant was charged under two offences, section 250 and 256(2) of the penal code at the same time.
  - ii. That the learned trial magistrate erred in law and fact in failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubt.
  - iii. That the learned trial magistrate erred in law and fact in convicting the appellant on the basis of DNA results notwithstanding the fact that the DNA expert admitted in her testimony that the results were incomplete, as testified by PW27.
  - iv. That the learned trial magistrate erred in law and fact failing to pay attention to the fact that the chain of custody of the DNA samples was flawed and broken as testified by PW27.
  - v. That the learned trial magistrate erred in law and fact in convicting the appellant notwithstanding the fact the source of light at the scene of crime was neither safe nor sufficient enough to help identify the appellant as testified by PW7,8 and 27.
  - vi. That the learned trial magistrate erred in law and fact in failing to consider that there was doubt as to whether or not an identification parade was conducted within the law or at all as testified by PW3,7,15, and 27.
  - vii. That the learned trial magistrate erred in law and fact in failing to consider the fact that the appellant was not an identification parade as testified by PW15.
  - viii. That the learned trial magistrate erred in law and fact sentencing the 2<sup>nd</sup> appellant to hang contrary to the Muruatetu supreme court judgment principles that declared the death sentence a nullity.
  - ix. That the learned trial magistrate erred in law and fact in placing the onus of proof on the on the appellant to prove his defence of alibi.
  - x. That the learned trial magistrate erred in law and fact in admitted a defective confession by the 1<sup>st</sup> accused a minor and an accomplice that did not meet the standards of confession.
  - xi. That the learned trial magistrate erred in law and fact in convicting the appellant on the basis of inconsistent, incomplete and contradictory evidence as testified by PW26 during cross examination who pointed out that the



important evidence captured in the CCTV footage at the scene of crime was deleted and the Safaricom communication data computer crashed.

- xii. That the learned trial magistrate erred in law and fact in failing to consider appellant's defence.

## EVIDENCE

### Prosecution's Case

10. The prosecution adduced evidence through twenty-six (26) prosecution witnesses. On 16/11/2018, the appellants were found with a case to answer. The 1<sup>st</sup> accused(subject) also testified as a prosecution witness.
11. PW1- Damaris Okeya, a widow to the deceased Richard Simiren Kumomoru. she testified that her late husband left home at 10.00 p.m. for his usual taxi work at night. She never received his usual call at 5.30 a.m. at about midday she called her husband's friend Kevin Karia and her mother-in-law. She also called her husband's employer Eddie at 11.a.m. At about 1.00 p.m. she reported a missing person at Narok police station.
12. On 15/3/2016 the report came at 9.00 a.m that the taxi was traced in Nakuru. On 16/3/2016 she received the sad news that her husband was no more. That same day she travelled to Nakuru and saw the body of her deceased husband.
13. PW1 identified her late husband's Samsung phone, his wallet, identity card, driving licence, her child's school bag and books they had forgotten in the vehicle. She was shown some currency and photographs of the accused persons but he met them physically in court. She identified the phone by a crack on it. She also stated that her husband was a slender man.
14. PW2-Mwongela Boniface. He testified that he has a miraa shop in town. On 14/3/2016, the 2<sup>nd</sup> appellant went to his shop at 11;30 p.m. He bought cigarettes of Kshs. 20/= . He was with a short dark-skinned boy. They sat in his shop for about 30 minutes chewing miraa which they had bought elsewhere. They also smoked at his place and were drinking legend liquor.
15. PW2 stated that he uses electricity for lighting. The 2<sup>nd</sup> appellant was listening to music and requested for reggae music. PW2 had a chart with the two and at some point, the 2<sup>nd</sup> appellant wanted to know why he was not chewing miraa. PW2 stated that the 2<sup>nd</sup> appellant had an ECK black bag which he had hung it on his shoulder. On 26/3/2016 police questioned PW2 about youths who had visited his kiosk. The same day he went to Narok police station and saw the boys. According to him the 2<sup>nd</sup> appellant had brushed his teeth at his shop. He got to know that the short boy was the 1<sup>st</sup> accused (Solomon). PW2 stated further stated that he ordinarily sees the 2<sup>nd</sup> appellant. He got to learn the 2<sup>nd</sup> appellant's name was Bashir. He knows him. The 1<sup>st</sup> appellant never came to his shop. The 2<sup>nd</sup> appellant was joined by the 1<sup>st</sup> accused at the shop. He did not see where the legend liquor was produced.
16. PW3-Kennedy Wekesa Simiyu. He is a motor cycle operator. He knew the deceased. On 15/3/2016 the deceased called him at about midnight. Before 2.00 a.m. he was from Majengo heading to total. He spotted the taxi of the deceased near family bank. He went and joined the deceased when two young men came showing interest in a taxi. One of the boys stated that he wanted a taxi. He wanted to go to total gate D. The deceased requested PW3 to give way to the customer. PW3 then left the deceased. The next day a common friend known as Kelvin asked him when he last saw the deceased. He replied that it was between 1.00 a.m. and 2.00 a.m. on 19/3/2016 the police questioned him about the deceased. He identified the boy he had seen go for the taxi on an identification parade. The trial court noted that some part of the PW3's statement was cancelled but PW3 stated that he does not know who cancelled



- it. PW3 did not identify the boy he saw in court though he maintained that he identified the boy in the identification parade. He stated that the 2<sup>nd</sup> appellant was on the parade although his name is not in the parade members. He did not see the 1<sup>st</sup> appellant. The boy he had identified asked the driver to take him to total. He stated that he had never seen the two accused(appellants) in the dock.
17. PW4-Kelvin Kipamei Kaaria. He worked with the deceased as a taxi driver of the vehicle no. KBN120P. He identified the vehicle. He worked with the vehicle for 6 years. Its owner was Eddie Yiapan.
  18. On 15/3/2016, his colleague Mwaniki was to operate the vehicle. When he got to their yard of operation, he found people asking for the deceased. The deceased's wife had no idea where the deceased was. He therefore was the owner of the vehicle. The vehicle had a tracker, and it led him to Narok hospital but the vehicle was not there. PW4 then reported to the police and went back to their yard. As they discussed a stranger joined them. The stranger was a carpenter and stated that he had seen people in the total area talking about a person who had been murdered.
  19. On 16/3/2016 he went to Nakuru with police officers. He saw their vehicle at Nakuru police station it had blood in the boot and deceased's shoes were there with a bag. Clothes were scattered on the seat. The sweater of Fanaka school and blue trouser. He identified the deceased's child's bag with books. There was a bloodstained jumper and jeans. There were boots. He then saw the body of the deceased at the Nakuru municipal morgue. The body had injuries on face, several cuts and body was swollen. He then drove back to Narok. Four boys had been arrested.
  20. PW4 further stated that he knows PW3 who assisted them as he stated he had seen the deceased last. The two accused were not among the four arrested. He could not tell how much fuel had been filled to get to Nakuru. The deceased made about Kshs. 1,000/= per night. The driver handed over Kshs. 1,500/= for the day and the fuel in the vehicle would have gone up to Nakuru and a distance back. The tank was empty when he picked the vehicle. The trouser and jumper were not in the bag. No sharp objects were recovered. He was only told that the signal of the phone was showing Narok hospital.
  21. PW5- John Njuguna Njoroge. He resides in Elburgon Nakuru. He received a report of the missing nephew in Narok on 15/3/2016. He confirmed that the deceased was a taxi operator. On 15/3/2016 he learnt that a taxi was recovered in Nakuru. The following morning, he went to Nakuru police station. He confirmed that his sister's son was dead. He identified the body for a post mortem to be conducted. He saw the injuries on the head.
  22. PW6-Karsis Edgar Yiapan. He is the vehicle owner. The deceased was his driver. He talked to PW1 who reported that they could not trace the deceased on 15/3/2016. The tracker first gave the location of Narok hospital then later at 5.00p.m. it was located in Nakuru. The motor vehicle was moving so he gave the OCS Bondeni the number to track. He travelled to Nakuru later when the vehicle was traced. He stated that the deceased was his reliable driver. His vehicle was valued at Kshs. 670,000/= and he had insured it. He does not know the appellants. He was not shown the people found with the vehicle.
  23. PW7- Adan Abdi. He sells miraa. He stated that he knows the appellants. The 2<sup>nd</sup> appellant is his customer. On 14/3/2016, he was at his place of business when the 2<sup>nd</sup> appellant went there at about 9.30 p.m. The 2<sup>nd</sup> appellant was with another boy. The 2<sup>nd</sup> appellant bought muguka but he does not allow students like the 2<sup>nd</sup> appellant to chew miraa at his shop. The 2<sup>nd</sup> appellant therefore went to chew miraa at the neighbouring shop. The other boy bought soda from his shop and he remained with 5 bob. He also left the bottle with him when he told the witness that he was with the 2<sup>nd</sup> appellant. When he closed his business, he left them there. He has known the 2<sup>nd</sup> appellant for about a year. He did not see the 2<sup>nd</sup> appellant and his friend with a bag.



24. On cross examination, PW7 stated that the 2<sup>nd</sup> appellant and his friend used the shop of a neighbour known as Baite. He also knows the 1<sup>st</sup> appellant. He did not attend any identification parade. He remembered the other boy who left change at his shop when he was reminded of the circumstances. The 2<sup>nd</sup> appellant was alone when he bought muguka. The second boy mentioned that he was with the 2<sup>nd</sup> appellant and this made PW7 leave him with a soda bottle which he was to leave at baite's shop. PW7 however did not confirm if the boy was with the 2<sup>nd</sup> appellant.
25. PW8-Benard Yegon. He worked at Samsung from June 2015 to about March 2016. On the night of 14<sup>th</sup> to 15<sup>th</sup> March 2016 he reported on duty at about 8 p.m. At about 2 a.m. He was sleeping when he woke up to some noise from about 10 meters away. He heard people talk as if there was a fight. He switched on the lights then a vehicle left. He went back to sleep but with the lights on. The vehicle came back. He then heard the door of a boot bang. His place of work was near a mosque, near a university. In the morning he went to the scene and saw blood stains.
26. On 18/3/2016 police came to the scene and he went to show them the blood stains. The police picked a stone which was stained. He recorded his statement.
27. On cross examination, he stated that the sound of the door closing is different from a boot closing. He heard sounds of beatings but did not hear anyone scream. He saw this from inside the house and when he went out the vehicle left. He did not hear anybody cry for help. The blood stains were outside Zamzam shop.
28. PW9- Dennis Kigen. He was a teacher at city mission secondary school in Nakuru. He testified that he knows Cyrus Maina a form four student. On 14/3/2016, Cyrus reported the school at 7.15 a.m. He was in class morning and afternoon. On 15/3/2016, the parent of Cyrus came and reported that he was not at home. The media visited the school claiming a student had been found in bad circumstances and was in police custody. The student was found with others with a stolen car and body of its driver. He did not know the boy as a criminal.
29. PW10-Silas Maina Muturi. He resides in pipeline Nakuru. He studies at city mission school. He was arrested in Nakuru on 15/3/2016. On that date he was going to hospital when he met the 1<sup>st</sup> accused in a vehicle. The 1<sup>st</sup> accused volunteered to drive him to hospital. They picked two other old classmates; Geoffrey and Moses. They queued but it was long so they left with intentions of returning later. They went to school and the 1<sup>st</sup> accused wanted to change school. They visited a second school. They parted ways when fuel ran out but as they left the 1<sup>st</sup> accused came with Moses, PW10 joined them. They went to free area. Moses asked what was smelling and the 1<sup>st</sup> accused lit a cigarette. They went to a brother to Geoffrey and Moses who added them fuel. On their way from there they were stopped by police they were questioned by police and beaten up. The 1<sup>st</sup> accused claimed his father had given him the vehicle and had killed the vehicle driver.
30. They were brought to Narok police station and pleaded with the 1<sup>st</sup> accused person to tell the truth so they could be set free. Police took his clothes, a yellow T Shirt, grey trouser, grey socks and black shoes for investigations. On 14/3/2016 he had been at school till 5.00 p.m. when he went home.
31. The Narok police station treated them well. The 1<sup>st</sup> accused was crying in the cells. No evidence was found against them then they were released. They were returned to Nakuru central police station.
32. On cross examination, PW10 stated that the 1<sup>st</sup> accused claimed his father gave him the vehicle. They were arrested at about 6.00 p.m. 1<sup>st</sup> accused had sleeveless t-shirt and rugged trouser. He did not have school sweater. In his statement he stated that he smelled something but in his testimony in court he denied smelling anything. 1<sup>st</sup> accused claimed the smell was lake Nakuru. Pw10 found it to be a lie and



- that the vehicle was his father's was also a lie. 1<sup>st</sup> accused owned up that the vehicle belonged to Richard who was killed by his father. 1<sup>st</sup> accused talked a lot. 1<sup>st</sup> Accused claimed that three of them killed the driver and one of the killers was the 2<sup>nd</sup> appellant.
33. PW11- Geoffrey Lopoi Morgan. He was one of the friends picked up by the 1<sup>st</sup> accused. and pw10 in Nakuru at 5.00 p.m. he was with his brother Moses. They found the 1<sup>st</sup> accused with his father, a cobbler. They went round to schools and hospital. They were dropped off at some point and again picked by the vehicle. They ran out of fuel. Pw11's brother gave them Kshs. 100/= to fuel. They were arrested by the police. He learned that they were carrying a corpse. 1<sup>st</sup> accused claimed his father John Bigudi had a vehicle. PW11 knows the father of the 1<sup>st</sup> accused as mike. They pleaded with the 1<sup>st</sup> accused to tell them the truth. After much pressure the 1<sup>st</sup> accused agreed to talk.
  34. PW11 had suede pants, red shirt with white stripes. They were returned to Nakuru.
  35. On cross examination, PW11 stated that he got to meet the 2<sup>nd</sup> appellant, who the 1<sup>st</sup> accused had mentioned when he was brought to their cell. 1<sup>st</sup> accused claimed he knew the 1<sup>st</sup> appellant by appearance. After 4 days 1<sup>st</sup> accused was removed from their cell. He knew that the 1<sup>st</sup> accused had changed school but he did not know his current school. He confirmed that it was Moses who asked about the foul smell. He did not know the 2<sup>nd</sup> appellant before and was not the 1<sup>st</sup> appellant in the cells.
  36. PW12 Moses Lonyet Morgan. A friend of the 1<sup>st</sup> accused. his evidence is similar to that of PW10 and PW11. He joined PW10 in the vehicle of 1<sup>st</sup> accused. They went round till they were stopped by police who arrested them. He knows the father of the 1<sup>st</sup> accused as mike. They were taken to Narok police station. The 2<sup>nd</sup> appellant mentioned by the 1<sup>st</sup> accused joined them in the cells. They were together for five days. They were released at Nakuru.
  37. PW12 stated that the 1<sup>st</sup> accused told different versions. He stated that his father gave him the vehicle and also showed a picture of someone on mobile phone who he claimed was his employer that he was employed as a taxi driver. He did not know if the 1<sup>st</sup> accused had a driving licence. The 1<sup>st</sup> accused had a sleeveless shirt, dirty trouser and blue shoes. PW13 smelt a foul smell and when he asked the 1<sup>st</sup> accused, the 1<sup>st</sup> accused lit a cigarette. So, he suggested that maybe it was lake Nakuru that was smelling. When the 1<sup>st</sup> accused was beaten in Nakuru he stated that he had killed the deceased with his father John Bigundi.
  38. PW12 stated that he saw a black bag in the vehicle (P Exh 9). The 1<sup>st</sup> accused claimed his father had told him to park the vehicle at his mother's place and would pick it from there. The 1<sup>st</sup> accused claimed that the 2<sup>nd</sup> appellant had removed him from school at a gun point. Later the 1<sup>st</sup> accused told them how he participated in killing the deceased. The 2<sup>nd</sup> appellant joined them in the cells. The 1<sup>st</sup> accused was not allowed to mix up with the 2<sup>nd</sup> appellant in cells. He knows the father of the 1<sup>st</sup> accused as mike.
  39. PW13-Joshua Kimanei. He was a teacher at Nakase high school. The 1<sup>st</sup> appellant was a student at their school. It is a non-formal school. Students do not wear uniforms. They train school drop outs and adults. The 1<sup>st</sup> appellant used to attend morning sessions of 8.00 a.m. to 2.30 p.m.
  40. On 14/3/2016, the 1<sup>st</sup> appellant was at school. On 15/3/2016, he was not at school. On 16/3/2016 and 17/3/2016 he was at school. The absence of 15/3/2016 was not explained. He is not a regular student; he misses class a lot. On 21/3/2016, CID officers went to the school to find out if the 1<sup>st</sup> appellant was a student there and if he attends classes. The register lists the two names of students but the 1<sup>st</sup> appellant is only listed as Ibrahim. The dates are not indicated. They are listed in terms of weeks. They had never had disciplinary issues with the 1<sup>st</sup> appellant. He was aware the 1<sup>st</sup> appellant could miss school because of lack of fare.



41. PW14-PC William Wambua of Narok police station. He testified that on 18/3/2016, he was a at cell sentry when the 1<sup>st</sup> accused requested to talk to the investigation officer. He called the IO. The suspect was not crying when he made the request.
42. PW15-IP Joseph Kimeu deputy OCS Narok. He testified that on 26/3/2016 he conducted an identification parade where the suspect was the 1<sup>st</sup> accused. the witness was PW3. The witness identified the suspect. The suspect asked the witness if he knew him before. The witness said he saw him at the place of offence. The name of the suspect is not on the parade forms. The suspect did not resist appearing on parade.
43. PW16- Josephine Mumbua Wambua. she testified that she wrote a confession statement from the suspect- Solomion Ndiru. She cautioned him that anything said could be used as evidence. The 1<sup>st</sup> accused wanted his aunt Winnie Margaret Ndiru to be present. She was called in.
44. The officer recorded the confession and they all signed it including his aunt on 24/3/2016. He used Kiswahili language. They wrote at an interval and it took 30 mins to record it. The confession was produced as P Exh 20.
45. PW16 stated that she was not aware that the 1<sup>st</sup> accused had been beaten up in Nakuru. His finger had a slight cut which he claimed from a fall.
46. PW17-Winnie Margaret Wambui Ndiru. She testified that she is an aunt to the 1<sup>st</sup> accused person, sister to his mother. She got him a chance at Fanaka high school in December 2015 to join form 3. His mother passed away in April 2016. The 1<sup>st</sup> accused joined the school on 14/2/2016 before 14/3/2016 the 1<sup>st</sup> accused dislocated his leg and went for treatment.
47. On 7/3/2016, she had taken him back to school and the principal had rejected him but on 14/3/2016 he was accepted back. She had relocated from Narok to Nakuru. On 14/3 2016, the principal called her saying that the accused was missing from school. She promised to find out and inform the teacher. She was later informed by her sister that the 1<sup>st</sup> accused had been arrested for a murder case. She did not know the father of the 1<sup>st</sup> accused and she did not know him to have a step - father. His mother was Ann Njeri.
48. She visited the 1<sup>st</sup> accused who told her what had happened. She was present when she confessed. He was convicted. She does not know John Bigudi.
49. On cross examination, she stated that the accused had been expelled from a school in Nakuru. The new school did not ask for a leaving certificate. The principal Fanaka is her cousin but the student went through an interview for him to get an admission. The 1<sup>ST</sup> accused had a phone against the school rules. On 7/3/2016, the 1<sup>st</sup> accused had to appear before a disciplinary committee and was punished. He promised to change. On 14/3/2016 she was told he was missing. She did not know if accused had a step- father. She was told there was a buyer for the vehicle but he wanted it without a body. The 1<sup>st</sup> accused claimed he was lent kshs. 800/= and did not steal it.
50. PW18-CPL Paul Kiilu of crime support service. He testified that on 18/3/2016, he and the IOs visited Maasai Mara gate D, the scene where taxi driver was killed. They had a suspect with them. The suspect showed them where the incident happened and stains of blood. He took ten photographs of the scene, blood stains, a stone used in the assault. The photographs were printed and produced as exhibits 20(i)-20(x). he prepared his certificate (P Exh 21). The dark parts of the photographs depicted blood.
51. PW19 Solomon Ndiru Njeru. He gave accomplice evidence. He is the 1<sup>st</sup> accused (subject) aged 17 years. He testified that he joined Fanaka high school in January 2015. He moved from Nakuru due



to societal problems. He found the 2<sup>nd</sup> appellant at that school. He stated that they committed an offence on 14/3/2016. On 14/3/2016, the 2<sup>nd</sup> appellant had been away from school sneaked back into the school. He claimed that the 2<sup>nd</sup> appellant had confided in him that he robs people of vehicle and sells and that he was on such mission and if he left the witness behind he would speak out on him. He claimed that the 2<sup>nd</sup> appellant removed him from school at gun point. He went out in his school uniform. He was given civilian clothes to change into. They were a rugged blue trouser, black jumper and blue shoes. The 2<sup>nd</sup> appellant had black loafer shoes, red t-shirt and blue jeans trousers. They went to town where they chewed miraa up to midnight. He drank coca cola soda. When they left, they met the 1<sup>st</sup> appellant in town. The 1<sup>st</sup> appellant asked him to go pause as a customer to a taxi and he did so. There was a motorbike nearby. He asked if it was a taxi and he boarded it. The charges were Kshs. 200. They were to pick his two friends at a petrol station. They did so and proceeded to gate D of Maasai mara university. They passed HASS petrol station then a bridge and proceeded to the university gates. The 2<sup>nd</sup> appellant directed the driver where to go. When he reached the place the deceased was pulled out of the vehicle at gun point.

52. The 2<sup>nd</sup> appellant hit the deceased on the head using a sharp metal. He was asked to use a stone to hit the deceased and he did so. Deceased cried out that he should not be killed. Security lights were turned on. When the lights went off the 2<sup>nd</sup> appellant stabbed the deceased on the neck and they placed him in the boot. The 2<sup>nd</sup> appellant drove. The 1<sup>st</sup> appellant was a co-driver and 1<sup>st</sup> accused sat behind. They refueled at Hass petrol station with Kshs. 3,000/=. They travelled to Nakuru. The clothes were produced as P Exh 12 and 13. There was a Samsung phone and when it rang the 1<sup>st</sup> appellant removed the battery and sim card. The 1<sup>st</sup> accused left alone with the car and met his friends who gave evidence earlier. They were to meet at Gillanis at 11p.m.
53. As he went around with his friends they were intercepted by the police and arrested. They were questioned about the deceased. The accused waited to confess and that is what he exactly did. The 1<sup>st</sup> accused narrated what he has told the court. He recorded his confession. the 1<sup>st</sup> accused denies having been expelled from his previous school. He learnt with the 2<sup>nd</sup> appellant who in 2 months told him he was a murderer and a carjacker. The 1<sup>st</sup> accused stated that the 2<sup>nd</sup> appellant had asked him join al-Shabaab. He did not take it seriously so he told nobody. He did not tell anyone about the carjacking and sale of vehicles in Mombasa. He denied that at 9.30 p.m. he was already chewing muguka at PW77 shop. He heard the 2<sup>nd</sup> appellant speak Somali language. He denied that there was no fuel at Hass petrol station. He did not drive to Nakuru. He did not disclose to his friends in Nakuru that the foul smell could be from within. He denied smoking a cigarette. He stated that his friends wanted to visit the schools in Nakuru. He denied having told his friends that he was employed as taxi driver but he again admitted he said so.
54. PW19 told the police that his dad had given him the vehicle. On interrogation he said that he had committed the offence with his dad police wanted him to say so. He named Bigudi. Though only his mother knew his dad. He approached the deceased alone. They changed clothes with the 2<sup>nd</sup> appellant. He denied having shown his friends the phone of the deceased. He denied having driven or his father having driven the motor vehicle to Nakuru from Narok. He did not watch CCTV from Gillanis. He stated that he had one discipline letter from Fanaka. He denied having stolen Kshs. 800/- from a fellow student and he did not borrow it either. He was not promised that with a confession he could get 3 years sentence. 2<sup>nd</sup> appellant had a blue jean, red t-shirt and black shoes which he removed and kept in the vehicle. He did not give his father's contact to the police. He denied that the two accused persons did not take part in the commission of the offence. He killed and regretted but was never promised leniency. He agreed that he was punished for going to demand his phone at school.



55. PW19 testified that his birth certificate does not have a father's name. He confessed under beatings.
56. PW20-Onesmus Mwangi Wanjohi. The principal Fanaka high school. He testified that the 2<sup>nd</sup> appellant and the 1<sup>st</sup> accused were his students. According to the school register, the 2<sup>nd</sup> appellant was missing from the school the whole week of 14<sup>th</sup> and 15<sup>th</sup> march 2016. The 1<sup>st</sup> accused was absent from 15<sup>th</sup> to 18<sup>th</sup> march 2016. The deputy principal reported that the 2<sup>nd</sup> appellant was away. He tried to find out from the sister to the accused who was like a guardian but never got a positive response. He also called the guardian of the 1<sup>st</sup> accused.
57. The 2<sup>nd</sup> appellant had obtained permission to be away on 11/3/2016 but he had gone and come back, when he called the sister to the accused on 14/3/2016 she claimed he was not at home either.
58. On 16/3/2016, the school director called and told him that the 1<sup>st</sup> accused was arrested in Nakuru with a vehicle and a dead body.
59. As the school put their heads together the 2<sup>nd</sup> appellant was brought to school by the mother. Just then the school director rang asking him to go to the sister girl's school. He left the 2<sup>nd</sup> appellant and mother to deal with his disciplinary committee. Upon his return the 2<sup>nd</sup> appellant was not at school.
60. On 18/3/2016, CID officers came looking for the 2<sup>nd</sup> appellant who was absent. The officers checked his locker and box. They also picked the school register. They also picked the report of 1<sup>st</sup> accused. On 22/3/2016, the mother to 2<sup>nd</sup> appellant brought him to school. Police officers came and arrested him. Admission number of the 2<sup>nd</sup> appellant was F847 and that of the 1<sup>st</sup> appellant was F725.
61. PW20 further stated that the 2<sup>nd</sup> appellant was disciplined but 1<sup>st</sup> accused was not. 1<sup>st</sup> accused had allegedly stolen another student's Kshs. 800/= and also a phone. The 1<sup>st</sup> accused had been disciplined earlier for sneaking out of school and was brought back on 8/3/2016. He called the police when the 2<sup>nd</sup> appellant was brought by the mother.
62. PW21- PC Salim Mwachenga. Of mwariki police station Nakuru. He was on duty on 15/3/2016 when his in charge informed him of the report from Narok that a motor vehicle KBN 120P was stolen. The vehicle was said to be enroute from Narok to Nakuru. With his two colleagues they started tracking that car. It was in pipeline area. The vehicle was felt in white house area after tracking movements. The officers saw it, challenged the driver to stop but he disobeyed. It was blocked by their car. The vehicle had four occupants who surrendered at gun point. The vehicle was searched and a dead body found in the boot. The security team were called in DCIO, OCPD and OCS. The body was moved to a morgue in Nakuru. The accused persons and car were taken to Nakuru central police station. The suspects were escorted to Narok police station. The witness identified the car KBN 120P (P Exh 11). The body of the deceased had deep cuts on the head and face.
63. School's uniforms were recovered. The driver of the vehicle was the 1<sup>st</sup> accused . they were armed the time they stopped the car but they were in uniform although in a civilian vehicle. He did not see the 1<sup>st</sup> and 2<sup>nd</sup> appellant in the vehicle.
64. PW22-IP John Macharia of Mwariki police station. He received the report from Narok police station who linked him up with the owner of the missing vehicle. He logged the information in the google map and started the search. His evidence is similar to that of PW21. He asked the recovered car's driver where Richard was. The 1<sup>st</sup> accused claimed the driver was in town only for the police to find the body in the boot. A phone and some clothes were recovered Narok police were alerted and they came for the suspects. Boots shoes and a bag with items were also recovered.



65. On cross examination, he stated that when the vehicle defied the order to stop the officers set out their guns and blocked the vehicle. He did not see the 1<sup>st</sup> and 2<sup>nd</sup> appellant at the scene.
66. PW23- CPL Bethwel Nyangate. He was sent to Nakuru police station to collect four suspects among them the 1<sup>st</sup> accused. they had been involved in a robbery with violence incident. The 1<sup>st</sup> and 2<sup>nd</sup> appellant were not among the suspects.
67. PW24-CPL Paul Kiilu. Of crime scene support services. He came to testify on behalf of his colleague IP Songa who took some photographs in Nakuru. He took 56 photographs at white house area in Nakuru. Among the items captured were; motor vehicle KBN 120P, motor vehicle 931R, insurance sticker and chassis no. of motor vehicle kbn120p, body in grey jacket, stained in the car boot, body had wounds, general view of the bloody boot, clothing, documents including identification documents of deceased, ID no. 22667421 for Richard Simiren Kumomoru, his driving licence, money, shopping bag, bible and children books, assorted clothing, school sweater and bag, Fanaka high school sweater and bag of electoral commission. The photographer wrote a certificate and signed. All were produced as exhibits 26-43.
68. PW25-Doctor Allan Soita of cottage hospital Narok. He produced post mortem examination report on behalf of the pathologist doctor Ngulugo Titus. The doctor did a post mortem on the body of Richard Simiren who was; African male of about 36 years of age, abdomen distended, skin peeling due to decomposition, 2 days dead, body pale showing evidence of lack of oxygen flow, head had multiple incision wounds on face, forehead, supra orbital region, cheeks, 2 incision wounds on the scalp, right palm had a long incision wound, left finger had incision wound, chest had a stab wound which penetrated to the rib area and the lungs, leaving a collapsed lung. There was blood in a cardiac sac. Route to the aorta had slits and sac was blood filled. Brain was swollen.
69. The doctor assessed cause of death was cardiac Temponara. The conclusion was it was a homicide. The form was signed on 16/3/2016.
70. The conclusion was that a sharp object caused the injury. The doctor stated that once the iota is slit death can be instant. Strangulation can cause interruption in the flow of oxygen. The doctor did not see strangulation. The injuries were stab ones. A stone could have caused a crash injury. A hit injury to the head could not have caused immediate death.
71. PW26-Anne Wangeci Nderitu. A government analyst.in connection with this case she testified that the government chemist received a number of items on various dates of 24/3/2016, 30/4/2016 and 26/9/2017. Items were analyzed by her officers who she supervises.
72. On 24/3/2016 items were submitted by Paul Kiilu (PW18, 24)finger nails and toe nails of deceased in khaki envelops (a, b)Cotton swabs of boot mat, boot, electoral commission of Kenya bag, boot cover.Grey coat, navy blue t-shirt, black jeans trouser with handkerchief ankle length boots.White checked navy blue shirtAll items as belonging to deceased.Stone, soil from the sceneBlue jeans trouser of Solomon Ndiru Njeri(1<sup>st</sup> accused)Grey track suit trouserLeft foot Nike sport shoesYellow polo t shirt for Moses Lonyet MorganPair of black leather shoes for Cyrus Maina MuturiLong sleeved shirt for Geoffrey LuboiHandkerchiefBroken hair comboWooden toothbrushA number of clothes blue jeans, blue short sleeved shirtJungle green vest with black bindingBlack trouser.They were in a carton box.Pair of black leather shoesBuccal swap samples from Bashir (2<sup>nd</sup> appellant)Grey trouser of Cyrus Maina MuturiBlack hooded long sleeved sweat shirtBlue suede shoes of the 2<sup>nd</sup> appellantBlue suede shoes of Solomon ndiruBlue jean trouser of 2<sup>nd</sup> appellantBuccal swab samples of the 1<sup>st</sup> accused and other for Godfrey Luboi, Moses Lonyet and Cyrus Maina.



73. On 30/4/2016, PC Collins Okoth delivered items to the government chemist. The items were buccal swab samples of the 1<sup>st</sup> appellant.
74. On 26/9/2017 PC Collins delivered to the chemist a buccal swab of the mother of the deceased Veronica Wamaitha and a buccal sample of Joseph Kedipo a father to the deceased.
75. They were to examine and determine the source of the blood stains. Several findings were made after testing.
76. The conclusions were; blood stains from cotton swab C2, T-shirt, D2 handkerchief D3 soil D6 and short J2 generated partial DNA profiles that were inconclusive. Blood stains from C1, C4, J(i) and J4 generated the same DNA profile. There are 99% more chances that samples of parents examined were parents of the donor of DNA profiles generated from some blood-stained items C1, C4, Jii, J4 for deceased. Blood stains on the electoral commission of Kenya bag where the DNA partially matched that of the deceased. The other profile matched that of Solomon Ndiru. On wooden toothbrush, had a mixed DNA profile part of it for Bashir (2<sup>nd</sup> appellant). The other part of the profile was inconclusive. Blood stain from the leather shoe generated a mixed DNA profile one part matched that of the deceased the other part was inconclusive. DNA generated from the handkerchief matched that of the 1<sup>st</sup> accused. DNA profiles from the blood stains on the timberland boots and stone matched that of the deceased and the 1<sup>st</sup> accused. Blood stains on boot mat matched that of the deceased. DNA profiles from vest and jeans trouser J(i) matched that of the deceased. DNA profile generated from the blood stains obtained from the sweat shirt indicated as for Bashir (2<sup>nd</sup> appellant) matched profile of the deceased.
77. The analyst prepared the report on 19/1/2018. The errors she corrected are typographical and she signed against the corrections. The nails did not work. She produced her report as P Exh46.
78. On cross examination, she stated as follows;
1. She did not prepare the chain of custody form.
  2. She did not personally harvest the DNA samples, it was done by officers and analyzed under her supervisions
  3. The DNA profile detected on the toothbrush was for 2<sup>nd</sup> appellant and a second DNA on it was inconclusive. If the toothbrush was for the deceased his DNA would be there. DNA of the deceased was indicated as no. 12- the stain on the sweatshirt belonging to 2<sup>nd</sup> accused.
79. There was no DNA that matched that of Ibrahim Abdullahi(1<sup>st</sup> appellant)
80. She further stated that she supervises the analysis and if there is inaccuracy, she orders a repeat. She stated that the items received for analysis were properly packed in separate khaki envelopes. They were analyzed according to the due process, recorded and stored in their stores. She stated that cabin of custody and sanctity of the samples was guaranteed.
81. According to analysis the tooth brush and t shirt have the profiles of the 2<sup>nd</sup> appellant and deceased. The DNA of Solomon Ndiru appeared on a number of items D8- Ef1 C3 D4 and D5(1<sup>st</sup> accused-PW19)
82. PW27- PC Collins Okoth, investigating officer. On the material time he worked at Narok DCI. On 17/3/2016 he was instructed to team up with colleagues to handle this case. They took over the matter from CPL Nyangate. A taxi man had disappeared and his body traced in the boot of the taxi registration no. KBN120P Toyota Premio in Nakuru.



83. The officers took over the case with exhibits and four suspects. He had time with the suspects, interrogated them. It turned out that 3 of the suspects had just taken joy ride in that car and it was Solomon, 1<sup>st</sup> accused who had it. He investigated up to schools of two of the three suspects and took possession of their clothing.
84. The 1<sup>st</sup> accused requested for a talk with PW1. The 1<sup>st</sup> accused had a confession to make, he had killed the deceased. Earlier on he had told the IO that he had been given the car by his father John Bigudi.
85. The suspect gave him the story that is (pw19). The 2<sup>nd</sup> appellant had picked 1<sup>st</sup> accused and upon coming to town they met the 1<sup>st</sup> appellant. They went to miraa joints, one was Texas the other was baite's.
86. It was after 1a.m. that the 1<sup>st</sup> accused lured the taxi man. A bodaboda was near the taxi when the 1<sup>st</sup> accused engaged him.
87. They picked the two accused persons and went to maasai mara university at a secluded area. The taxi driver was hit with crude weapons. They stopped beatings when someone switched on lights. 1<sup>st</sup> accused used a stone to hit the deceased on the head. The stone was produced as exhibit. 2<sup>nd</sup> appellant stabbed the deceased severally using a knife.
88. The taxi man was put in the boot. They went to Hass petrol station. They then drove to Nakuru.
89. PW19 led them to the scene where a scene of crime officer took photographs. There was blood on the ground. A watchman at the place recorded a statement. It tallied with the account given by the 1<sup>st</sup> accused.
90. 1<sup>st</sup> accused led officers to the miraa dens. PW27 talked to the miraa dealers who confirmed seeing the 1<sup>st</sup> accused and two others. The two traders claimed the 2<sup>nd</sup> appellant had a bag and this bag was recovered from the boot of the car.
91. PW27 left with the chief inspector to interview the suspects. The officer identified exhibits including the following:Uniform of 1<sup>st</sup> accusedJeans of 2<sup>nd</sup> appellant (51)Shirt of undisclosed owner (52)Trousers of deceased (53)Shirt of deceased (54)Greenish vest of Bashir (55)Black jumper of 1<sup>st</sup> accused (56)Beige shorts of bashir(57)Timberland boots of deceased (58)Blue shoes of 1<sup>st</sup> accused (59)Shirt for bashir-light bluish (60)Jacket of deceased (61)Black trouser suspected to be bashir's(62)Trousers of 4<sup>th</sup> suspect (63)Handkerchief (64)Teen comb (65)Black loafer shoes (Silas Maina) (66)Black loafer shoes of Bashir (67)Sport shoes of initial suspects (68)Smaller white handkerchief (69)Yellow t shirt (70)Red checked shirt (71)Soil samples picked from scene (72)Wooden toothbrush (73)
92. The person who saw the deceased lase on Kenddy Wekesa recorded a statement. Miraa traders recorded their statements. The three initial suspects who were released recorded their statements and were released.
93. The 2<sup>nd</sup> appellant was arrested when he returned to school, Fanaka. He recorded statement. He gave statement like the evidence he gave in court. the two statements the 2<sup>nd</sup> appellant gave were self-contradicting.
94. The police had intelligence that the 1<sup>st</sup> appellant wanted to flee. His mother recorded a statement on 28/3/2016 claiming she did not know where the 1<sup>st</sup> appellant was. She claimed to have prepared a place for the 2<sup>nd</sup> appellant to sleep on 12/3/2016 yet the 2<sup>nd</sup> appellant claimed to have slept there without his aunt's knowledge. The mother claimed to have locked the 2<sup>nd</sup> appellant in a house and called his mother to come for him. She appeared to be hiding something.



95. The officers then told her they were looking for her son. She was told she was hiding a suspect who had committed an offence and she could be charged. That evening her son brought in the brother the 1<sup>st</sup> appellant.
96. The 1<sup>st</sup> appellant recorded a statement on 4/4/2016. The accused claimed the accused went there on 14/3/2016 and did not want people to know he was there. On 13/3/2016 the 1<sup>st</sup> appellant went to school leaving the 2<sup>nd</sup> appellant sleeping.
97. The officers investigated and found that the 1<sup>st</sup> appellant had not been at school. The 2<sup>nd</sup> appellant mentioned a cousin Adan who he said to have picked him on 15/3/2016 and taken him to school.
98. Adan claimed that he first took the accused to his home before taking him to his mother's home and these accounts are contradictory. With contradicting accounts of where the accused persons were, the officer concluded that indeed they were with the 1<sup>st</sup> accused.
99. PW27 had the suspects give their DNA samples for testing. He escorted the exhibits to government analyst and upon getting the results he charged the accused persons.
100. On cross examination, the following came out; Adan said in his statement that he had picked 2<sup>nd</sup> appellant from home of the mother of the 1<sup>st</sup> appellant and took him to Adan's home. The 2<sup>nd</sup> appellant claimed it was Athan who went for him and PW27 established that this Athan is different from Adan and he declined to record a statement. The 1<sup>st</sup> accused came from Nakuru with a different story that his father John Bigudi gave him the vehicle. Mother of 1<sup>st</sup> accused did not know John Bigudi who was a creation of the accused. 1<sup>st</sup> accused said 2<sup>nd</sup> appellant had the bag from which he gave the 1<sup>st</sup> accused clothes. The clothes 2<sup>nd</sup> appellant had been subjected to tests. Birth certificate of 1<sup>st</sup> accused placed his age as under 18 years but age assessment placed him at 16 years. 1<sup>st</sup> accused had poor discipline of school attendance and was a truant. 1<sup>st</sup> accused was not coerced into doing anything wrong he voluntarily participated. Hass petrol station had claimed not to have had fuel at the particular time. 2<sup>nd</sup> appellant is alleged to have drive to Nakuru, they had fueled the vehicle. The officer does not know who drove the vehicle to Nakuru. Gillanis supermarket claimed they erase their CCTV after sometime. The government analyst was to do her work and give findings. The 1<sup>st</sup> appellant appeared to be hiding something considering the contradictory statements. The choice of road to Nakuru was meant to confuse those who would pursue the vehicle. 1<sup>st</sup> accused did not outrightly tell police he had a dead body in the vehicle. He did not trace the toothbrush. No identification parades were done and did not take the accused to show PW7. There is the issue of whether or not or at what point the mother of 1<sup>st</sup> appellant saw the 2<sup>nd</sup> appellant. Bashir is supposed to have worn a vest. The clothes Bashir had at the time of arrest were not taken for analysis time had passed. PW27 did not investigate the angle of whether 1<sup>st</sup> appellant was an al-Shabaab. PW27 did not seek for details of how the 2<sup>nd</sup> appellant to the dormitory to pick the 1<sup>st</sup> accused. The officer did not investigate if the second accused used to rob vehicles and sell in Mombasa. No pistol was recovered. The stone used in the killing was also sent to the government analyst. PW27 stated that the media had flashed the news of the suspects and identification parades would have been of no consequence.

### **Defense Case**

101. The 1st and 2nd appellants gave sworn testimony. They called a total of Five (5) witnesses in their defense
102. DW1- Bashir Ibrahim. He was schooling at Fanaka high school. On 12/3/2016 he escaped from school through the fence at 2.30 p.m. he was in school uniform. He went home in Lenana. He found a younger



- brother (Mohammed Ibrahim) at home. He changed into home clothes and went to town but carrying his uniform to conceal from his mother that he had escaped from school.
103. He went to a miraa joint and chewed up to 9 p.m. (Texas). He then went to his cousin's place, the 1<sup>st</sup> appellant. 1<sup>st</sup> appellant opened for him his house and he slept there. The following day he went out for tea. He went to the mosque up to 2p.m. He then went to Texas base and chewed miraa up to 9 p.m. He went back home of the 1<sup>st</sup> appellant and access his house himself.
  104. The 1<sup>st</sup> appellant had rung one Adan Mohammed that the 2<sup>nd</sup> appellant had escaped from school. On 13/3/3016 he was not in the company of the 1<sup>st</sup> appellant at Texas. He slept at the house of the 1<sup>st</sup> appellant from 12, 13, and 14<sup>th</sup>, for three days.
  105. The 1<sup>st</sup> accused was his desk mate and dorm mate. On 14/3/2016 he met the 1<sup>st</sup> accused at veve base. As he sat the 1<sup>st</sup> accused told him that he wanted to hijack a taxi and that he did it for his father. They were the 3 of them with the 1<sup>st</sup> appellant. The 2<sup>nd</sup> appellant had his pocket money and he sent the 1<sup>st</sup> appellant for a brandy this was about 10 p.m. he claimed that it was after 1<sup>st</sup> appellant left that the 1<sup>st</sup> accused told him about the hijacking the taxi. Mbite who is the owner of the store did not hear their conversation.
  106. 1<sup>st</sup> appellant had brought the brandy, they mixed with soda and the three of them drank. thereafter the 1<sup>st</sup> appellant who claimed not to be feeling well went home 2<sup>nd</sup> appellant also left for the 1<sup>st</sup> appellant's home a few minutes later. 1<sup>st</sup> appellant opened the door for him.
  107. 1<sup>st</sup> accused did not tell him where he was going. Adan Mohammed and his mother came and woke him up. He was taken to Adan's home at 2 p.m. he then went home with his mother. He had met his sister Nimo at Ibrahim's home. He was at home the whole day.
  108. On Wednesday his aunt took him home. He was in uniform when he was taken home after Mr. Wanjohi at school said they go back home. Mr. Wanjohi was to call them.
  109. The time he was called to school he went and was arrested by the police. He was not given the reason for his arrest. Police demanded at the police station that he produces the gun he holds. He was 18 years old at the time of his arrest.
  110. He denied that even the 1<sup>st</sup> accused was his dormitory mate he did not agree with him to hijack a taxi then they meet at Maasai Mara university. He did not tell him he was al Shabab nor did he tell the 1<sup>st</sup> accused that theft of taxi was something usually did or that they sold the taxis in Mombasa.
  111. He did not have two guns or a sword. He does not drive and was not give the vehicle to drive.
  112. The 2<sup>nd</sup> appellant knew the deceased he used to drive them home. It was not the first time he was sneaking out of school. Adan had persuaded him they clear that class then transfer to different school. When the police officers beat him up, they used clothes from IEBC bag to wipe the blood. He denied giving the 1<sup>st</sup> accused any clothes or ask him to join them.
  113. He had met mother of the 1<sup>st</sup> appellant at home but they did not talk.
  114. On cross examination, he stated that he had recorded statements with police. He was beaten up as he recorded them.
  115. The uniform he escaped with from school he kept at the Texas veve base till Monday. He picked it on Tuesday while in the company of his mother and Adan. He had been at house of the 1<sup>st</sup> appellant from Saturday to Monday. On 13<sup>th</sup> march I, Fatuma Mohammed opened for him. On 12<sup>th</sup> he opened



- for himself the door. That it is not true that Fatuma opened for him. The 1<sup>st</sup> time mother of the 1<sup>st</sup> appellant saw the 1<sup>st</sup> appellant was on 13<sup>th</sup> June 2016.
116. He reiterated that his DNA could be on the clothes exhibit because the police used them to wipe his blood as they beat him up. He had his box with the 1<sup>st</sup> accused and if his tooth brush was in that box it can explain why his DNA was traceable to it.
117. 1<sup>st</sup> accused must have mixed up things in his co-accused but they parted. He stated that if the 1<sup>st</sup> appellant wrote a statement that he was not with 2<sup>nd</sup> appellant it would be a lie but if he stated he went at 8.00 p.m. and 2<sup>nd</sup> appellant at 11.p.m. it is true. He stated that he followed the 1<sup>st</sup> appellant after 10 minutes. He was avoiding mother of the 1<sup>st</sup> appellant so he stayed outside for some time. He did not want the mother to know to know that he had escaped from school.
118. He added that the evidence he has given is in line with his second statement to police. He again stated that the first statement he wrote is what he has told the court. in the second statement he has said that all along he was at the house of the 1<sup>st</sup> appellant. He claimed he was beaten even during the second statement.
119. On 14/3/2016 his mother knew that he was not at school that is the date Adan learnt he was not at school. They came for him on the morning of 15<sup>th</sup> and if they said otherwise, they would be wrong. He cannot tell why Adan can say he got to know of the escape on 15<sup>th</sup>. That it is the 1<sup>st</sup> appellant rang Adan on 14/3/2016. He leaves it to court to judge the dates. he again his mother was informed on 15<sup>th</sup> that he had escaped from the school. It cannot be true that it was his mother who went to inform Adan that accused had escaped from school. On reexamination that he was forced to write the first statement he did not mention in it name of 1<sup>st</sup> accused- Solomon but he recorded it in 2<sup>nd</sup> statement.
120. DW2- IA Alias A. The 1<sup>st</sup> appellant in his sworn defence he was at [Particulars Withheld] high school in form iv. He was a truant skipping school regularly. His was an informal school with no rules. They did not use school uniforms. The students could walk in and out as they wished. Electronic gadgets like phones laptops and the like were not prohibited. At home he had his own room in same compound as his mother.
121. On 12/3/2016 he does not remember receiving any visitor. On 13/3/2016 Bashir visited him date in the night. It could have been past midnight. He knocked at the door and 1<sup>st</sup> appellant opened for him. 2<sup>nd</sup> appellant gave excuses of visitors at his home and that he had no taxi money to go to lenana. He let him in.
122. On 14/3/2016 he advised the 2<sup>nd</sup> appellant to wake up late so that he avoids mother of the 1<sup>st</sup> appellant who is strict. It was a Monday. He himself went to school. The 1<sup>st</sup> appellant returned home at 12:30 p.m. and found 2<sup>nd</sup> appellant had left. He assisted his mother with work then went to a movie shop.
123. A cousin of his Adan came there asking for 2<sup>nd</sup> appellant. Adan claimed 2<sup>nd</sup> appellant. Adan claimed 2<sup>nd</sup> appellant had sneaked from school. The 1<sup>st</sup> appellant opened up that Bashir had slept at his place. They exchanged numbers, then the 1<sup>st</sup> appellant was to alert Adan once he saw the 2<sup>nd</sup> appellant. 2<sup>nd</sup> appellant had told him that the previous day he had been at the Texas miraa base. The 1<sup>st</sup> appellant went to look for him and found him at Mbaite's base. The 2<sup>nd</sup> appellant was with some boys including the 1<sup>st</sup> accused. The 1<sup>st</sup> appellant was sent to buy legend brandy. He drank. He informed Adan that Bashir was there. At 1130 p.m. Bashir came home.
124. The 2<sup>nd</sup> appellant denied that he was in Nakuru that night. He denied taking part in killing the deceased. He did not have Somali swords or guns. He did not take a ride in the vehicle of the deceased. He does



- not know if Bashir knows how to drive. He has never seen him drive and does not know if he has a driving licence. He did not leave with Bashir that night. On 15/3/2016, he left Bashir sleeping and locked him in. he went to his mum's house then to the mosque. He came back home at 11;30 a.m.
125. The 2<sup>nd</sup> appellant had been picked at home by his mother and Adan. He got to see him again on 4/4/2016 at the police station.
  126. He was not in the taxi when it was allegedly fueled at Hass petrol station. They did not abandon the 1<sup>st</sup> accused at Gillani's petrol station and the 2<sup>nd</sup> appellant did not tell him they had planned to hijack a taxi.
  127. On cross examination, he maintained that his school was a free style one. Bashir went home on 13<sup>th</sup> and not 12<sup>th</sup> March 2016. In his statement to police, he claimed Bashir went to his place on 14/3/2016 at 2a.m. He again stated that on 14/3/2016 he left Bashir asleep in his house as he went to school. He claimed to have left Mbaite's place at 8: 30 p.m. He again stated that Bashir came home at 1:30 p.m. but agrees that his statement stated it was 3 a.m. and according to him it was on 13<sup>th</sup> and not 14<sup>th</sup>.
  128. He agreed that at some point he and his co accused sat at Mbaite's. His mother's statement contradicts their account. He denied that Bashir was at his place in 12<sup>th</sup> march 2016.
  129. His mother recorded here statement before he was arrested on 4/4/2016. By the time she recorded it on 28/3/2016 Bashir had been arrested and the 1<sup>st</sup> accused as well. He had been at home from 28/3/2016 up to 4/4/2016. He stated the aunt of Bashir and his brother had pleaded that the 1<sup>st</sup> appellant goes to record as statement and he was willing to do so at all times. It is his mother who obstructed him from doing so. It cannot be true if Adan stated that the first time he heard of that matter was on 15/3/2016.
  130. The 1<sup>st</sup> appellant stated he confused the dates 13<sup>th</sup> and 14<sup>th</sup> March 2016 because he could not remember the exact date he was at Mbaite's place and when forced by the investigating officer to drop a date he said 13<sup>th</sup> but the officer said he was interested on 14<sup>th</sup> /3/2016. He agreed that his school had rules and regulations but it was a non-formal school. Mobile phones were allowed but they could be switched off. The dressing was to be decent. Absenteeism was to be allowed with explanation.
  131. DW3- Adan Mohammed. He testified that on 15/3/2016 mother of Bashir the 2<sup>nd</sup> appellant claimed DW3's aunt and who is the mother of the 1<sup>st</sup> appellant rang to tell him that Bashir had slept at her place and she wanted her to go for him. She requested DW3 to accompany her.
  132. They went and found Bashir locked inside the room of the 1<sup>st</sup> appellant. The 2<sup>nd</sup> appellant was in deep sleep. It was 10 a.m. the witness woke up the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant said his uniform was at Texas kiosk and they went for it.
  133. Dw3 did a bit of counselling for the 2<sup>nd</sup> appellant who claimed not to like his school. He persuaded him to complete that term. Later he learnt that Bashir had been arrested. He recorded his statement. He declined to give his phone. He had visited the 2<sup>nd</sup> appellant in custody before he went to record his statement. The 2<sup>nd</sup> appellant had blood stains on a white shirt.
  134. Dw3 did not know the 1<sup>st</sup> accused person. The 1<sup>st</sup> and 2<sup>nd</sup> appellants are his cousins. He agreed that in the statement he wrote with the lawyer he did not state that the 1<sup>st</sup> appellant had been beaten up. He stated that most of his evidence is not in his written statement.
  135. He denied having been aware on 14<sup>th</sup> March 2016 that Bashir was not at school. He did not question Bashir's mother about how many days he had been away. DW3 stated that when they went for the 2<sup>nd</sup> appellant the 1<sup>st</sup> appellant was away. In the statement he did not specify that he had escorted the accused home. He saw blood on the shirt of Bashir and assumed he had been beaten up.



136. DW4- Amina Adan Hassan. Mother to Bashir. The 2<sup>nd</sup> appellant was in form 3 at Fanaka. On 15/3/2016 mother to the 1<sup>st</sup> appellant who is her niece rang and told her that her son had slept at their place. She went and picked Adan (DW3) and they went for Bashir at ODM market.
137. They went to Adan's home. Adan talked to Bashir about school. They then proceeded home and her daughter Nimo likewise talked to Bashir about school. DW4 took the accused to school the following morning. They had gone for his uniform at Texas. The principal released them home saying they would call him.
138. The day she was called to take the son to school she did so and was arrested. They picked his brown bag and she was told that a boy had mentioned her son. She was called to the station and shown some clothe which she said were not her son's.
139. She said that her son was beaten up during investigations. His uniform was blood stained when he was taken to court 2 which ordered that he be taken to hospital. She recorded her statement. She cannot remember if her statement was read over to her.
140. She stated that her son was good at going to school but in form 3 he started delaying to report. She first saw the 1<sup>st</sup> accused in court. She has never seen her son drive and has never seen him with a gun. She did not know if he took any alcohol or chew khat. She heard of it in court.
141. On cross examination, the mother of 1<sup>st</sup> appellant said Bashir had slept there for two days and had seen him when she went to wake 1<sup>st</sup> appellant. The witness stated that was the second secondary school of Bashir, he had learnt in Naivasha previously. She stated he first ran off from school when he was sick. He had never come home drunk. She has never seen him drive.
142. She is not aware that Nimo did not talk to Bashir or that he went to sleep straight away. She stated Bashir used to come home when school closed but this time he had gone to 1<sup>st</sup> appellant's home. This was the second time he was going there that is why she intervened. She stated DNA samples were to be taken and accused be remanded. Mother to 1<sup>st</sup> appellant maintained that Bashir had been at her place for 3 days.
143. DW5-Fatuma Mohammed Hussein. Mother to 1<sup>st</sup> appellant. 2<sup>nd</sup> appellant is her relative. She used to wake her son up to go to school as he had his own room. On 14/3/2016, she went to wake him up and instead found the 2<sup>nd</sup> appellant in bed. The 1<sup>st</sup> appellant left for school. She does not know how 2<sup>nd</sup> appellant left. On the evening of 14/3/2016 she had not seen Bashir in that room.
144. On 15/3/2016 she saw Bashir in the same room. She sought Bashir's mother's number and called her. She claimed Bashir was in boarding school but she told her Bashir had been at her place for 2 days. The mother came with Adan and picked Bashir. It is Bashir who brought police home wanting her son and she told them he was at school. When the school was contacted it was said the school was closed for midterm. The 1<sup>st</sup> appellant had not told the mother it was half term. She was held by the police instead of her son claiming she had taken him to Somalia and when he showed up in the evening she was released.
145. She was questioned and her phone was held for almost a year. Police took photographs of the shoes of Bashir. She recorded a statement with the police but did not re read it. She had never been called that the 1<sup>st</sup> appellant had a problem at school. She did not know if he played truant. She did not know if the accused knew how to drive. He had taken his identity card.
146. On cross examination she stated that she saw Bashir on 14<sup>th</sup> and not 12<sup>th</sup> or 13<sup>th</sup> March 2016. It is not true that the 2<sup>nd</sup> appellant went to her home on 13<sup>th</sup>.



147. His son's teacher told her that the school was closed on midterm. She denied recording that Bashir came to her place on 12<sup>th</sup> asking for a place to sleep claiming that there were visitors at his home. When police came for her the 1<sup>st</sup> appellant was being sought by his siblings. She was released after his arrest. She stated that for inaccuracies in her statement she attributed to the recording officer.
148. DW6 is Nimo Ibrahim. A sister to 2<sup>nd</sup> appellant. She was at home on 15/3/2016 when her mother brought Bashir at about 3p.m. He refused to talk to her and went to sleep. He woke up at 7 p.m. saying his problem was that he did not like his school. They discussed and he agreed to return to school.
149. On 16/3/2016, he was taken to school but was to return home and be called by the school. On 22/3/2016 she learnt that Bashir had been arrested.
150. On cross examination, she stated that Bashir was not willing to talk when he came; he wanted to rest first. If her mother's version is different that was her word. She has never seen the accused drive or drink alcohol. She did not know if he chews miraa.
151. DW7- Mahat Hussein Dhahir. He works at Hass petrol station as a supervisor. He stated that on 14/3/2016 they did not have fuel. They had no petrol but had diesel and kerosene. They have a register for sales and monies.
152. When cross examined he agreed that on Monday there was petrol sales. He again agreed that on 14/3/2016 they had petrol in the morning and it was over by midday.

#### **Directions of the court**

153. On 11/2/2021, this court ordered the consolidation of this appeal with no. 2 of 2020. It also allowed the amendment of the petition of appeal in no. 2 of 2020. the annexed amended petition of appeal be deemed to be duly filed.
154. On 19/4/2021 this court directed that Narok HCCRA no. 2 of 2020 and Narok HCCRA No.19 of 2020 be consolidated. The lead file is Narok HCCRA No.19 of 2020
155. The appeal was canvassed by way of written submissions. the respective parties' counsel also highlighted their submissions.
156. On 14/12/2022, this court directed as follows;
  - i. Mr.Ondimu to transmit to court the alleged original service of submission to the appellants' legal counsel email addresses immediately
  - ii. M/s Wambui to transmit copy of the publication in the star newspaper immediately.
  - iii. The question of the publication shall be preliminary issue saddling upon the appeal.

#### **Media publication of court documents**

157. Ms. Wambui stated that on 13/12/2022, DPP's submission were published in the star. They have actually already submitted in the court of public opinion. The DPP has abused court process.
158. Ms. Olewe stated that she was told of the article and she was looking for it. That it is unfortunate that the DPP canvassed this matter in the public court. she urged the court to censure DPP because the leak was not accidental but by design.



159. Mr. Ondimu in response stated that he was aware an article was published in the STAR. Whatever they file is public document. However, the court cannot be swayed by the reporting. A court of law decides on evidence and facts before it. The court has so decided in case of cabinet minister for agriculture William Samoei Ruto. Whatever they published does not form part of record. He apologized to his colleagues nonetheless. He is sure the publication will not influence this court's decision.
160. Ms. Wambui submitted that this is disingenuous because the article said lies that the matter proceeded yet it was untrue. There is foul play. They should retract it. They have not asked for that.
161. Ms. Olewe submitted that they did not talk of adverse reporting. Her worry is that the DPP has not served them with the submissions yet.
162. Mr. Ondimu submitted that they served on 16/11/22 at 1330 hours to Mbugua Mureithi and Chigiti. Chigiti acknowledged the service Mbugua did not return to sender.

### **1<sup>st</sup> Appellant's submissions.**

163. M/s Olewe orally submitted that they rely entirely on their submissions filed. Their memorandum of appeal has 13 grounds. However, she chose to emphasize on 3 grounds
164. 1<sup>st</sup> appellant submitted that the 1<sup>st</sup> appellant was never placed at the scene of crime. There were 3 accused persons. 1<sup>st</sup> accused person was a minor. 2<sup>nd</sup> accused and 3<sup>rd</sup> accused persons are the now 2<sup>nd</sup> and 1<sup>st</sup> appellant respectively. No witness placed 1<sup>st</sup> appellant to the scene of crime. Pw10, 11, and 12 who were arrested together with the 1<sup>st</sup> accused(minor) are the ones who had the body of the deceased in the vehicle. PW2 confirmed 1<sup>st</sup> appellant was nowhere near his shop. He also confirmed that when he was taken to Narok Police Station only the minor and the 2<sup>nd</sup> appellant were presented to him for identification. There was no identification parade. PW1 was only shown their photos and there was no parade.
165. The 1<sup>st</sup> appellant submitted that DNA test did not place 1<sup>st</sup> appellant anywhere in the entire scenario. The minor was found driving the vehicle of the deceased and the appellants were not with the minor. - see the record on stories by the minor to PW10,11 and 12 are critical that is the minor's father had killed the deceased.
166. The 1<sup>st</sup> appellant submitted that the trial court laid emphasis on the confessions by the minor yet it was clear the minor was not truthful and honest.
167. The 1<sup>st</sup> appellant submitted that the trial court failed to grasp the motive of the offence. According to the minor the 1<sup>st</sup> appellant told him they were going to sell the vehicle at Mombasa but the vehicle was found with the minor at Nakuru. Vehicle could have been hidden in a specific place. Vehicle was driven from Nakuru to Narok. The minor is the only person who drove the vehicle.
168. 1<sup>st</sup> appellant submitted that the trial court convicted the 1<sup>st</sup> appellant on circumstantial evidence. The law thereto is well established. Suspicion alone is not enough. (Sawa V R). no evidence regarding 1<sup>st</sup> appellant was established. Gaps were filled by the trial court for the prosecution
169. The 1<sup>st</sup> appellant submitted that the appellants were sentenced to hang. Court did away with the death sentence. See last paragraph of trial court's judgment on Muruatetu.
170. In the end the 1<sup>st</sup> appellant urged this court to find their appeal has merit, set aside the judgment of trial court. Further that the issues in the appeal have not been controverted by the DPP. Therefore, urged this court to acquit the 1<sup>st</sup> appellant.



171. The 1<sup>st</sup> appellant has relied on the following authorities;

- i. Charles Maitanyi V R [1986] 1 KLR 198.
- ii. Reuben Lukuru V Republic In Criminal Appeal No. 15 Of 2015
- iii. David Mwita Wanja& 2 Others V Republic [2007] Eklr
- iv. R V Mwangi S/O Manaa (1963) 3 EACA 29
- v. Teper V R (1952) All Er 480 And Musoke V R (1958) EA 715
- vi. Joan Chebichi Sawe Vs Republic Criminal Appeal No. 2 Of 2002 Echoing Sentiments In R V Kipkering Arap Koske & Another 16 EACA 135
- vii. Mary Wanjiku Gichira V Republic (Criminal Appeal No. 17 Of 1998(Unreported))
- viii. Abanga Alias Onyango V Republic Cr. App. 32 Of 1990
- ix. Section 8(2) Of the *Sexual Offences Act*.
- x. Article 48, 50(2) (Q) And 159 Of *the Constitution*.
- xi. Bhatt Vs Republic (1957) eKLR 33.
- xii. Republic Vs Cosmos Mwaniki Mwauara (2006) eKLR
- xiii. Uganda Vs Ssybyala (1969) EA 204.

## **2<sup>nd</sup> appellant's submission**

172. The 2<sup>nd</sup> appellant relied on the amended petition and their submissions filed in court.

173. The 2<sup>nd</sup> appellant submitted that the trial court based its decision on fatally defective DNA evidence. PW26 claimed in 3 dates she received evidence from DCIO Narok which was in contradiction with evidence of PW27. That page 112 lists exhibits PW26 admitted these key exhibits were not covered by any custody report. This is incurable as you cannot know when, where, by whom and from whom they were obtained. See paragraph 117.

174. The 2<sup>nd</sup> appellant submitted that DNA profile of 2<sup>nd</sup> appellant was inconclusive. PW10,11,12 was in the vehicle yet DNA was incomplete. See page 122-123. MF19. there was no chain of custody provided up to the government chemist.

175. The 2<sup>nd</sup> appellant submitted that PW27 testified that the tooth brush was not produced in court yet it was the only evidence with DNA for the 2<sup>nd</sup> appellant.

176. The 2<sup>nd</sup> appellant submitted that the source of light, the intensity was not fully established. Source of light at page 178. (Kansa case). They were 300 m from the source of light.

177. Of identification parade, the 2<sup>nd</sup> appellant submitted that there was no identification parade. PW27 stated that there was need for the parade as media (page 132-133) had splashed them in the media. correctness of identification Is necessary and caution is also necessary.

178. Of death penalty, the 2<sup>nd</sup> appellant submitted that Muruatetu mandatory sentence denies court discretion thus unconstitutional. Defective confession; section 25 of the *Evidence Act* on confession. DPP is silent on this whilst they lay much emphasis on the confession.



179. 2<sup>nd</sup> appellant submitted that Of CCTV footage, PW6 stated that the system collapsed.
180. In conclusion the 2<sup>nd</sup> appellant submitted that the appellants were not connected to the offence.
181. The 2<sup>nd</sup> appellant's submissions are considered in detail in the analysis. I record also that the appellant relied on the following authorities;
- i. Josephat Shikuku V Republic [2010] eKLR
  - ii. Republic V Daniel Kazungu Karisa [2020] eKLR
  - iii. Wardi Yussuf & 2 Others V Republic [2007] eKLR
  - iv. Michael Owuor Ogada Vs Republic -Criminal Appeal No. 7 Of 2004
  - v. Joseph Njoroge Ndichu V Republic [2020] eKLR
  - vi. James Mwangi Kamu V Republic [2020] Eklr Cited The Case Of Wamunga V Republic [1981] Eklr (1989) KLR 424
  - vii. Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR
  - viii. Dennis Kibaara V Republic [2019] eKLR
  - ix. Stephen Gitwa Kimani V Republic[2017] eKLR
  - x. Victor Mwendwa Mulinge V Republic [2014] eKLR
  - xi. Evans Kalo Callos V Republic [2014] eKLR Cityed In The Case Of Bukenya And Others V Uganda [1972] EA 549
  - xii. Mohammed Mbugua Kamau &Another V Republic [2018] eKLR
  - xiii. Article 49(1)(B)(D) And 50(2)(A)(4) Of [\*The Constitution\*](#)
  - xiv. Sections 25A, 26 And 32(1) Of The [\*Evidence Act\*](#)
  - xv. Rule 4 Of The The [\*Evidence Act\*](#) (Out Of Court Confession) Rules, 2009.
  - xvi. Malik Mohamed Musa V Republic [2020] eKLR

**The respondent's submissions.**

182. Mr. Ondimu stated that they have summarized proceedings. He urged the court to consider the elements of the offence. That the motor vehicle is key in this case. That his colleagues have avoided the evidence of PW19 which is critical in this case. Evidence adduced have been analyzed in their submissions.
183. The respondent urged the court to look at their submissions on death sentence. The only available sentence for this kind of crime is death. The trial court took cognizance of the Muruatetu case and proposed death sentence. These are exceptional circumstances to justify death sentence imposed. He argued that their submissions are comprehensive. He urged this court to dismiss the appeal.
184. The respondent has relied on the following authorities;
- i. Section 216, 329 And 347 of the Criminal Procedure Code
  - ii. David Njuguna Wairimu V Republic



- iii. Section 21, And 296(2) of the Penal Code.
- iv. John Kariuki Gikonyo V Republic [2019] eKLR
- v. Uganda Vs Hussein Hasssan Agade & 12 Others Criminal Session Case No. 0001 Of 2010.
- vi. Fatuma Hassan Salo V Republic [2006] eKLR
- vii. S v Makwanyane [1995] (3) Sa 391
- viii. The State Vs Muller , Ivan , Andres Case No. 2 Sh98/2005 High Court Of South Africa
- ix. The State V Mpho Mpelegang CTHLB-000008-07 High Court of Botswana

## **Analysis and Determination**

### **Duty of Court**

- 185. As a first appellate court, this court will re-evaluate the evidence and make its own conclusions, except bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32
- 186. I have carefully considered grounds in the petition of appeal, the evidence tendered before the trial Court, the findings and decision by the trial Magistrate, written submissions, authorities relied upon by both parties and oral or highlighted submission by counsel for both parties.

### **Context**

- 187. Although a life was lost in the process, the accused persons were charged with robbery with violence. The appeal will therefore, be concerned with whether the prosecution proved the charge of robbery with violence to the required standard. Largely, the case turned on accomplice evidence and circumstantial evidence. Sentence has also been challenged.

### **Issues**

- 188. The ultimate questions to be answered are therefore: -
  - i. Whether the prosecution proved beyond reasonable doubt any one or more of the ingredients of robbery with violence under section 296(2) of the Penal Code.
  - ii. Whether it was safe to found conviction on accomplice evidence and circumstantial evidence.
  - iii. Whether the sentence was manifestly harsh in the circumstances.

### **Elements of robbery with violence**

- 189. Under Section 296 (2) of the Penal Code, the prosecution is required to prove beyond reasonable doubt any one or more of the ingredients of the offence of robbery with violence as was stated by the Court of Appeal in the case of Oluoch – Vs – Republic [1985] KLR:

“Robbery with violence is committed in any of the following circumstances:

- a) The offender is armed with any dangerous and offensive weapon or instrument; or



- b) The offender is in company with one or more person or persons; or
- c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person  
.....”

190. The three elements of the offence of robbery with violence under section 296(2) of the Penal Code are, however, to be read disjunctively and not conjunctively. Thus, proof of one element beyond reasonable doubt is sufficient to found a conviction for robbery with violence (Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007)

### **Accomplice and circumstantial evidence**

191. This case is primarily based on accomplice evidence and circumstantial evidence. The only eye witness was the 1<sup>st</sup> accused whose evidence is accomplice evidence which require corroboration. The rest of the evidence before this court is substantially circumstantial, thus, identification of the culprits and connection thereof to the offence should be clearly borne out of the evidence adduced. Notably, the trial magistrate based conviction on the circumstantial evidence, the doctrine of recent possession and accomplice evidence.

### **Of accomplice evidence**

192. PW27 stated that he was informed by PW14 that the 1<sup>st</sup> accused (PW19) had a confession to make; he had killed the deceased. PW16 wrote the confession of PW19.

193. The evidence by PW19 has been recorded. But, the gist of his evidence is that the 2<sup>nd</sup> appellant removed him from school at gun point. He went out in his school uniform. He was given by the 2<sup>nd</sup> appellant, civilian clothes to change into. They were a rugged blue trouser, black jumper and blue shoes. The 2<sup>nd</sup> appellant had black loafer shoes, red t-shirt and blue jeans trousers. They went to town where they chewed miraa up to midnight. He drank coca cola soda. When they left, they met the 1<sup>st</sup> appellant in town. The 1<sup>st</sup> appellant asked him to go pause as a customer to a taxi and he did so. There was a motorbike nearby. He asked if it was a taxi and he boarded it. The charges were Kshs. 200. They were to pick his two friends at a petrol station. They did so and proceeded to gate D of Maasai mara university. They passed HASS petrol station then a bridge and proceeded to the university gates. The 2<sup>nd</sup> appellant directed the driver where to go. When he reached the place the deceased was pulled out of the vehicle at gun point.

194. The 2<sup>nd</sup> appellant hit the deceased on the head using a sharp metal. He was asked to use a stone to hit the deceased and he did so. Deceased cried out that he should not be killed. Security lights were turned on and they stopped beating him and the 2<sup>nd</sup> appellant covered his mouth. When the lights went off the 2<sup>nd</sup> appellant stabbed the deceased on the neck and they placed him in the boot. The 2<sup>nd</sup> appellant drove. The 1<sup>st</sup> appellant was a co-driver and 1<sup>st</sup> accused sat behind. They refueled petrol worth Kshs. 3000 at Hass petrol station. They travelled to Nakuru. The clothes were produced as P Exh 12 and 13. There was a Samsung phone and when it rang the 1<sup>st</sup> appellant removed the battery and sim card. The 1<sup>st</sup> and 2<sup>nd</sup> appellants left for town for other business, and the 1<sup>st</sup> accused left alone with the car. On the way, he met his friends who gave evidence earlier. The three accused were to meet at Gillanis at 11p.m.

195. A conviction may not be founded solely on accomplice evidence; it requires independent evidence sufficiently corroborating it. What is the case here?



196. The evidence by the police including PW27, was that it was after 1a.m. on the material night that the 1<sup>st</sup> accused lured the taxi man. A bodaboda was near the taxi when the 1<sup>st</sup> accused engaged him.
197. They picked the two accused persons and went to maasai mara university at a secluded area. The taxi driver was hit with crude weapons. They stopped beatings when someone switched on lights. 1<sup>st</sup> accused used a stone to hit the deceased on the head. The stone was produced as exhibit. 2<sup>nd</sup> appellant stabbed the deceased severally using a knife.
198. The taxi man was put in the boot. They went to Hass petrol station. They then drove to Nakuru.
199. They also claimed that the three; 1<sup>st</sup> accused, the 1<sup>st</sup> and 2<sup>nd</sup> appellant violently robbed the deceased of, killed him and dumped his in the boot of motor vehicle KBN xxxP. Among the properties stolen were the motor vehicle that was driven by the deceased, mobile-phone, wallet, identity card, diving licence, some currency, deceased's child's school bag and books. PW24 took photographs of items recovered in the vehicle in Nakuru. PW18 took photographs of the scene in Maasai Mara gate D and among the exhibits was a blood-stained stone. PW19 testified that the 2<sup>nd</sup> appellant hit the deceased on the head with a sharp metal. PW19 hit the deceased with a stone. Then when lights went off the 2<sup>nd</sup> appellant stabbed the deceased on the neck and they placed him in the boot.
200. The evidence by PW8-Benard Yegon- was that, he worked at Samsung from June 2015 to about March 2016. On the night of 14<sup>th</sup> to 15<sup>th</sup> March 2016 he reported on duty at about 8 p.m. At about 2 a.m. he was sleeping when he woke up to some noise from about 10 meters away. He heard people talk as if there was a fight. He switched on the lights and saw a vehicle leaving. He went back to sleep but with the lights on. The vehicle came back. He then heard the door of a boot bang. His place of work was near a mosque, near a university. In the morning he went to the scene and saw blood stains.
201. On 18/3/2016 police came to the scene and he went to show them the blood stains. The police picked a stone which was stained. He recorded his statement.
202. On cross examination, he stated that the sound of the door closing is different from a boot closing. He heard sounds of beatings but did not hear anyone scream. He saw this from inside the house and when he went out the vehicle left. He did not hear anybody cry for help. The blood stains were outside Zamzam shop.
203. The police came and she showed them the blood. The police also took the stone which had blood stains.
204. The evidence of PW8 gives succinct details of the events of the night of 14<sup>th</sup>-15<sup>th</sup> March, 2016 and also describes the scene of crime and identifies one of the weapons used to injure the deceased during the robbery.
205. The investigations confirmed the evidence by PW8 of the scene of crime, what happened there and the weapon collected from there- blood-stained stone. See evidence by PW18 CPL Paul Kiilu. Scientific evidence also confirmed the blood on the stone matches that of the deceased.
206. It was proved that the stone is one of the weapons that were used to injure the deceased during the robbery. PW25 confirmed the injuries on the deceased, and the cause of death; cardiac temponara.
207. All these pieces of evidence corroborate the evidence by PW19 on where, when and how the crime was committed.



## Of circumstantial evidence and identification

208. Circumstantial evidence is not the inferior. Where it is properly cast, many a time it unravels crime committed in complete mystery and calculated concealment. See the Court of Appeal in *Mamush Hibro Faja v Republic* [2019] eKLR citing the case of *Republic vs. Taylor Weaver and Donovan* [1928] 21 Cr. App. R.20 that: -

“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 of evidence to say it is circumstantial.”

209. The threshold nonetheless, is that: -

“...in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt” (*Mwita v. Republic* [2004] 2 KLR 60 at p. 66).

210. Therefore, the court must be sure that there are no other co-existing circumstances which would destroy or weaken the inference drawn upon, before convicting solely on circumstantial evidence (*Simoni Musoke v. R* [1958] EA 715, *Teper v. R* [1952] AC 480), was quoted: -

211. Accordingly, care should be taken to thoroughly and closely examine evidence recorded to ascertain depicts a vivid picturesque of what happened; ‘...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 (*Musili Tulo vs. Republic* [2014] eKLR).

212. As the incident occurred at night, care should be taken to ensure the appellants were positively identified or revealed as the perpetrators of the offence (*Wamunga v. Republic* (1989) KLR 424)

213. I have interrogated the circumstances under which identification was done.

214. PW3 identified the 1<sup>st</sup> accused and 2<sup>nd</sup> appellant as the people who asked the deceased to take them to gate D. See also the evidence by PW15 IP Josephat Kimeu on identification of the 1<sup>st</sup> accused by PW3.

215. The investigators also set out to confirm or otherwise of statements made by PW19 and the defence during investigations on whether these three were together at the material time and during the commission of the offence herein as claimed by PW19.

216. They visited the shop of PW2 and recorded his statement. PW2 told the court that he the 1<sup>st</sup> accused and the 2<sup>nd</sup> appellant came to his miraa shop on the evening of 14<sup>th</sup> March, 2016. The 2<sup>nd</sup> appellant was not a stranger to him and he went to his shop on the 14/3/2016. He stated that the 2<sup>nd</sup> appellant was smoking cigarette, chewing miraa and drinking legend liquor at his shop. He further stated that the 2<sup>nd</sup> appellant had an ECK bag hanging on his shoulder. The bag recovered from the vehicle was an ECK bag- the same one PW2 saw. In addition, he stated that the 2<sup>nd</sup> appellant went out with a tin of water and brushed his teeth.

217. The evidence of PW2 show he spent enough time with the 1<sup>st</sup> accused and 2<sup>nd</sup> appellant in his shop. He even had a chart with them as they sought to know why he was not chewing miraa; they also asked him to play and played reggae music for them.



218. PW7 corroborated the evidence of PW2 in material respect especially that on 14.3.2016 the 2<sup>nd</sup> appellant and the 1<sup>st</sup> accused were in the shop of PW2. His evidence was that Bashir whom he knew well bought muguka from his shop but did not allow him to chew miraa in his shop for he is school going. Bashir then went to the next miraa shop belonging to a Meru Trader- from evidence this is PW2. According to him, the dark boy- the 1<sup>st</sup> accused- came from PW2's shop to buy a soda from him. He gave very vivid and fine details of the transaction with the two in his shop, for instance, he sold Bashir muguka and refused him to chew miraa from his hop for he was a school student, and that the dark boy did not have 5 shillings for the full price of a soda. He nevertheless, gave him the soda and left him with the bottle when he told him that he was with Bashir.
219. The evidence of PW13 Joshua Kimany, a teacher at Nakase High School where the 1<sup>st</sup> appellant was learning testified and produced register showing that the 1<sup>st</sup> appellant was not in school on 15<sup>th</sup> March, 2016 and that his absence for that day was not explained.
220. The IO PW24 after the 1<sup>st</sup> appellant made statements that he was at school on the material time and that on 14<sup>th</sup> March, 2016 the 2<sup>nd</sup> appellant spent at his house, set out confirm or otherwise of these statements. He established the 1<sup>st</sup> appellant was not at school and the principal of the school confirmed this. He also established that the statements by the 1<sup>st</sup> appellant and his mother were contradictory in a material respect.
221. The evidence of PW20 Onesmus Mwangi Wanjohi, the Principal of Fanaka High School where the 1<sup>st</sup> accused and the 2<sup>nd</sup> appellants were students at the material time show that the 2<sup>nd</sup> appellant was absent from school on 14<sup>th</sup> and 15<sup>th</sup> March 2016 and the whole of that week, and the 1<sup>st</sup> accused was absent on 15<sup>th</sup> March 2016. The 1<sup>st</sup> accused was at school on 14<sup>th</sup> March, 2016 but sneaked out thereafter. Both were classmates in the school. On 11<sup>th</sup> March, 2016, the 2<sup>nd</sup> appellant had come back to school after being granted permission but during super it was discovered that he had disappeared again.
222. Scientific evidence was also tendered in this case; DNA results. The 2<sup>nd</sup> appellant admitted the tooth brush to be his. That he used it for brushing his teeth after chewing miraa. PW2 was categorical that on the night of 14<sup>th</sup> March, 2016 the 2<sup>nd</sup> appellant brushed his teeth at his shop after chewing miraa. The tooth brush that was found in the vehicle herein was tested for DNA and it was conclusive that the DNA matches that of the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant's explanation on how his tooth brush was found in the vehicle herein was hollow. The 2<sup>nd</sup> appellant merely stated that he had his box with the 1<sup>st</sup> accused and if his tooth brush was in that box it can explain why his DNA was traceable to it. This is hollow explanation and is simply an afterthought aimed at creating a defence for himself.
223. There was nothing to show that the toothbrush or his other items recovered from, were planted in the vehicle to frame him. PW24 confirmed that the tooth brush was one of the items that were submitted to her for DNA testing and the DNA results submitted was in respect of inter alia the wooden toothbrush belonging to the 2<sup>nd</sup> appellant. This DNA result on the brush was conclusive; it was the 2<sup>nd</sup> appellant's.
224. Similarly, the sweat shirt found in the vehicle and belonging to the 2<sup>nd</sup> appellant produced DNA profile of the deceased. It connects the 2<sup>nd</sup> appellant to the vehicle and crime in a vivid manner at the material time.
225. At this juncture, I note the appellants seems to suggest that the DNA was largely inconclusive and therefore not reliable evidence of proof. The court notes that the report was clear on which item or part of the DNA was conclusive or inconclusive. Of significance are the DNA testing that were conclusive which the report sets out distinctly and clearly.



226. I do note also that the appellants attacked the integrity of the DNA results on the basis of lack of chain of custody. PW24 was categorical that she received the items for testing properly packed in individual and separate Khaki envelopes from the IO. This was secure transmission and custody of the DNA samples. She also stated that the samples were analyzed in accordance with due processes, packed securely, fully documented, recorded all processes in the files and the items were kept in their stores. She explained that these formalities and procedures were adhered to, and that they guaranteed sanctity of the samples.
227. Accordingly, the court does not find any breach in the chain of custody of these samples which may dilute or impeach the integrity of the DNA testing and results presented in court.
228. What about the alibi evidence?

#### **Alibi evidence.**

229. The 2<sup>nd</sup> appellant had been away from school from 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> March 2016 and this was discovered by his mother on 15<sup>th</sup> March 2016.
230. It was claimed that the 1<sup>st</sup> appellant knew this and rang DW3 on 13<sup>th</sup> to inform him. The 1<sup>st</sup> appellant denied and stated that he only met the 2<sup>nd</sup> appellant on 13/3/2016 and DW3 claims to have learnt of it on 15/3/2016.
231. In the instant case, the prosecution evidence is that the 1<sup>st</sup> accused and the 2<sup>nd</sup> appellant were together at PW2'miraa shop in the night of 14<sup>th</sup> March, 2016. The 2<sup>nd</sup> appellant had an ECK bag hanging on his shoulder. The same bag was recovered from the vehicle. DNA testing showed conclusively that the blood stains on the bag matched that of the deceased. The bag connects the 2<sup>nd</sup> appellant to the crime herein.
232. The appellants raised an alibi defence that they were not at the scene of crime. The 2<sup>nd</sup> appellant had been away from school from 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> March 2016. The 1<sup>st</sup> appellant was aware that the 2<sup>nd</sup> appellant was not in school and rang his mother. The contradictory statements of the defence witnesses and the two appellants detract completely from the alibi defence.
233. When the IO- PW27- set out to establish the truth or otherwise of the alibi, it turned out the appellants and their witnesses were contradicting each other in material respects as to where these two were at the material time.
234. The investigation and evidence of the IO- PW27- has established real connection between the appellants and the crime. This unravels the alibi defence and places the appellants in the scene of crime.
235. I further note that the trial magistrate considered the appellants' defence while making his decision and the same is evident on page 217, 218 and 219 of the trial court proceedings.

#### **Ultimately...**

236. The evidence by the prosecution show that, on the night of 14/3/2016 leading to 15/3/2016, the 1<sup>st</sup> accused, 1<sup>st</sup> appellant and 2<sup>nd</sup> appellant were away from school and were in company of each other at the material time. The circumstantial evidence is that the trio were together on the material time and at the scene of crime. And, given the chain of events and circumstances of the case, there can never be any other explanation than that the appellants in company of the 1<sup>st</sup> accused armed with dangerous



weapons robbed the deceased of motor vehicle and phone herein. And during or immediately before or after such robbery, the three used actual violence and fatal force on the deceased.

237. Therefore, it has been proved beyond reasonable doubt that the three; accused 1, 1<sup>st</sup> and 2<sup>nd</sup> appellant in company of each other, and armed with dangerous weapons- also used to kill the deceased- robbed the deceased of motor vehicle and phone herein. And during or immediately before or after such robbery, used used violence and fatal force upon the deceased. They were therefore properly convicted for robbery with violence contrary to section 295 as read with 296(2) of the Penal Code.
238. In light thereof, I dismiss their appeal on conviction.

### **Of sentence**

239. The court fastens a quarrel on two submissions. One is by the prosecution counsel; that the only available sentence for this kind of crime is death. The other is by the appellants to the effect that death penalty was outlawed by the Muruatetu decisional law. My understanding of the law is that a law that prescribes only one and mandatory sentence is inconsistent with *the constitution* to the extent that it takes away the discretion of the court in sentencing- an exercise that pertains to fair trial and justice. The suggestion by the appellants is simply misleading as Muruatetu did not outlaw death sentence. Until a final judicial pronouncement, death sentence remains part of law of Kenya and may be imposed in appropriate cases. I say so fully aware of anti-death sentence arguments and sentiments.
240. I will, however, consider other arguments that the death sentence passed on them was not appropriate sentence in the circumstances of this case.
241. The mitigating and aggravating circumstances were placed on record at the trial court. The trial court took cognizance of the Muruatetu case and passed the death sentence.
242. The respondent submitted that considering the circumstances the deceased met his gruesome death, the appellants do not deserve any mercy from this honourable court and any other court including the court of public opinion. The DPP was of the view that the two appellants deserve a death sentence.
243. It bears repeating that death sentence is still lawful in Kenya, and may be imposed where circumstances so deserve. It has been observed by courts that death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder (see Prof. Ngugi J (as he then was) in *James Kariuki Wagana vs Republic* [2018] eKLR); say, where excessive or brutal force has been employed, or offence committed in most bizarre manner, or in circumstances which expose many to danger or injury or death.
244. In the case before me, all the ingredients of robbery with violence have been met. The appellant, who was in the company of others, robbed the complainants, and in the course of the robbery, lethal force was used, and also, they were armed with a dangerous weapon which was used to kill the deceased; the cause of death was stated to be cardiac tamponade.
245. The level of violence unleashed on the deceased is sufficiently serious to warrant death sentence or long period of imprisonment.
246. The court is aware that death sentences were commuted by the president to life imprisonment. In the circumstances of this case, I will take a more practical approach; life sentence is appropriate sentence. I therefore, set aside the death sentence and impose life sentence upon the appellants.
247. It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 2<sup>ND</sup> DAY OF MARCH, 2023.**

**F. GIKONYO M.**

**JUDGE**

In the presence of:

Both appellants

Mr. Kasaso – CA

Olewe for 1<sup>st</sup> Appellant

Ms. Mwaniki for DPP

Ms. Nyaga holding brief for Wamboi Kabage for 3<sup>rd</sup> Appellant

