REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 74 & 75 OF 2019

DANIEL WAMBUA MAINGI.....1ST APPELLANT

MUSAU KIOKO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. M. Opanga

Senior Resident Magistrate dated 7th day of August 2019 in Kangundo SPM'S Court

***Criminal Case Number 335 of 2017*)**

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

DANIEL WAMBUA MAINGI.....1ST APPELLANT

MUSAU KIOKO.....2ND APPELLANT

JUDGEMENT

1. The appellants herein, **Daniel Wambua Maingi** and **Musau Kioko**, were charged in the Kangundo SPM'S Court Criminal Case Number 335 of 2017 with the offence of Robbery with Violence contrary to section 296(2) of the ***Penal Code***. The particulars were that the accused on the 22nd day of March, 2017 at Kausiani Village of Athi River Sub-county within Machakos County, they jointly robbed **Dixon Mwanyangwa Ngonda** a motor cycle registration no. KMDF 720C Make Skygo, Mobile Phone make X-Tigi, driving licence C. of C. No. 026918 (ID W178) all valued at Kshs 100,000/= and at the time of such robbery fatally injured **Dixon Mwanyangwa Ngoda**.

2. After hearing the case, they were convicted and sentenced to serve twenty (20) years imprisonment.

3. Aggrieved by the said decision the appellants have preferred this appeal and although in their grounds they mentioned that they were challenging both conviction and sentence, in their submissions, they have only dealt with the sentence. The appeal is based on the following grounds:

1. **The Trial Magistrate erred in law and fact by not considering the whole evidence as required by the law.**

2. The Trial Magistrate erred in law and fact in dismissing the defence of the appellant without enough reasons yet the same was comprehensive and casted enough doubts which could have overturned the prosecution evidence.

4. At the trial, the prosecution called 6 witnesses.

5. According to PW2, **Elizabeth Kinyasi**, she had a grandson who used to be picked up by Dickson, the deceased herein, her neighbour, by his motor bike to take him to school. On 22nd March, 2017, she woke up as usual to prepare her grandson to go to school and waited for the deceased at 5.30am. When the deceased was not answering his phone, she decided to go check on him and when she proceeded to his place she found his gate wide open. She then returned back home without entering the deceased's home and took her grandson to school.

6. Upon her return, she still saw the gate wide open and sought from the neighbours if they had seen the deceased but they replied in the negative. They then went to check on him in case he was unwell and past his gate, they found a wooden plunk with blood on it with a stone on the side. When she proceeded further, she saw the deceased lying in a pool of blood facing down, dead. According to her, she was in the company of her husband, Dorcas and a village elder who called the police who arrived and took the body away.

7. The witness confirmed that she knew the 1st Appellant who was her neighbour and with whom she had seen the deceased. The 2nd Appellant was however, unknown to her.

8. PW3, Francis Kinyasi Kanyau, PW2's husband corroborated PW2's testimony by stating that upon the return of PW2 from the school, they decided on the advice of their son to go to the deceased's home where they found the gate open. Inside they saw a wooden plunk with blood on it and on proceedings further, they found the deceased on the ground facing down, dead. They also saw a huge building stone 9x9 on his side near his head. PW3 called the village elder who came and called others and sister to the deceased. Thereafter the Police came and took the deceased's body away to the mortuary. He also confirmed that the 1st appellant was a neighbour who used to hang out with the deceased even on his motor bike. The 2nd appellant was however unknown to him.

9. **PW1, Sgt. Charles Webo** who was stationed at KBC Police Station was on 22nd March, 2017 at 10.00am called by the OCS and informed that he had received information that a man had been found killed at Kausyani area. PW1 looked for **PC Kemboi** and **PC driver Timothy Njoroge** and accompanied by the OCS and the OCPD they proceeded to the scene where they found a group of people gathered including the village elder and chief. At the scene they found owner of the home on the ground facing downwards with injury on his head. On the ground was a huge stone and a wooden plan with pieces of hair were there. When they went to the bedroom they found the bed unmade. The body was however, outside the house but within the compound. They then took photographs. According to the information he got from the OCS, the deceased had a motorcycle SKYGO black in colour which was missing as well as his mobile phone and when they tried calling it, they found that it had been switched off. They then took body to Kangundo level four mortuary at about 1.05pm. They also took the 9x9 stone and the plunk of wood which to Mlolongo police station.

10. When the witness reached the police station from mortuary, the OCS called informed him that two people were arrested at Mlolongo at about 11.00-12.00 pm (midnight) by *boda boda* riders who said the two suspects had wanted to sell a motor cycle at Kshs. 25,000/= together with a phone for sell. However, the said riders became suspicious because that was not the price of a motor cycle and it was being sold at odd hours. Further, the two did not even have any documents of ownership. The *boda boda* operators arrested the two and took them to Mlolongo police station with the motor cycle and phone. On the instructions of his OCS he proceeded to Mlolongo police station with other officers where they police informed them that they had recovered a driving license with the names of **Mangwanda Dickson** in possession of the two suspects.

11. When the two suspects were called they identified themselves as **Daniel Maingi** and **Musau Kioko**. One was tall and the other was short. According to PW1 the 1st appellant said he hit the deceased with a wooden plunk and he fell down and the 2nd appellant told him to take the motor cycle and finished the job. According to the 1st Appellant, it was the 2nd Appellant who hit the deceased with the huge stone. They then took the motor cycle registration no. KMDF 720C SKYGO and the deceased's driving license as well as his mobile phone green in colour, a bunch of keys and padlocks and proceeded to Mlolongo to look for market where they were arrested.

12. The two suspects were then taken to KBC Police Station to face the charges after they recorded their statements stating their respective roles. He identified the deceased's driving license, mobile phone (X-Tigi), two padlocks and bunch of keys as well as motor cycle is outside the court. Registration No. KMDF 720C SKYGO black in colour and the statements by the Appellants. According to him, the stone with blood hair and wooden plunk was taken to government for DNA analysis. According to him, the Appellants voluntarily recorded their statements which was recorded by the investigating officer after which they were read over to the Appellants who appended their signatures thereon.

13. **PW5**, Cpl Joram Karanja, of Mlolongo police station testified that on 22nd March, 2017 at 10.00am two suspects were taken to the police station by *boda boda* operators from Syokimau stage led by one **Alex Mutuku** their manager. They narrated that the two suspects were trying to sell a motor cycle SKYGO registration no. KMDF720C at Kshs. 25,000/= and when asked for documents of ownership the two handed them driving license which did not bear their names. For that reason the *boda boda* operators suspected them to be thieves. The two suspects were interrogated by PW5 and they said they got the motor cycle at a place called Joska. Upon being searched PW5 found a driving license, mobile phone make XTIGI, two padlocks and keys. When PW5 scrolled the mobile phone, he came across the name of one Grace whom he called and asked if she knew one Dickson Ngonda and she confirmed knowing him. When PW5 asked to speak to know his whereabouts, she told him she was far but would make a call and find out his whereabouts. While waiting PW5 received a phone call from OCS KBC police station who informed him that the motor cycle had been stolen at Joska area so PW5 detained the suspects waiting for police from KBC to come for them.

14. Later, PW5 learnt that the owner of the driving license was the owner of the motor cycle whose name was Dickson Ngonda who had been killed to steal his motor cycle. He also identified the items that had been recovered which he exhibited and identified the Appellants as the two suspects before court.

15. **PW4**, **Dr. Kalekye**, a medical officer Kangundo level four hospital . performed post mortem of Dickson Mwangangwa on the 30th March, 2017 at 12.30 pm after the body was identified by two of the deceased's relatives. According to him, the body was refrigerated and had blood on nostrils and left ear. The body was pale meaning he had over bled and had a 3 by 3cm wound on temporal region with a deformed skull. The other systems were normal. It was his opinion that the Injury was on the head and the deceased bled within the skull whose compression exerted pressure on the brain since there was also bleeding within the brain. He found that the deceased suffered several head injury. He then took specimen blood and took for DNA analysis to be matched against stains found on the weapons recovered at the scene. He signed post mortem report, dated and produced it as an exhibit.

16. PW6, **PC Charles Oduol**, testified that he was the Investigating Officer in the case. After narrating the aforesaid evidence, he stated that he was not present when the Appellants recorded their statements at Kangundo and that the Appellants were taken to the OCS on their request to record their statements after they had been taken to the station by *boda boda* operators from Mlolongo.

17. At the close of the prosecution's case, the Appellants were both placed on their defence. The 2nd Appellant who testified on oath as DW1 stated that he was in the business of collecting scrap metals. On 22nd March, 2017, he woke up in the morning and proceeded to Mlolongo where he picked scrap metal worth 80kg and because he was not able to carry the load he left them at a place for someone to watch over them as he went to look for a motor bike to carry the load for him. In the process while on the road he saw a motor cycle make Skygo being ridden by the 1st Appellant. They then agreed on the transportation at Kshs. 200/= and he boarded the motor cycle and took him to where the load was.

18. Along the way the rider told him we alight he speaks to some people on the side and the 2nd Appellant did so. He however did not know what they spoke about but saw the said people get hold of the rider and both of them were arrested though he did not know why he was arrested. According to the 2nd Appellant, he did not know where the motor cycle came from and he did not know the 1st Appellant before that day.

19. The 1st Appellant similarly gave sworn evidence. According to him, he was doing masonry and was arrested on 22nd March, 2017. On 21st March, 2017 he left work at Joska at 5.00pm and went to Gaza club in the company of the 2nd Appellant and the deceased and they stayed there until 8.30 pm when he took a motor cycle *boda boda* and went to sleep. The next morning, on his way to visit his aunt at Isinya, he boarded a motor vehicle to Mlolongo then got into a restaurant for tea and as he was going to buy cigarettes in a shop, he met the 2nd Appellant with a motor cycle which he knew well. The 2nd Appellant, being his friend, offered to buy him a drink and they went to a club at 9.00am and started drinking. The 2nd Appellant then inquired from him about a customer to buy a motor cycle. When the 1st Appellant, who knew the owner of the said motor cycle asked him about it, the 2nd Appellant informed him that the owner had consented to him selling it.

20. However, while still at the club, some *boda boda* operators arrived and he asked if they would buy the motor cycle but were arrested and taken to Mlolongo police station. According to the 1st Appellant, he knew the 2nd Appellant and the bike but didn't know why he had it or how he got it.

21. In cross-examination he stated that on 21st March, 2017 he met the deceased and the 2nd Appellant at Gaza Club and the deceased had a Skygo motor cycle which he knew well because many times the deceased had carried him on it to work. On 22nd March, 2017, when he met the 2nd Appellant at Mlolongo, the 2nd Appellant had the deceased's motor cycle and the 2nd Appellant requested him to assist in selling the same at Kshs 45,000.00. Since he had no mobile phone he was unable to confirm the position from the deceased.

22. In his judgement the learned trial magistrate found that the prosecution's case was well knitted even without the Appellant's admission since the items belonging to the deceased were found in possession of the two Appellants less than six hours after the death of the deceased in circumstances that point to the fact that they were the perpetrators of the crime. It was therefore found that the prosecution had proved its case against the appellants beyond reasonable doubt. He found the Appellants guilty of the offence, convicted them accordingly and sentenced them to twenty years imprisonment.

Determinations

23. This being a first appeal, the court is expected to analyse and evaluated afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

24. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows: -

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully**

weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

25. In **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

26. In this case, the prosecution's case in summary was that PW2 and PW3 were the deceased's customers in that the deceased used to ferry their grandchild to school using the deceased's motor cycle. However, on 22nd March, 2017, both of them waited for the deceased to pick up the child and as the deceased was not coming PW2 decided to drop the child to school herself. Upon her return the two decided to check on the deceased and it was then that his lifeless body was discovered in his house. Also found was a building stoke and a bloody wooden plank. The police were then called and the body removed to the mortuary.

27. In the meantime, at Mlolongo Police Station a report was made by *boda boda* riders that they had apprehended two suspect at night who were attempting to sell a motor cycle at a very low price. Being suspicious they decided to apprehend them and handed them over to the police. Upon being searched, the two suspects, the Appellants herein, were found in possession of the deceased's driving licence, his mobile phone, a bunch of keys and padlocks.

28. The post mortem on the body of the deceased revealed that the deceased died from head injury that led to internal bleeding.

29. In this case the Appellant's conviction was based on the doctrine of recent possession. Delivering the judgment for the majority, **McIntyre J.** in the Canadian Supreme court case of **Republic vs. Kowkyk (1988)2 SCR 59** explored at length the history of the doctrine in various decisions from its roots in the nineteenth century in England and Canada and said in part:

"Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in R. v. Graham, supra, said at p. 215:

"The use of the term 'presumption', which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is 'inference'. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused."

He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft."

30. In the end, the majority of that Supreme Court accepted the following summary of the doctrine:-

"Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

31. In **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr App. No. 272 of 2005(UR),** the Court of Appeal held that:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

32. The applicability of the doctrine of recent possession was dealt with in **Erick Otieno Arum vs. Republic [2006] eKLR** where he Court of Appeal held:

"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion."

33. In **Malingi vs. Republic, [1989] KLR 225**, the Court of Appeal had this to say about the doctrine of recent possession:

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."

34. **Laidlaw J.A** put it more succinctly in the case of **R vs. O'keefe {1958} O.R. 499 (C.A .)** when he said:-

"It is possession by an accused person of recently stolen goods that constitutes the foundation of a prima facie case against him and creates a presumption of guilt. It is a persuasive presumption which imposes on the accused person a burden of giving an explanation of his possession that might reasonably be true. When such an explanation has been given the burden then continues to rest, as always, on the Crown to prove the guilt of the accused beyond reasonable doubt."

35. According to the 2nd Appellant he was in Mlolongo to pick scrap metals which he was trading in when due to the weight of the said materials, he decided to look for a motor cyclist to assist him. He then got hold of the 1st Appellant who was not known to him at the time and while they were on their way to pick up his goods, they were both arrested and were charged with this offence.

36. It is clear from the evidence presented that none of the people who apprehended the Appellants was called to testify. According to PW5, the Appellants were taken to Mlolongo Police Station by the said *boda boda* operators led by their manager, one **Alex Mutuku** at 10.00am. Although the report was that the Appellants were arrested in the night no one testified as to the exact time of their arrest. It is therefore unclear as to the exact role played by the 2nd Appellant in the whole transaction. None of the witnesses knew the 2nd Appellant and according to the 1st Appellant, it was in fact the 1st Appellant who approached the said *boda boda* operators with a proposal to them to buy the motor cycle.

37. The learned trial magistrate in his judgement did not deal with all these issues. The same Court in **Antiphace Herman vs. R Mombasa Court of Appeal Criminal Appeal No. 40 of 1997** held that:

"None of the witnesses who gave evidence in the Magistrate's court identified the appellant and his co-accused (one Dominic Kiango Mutheu) as the actual thieves. The arrest of the two came to be as a result of the appellant and his co-accused running away when they saw a group of people coming towards them. These people chased the two and arrested them with the help of Tanzanian civilian group known as "Sungu Sungu" traditional guards. It was one Emmanual Longoto (P.W.2) who stated that the one of the accused persons (it is not clear whether it was the appellant on his co-accused) offered to free the cattle if he was paid Tanzanian shillings 80,000/=. As pointed out the accused persons were arrested after a chase. In such

state of affairs, the appellant's defence in the Magistrate's court was that he was at the market in question where he saw some cattle being offered for sale. He saw some people carrying weapons. He ran away along with others. He was running towards his house. His co-accused followed him and he was arrested along with him and taken to Kenya. He said no one believed his story. The appellant said he was in the business of selling old clothes. In short his defence was that he had nothing to do with the stock theft and that he was arrested whilst running away along with others from a group of armed persons. The learned Magistrate in evaluating the defence of the appellant said:

"I do not believe that the accused No. II (the appellant) was arrested for no reason or be (sic) is alleged to have (sic) involved in theft because P.W.III Emmanuel has a grudge against him. The charge against the accused has been proved that he and the accused No.1 did go to the complainant's boma and stole 12 head of cattle from his boma and took them to Tanzania."

What the learned magistrate did not consider was whether the appellant's defence was probably true or whether it raised some doubt as regards him having been actually involved in the theft of the cattle. It is possible that the appellant's version could well be true, more so if looked at in conjunction with the evidence of the co-accused. The appellant had taken the same stand, as regards his arrest, immediately thereafter. He said that no one believed what he told them. He said "that I was not with the accused No.1". His witness (the co-accused) gave evidence to the effect that he had nothing to do with the appellant; that they were arrested in different places at different times; that the appellant did not talk to him; that he did not even talk to the appellant. It was held in the Tanzanian case of R.V. Wilbald vs. Tibanyendela [1948] E.A.C.A. 111 that the fact that an accused person has made a statement denying his guilt very soon after he has been charged with the offence may often be very relevant as showing the consistency of his conduct at that early date with the version of facts as given by him at his trial and may in some cases be the last ounce which turns the scales in his favour. On first appeal to the superior court, that court failed to evaluate the appellant's version of events although the superior court set down, somewhat sketchily, the appellant's version of events. The superior court also failed to consider the evidence of the co-accused. That is where in our view the superior court erred. It is incumbent upon the first appellate court to properly evaluate the whole defence of the appellant as brought out in the lower court. Failure to do so, when it is possible that the appellant's version may well be true, is fatal to the conviction. In those circumstances we allow the appeal, quash the conviction and set aside the sentence as meted out to the appellant and order the appellant's immediate release unless otherwise lawfully held."

38. Having considered the evidence afresh, I find that the 2nd Appellant's explanation, in the absence of any other evidence incriminating him in the offence was sufficient to displace the doctrine of recent possession. Accordingly, the evidence fell short of the standard required in sustaining a conviction in a criminal offence. His conviction cannot therefore stand, since apart from the 1st accused no one testified that he was ever seen in the company of the deceased or with the motor bike.

39. As regards the 1st Appellant, he was well known to the deceased and PW2 and PW3 also knew him very well as he used to be seen with the deceased. The previous day, he was admittedly in the company of the deceased and the following day the deceased was found dead. Hours after the deceased's body was discovered, he was, by his own evidence negotiating for the sale of the deceased's motor cycle, though he contended that it was on behalf of the 2nd Appellant. In my view the doctrines of "last seen with" and recent possession as well as circumstantial evidence show that in the absence of a plausible explanation he had something to do with the incident in which the deceased was robbed. In the premises his conviction cannot be faulted.

40. As regards the sentence of 20 years, in the circumstances of this case, I find the sentence meted against him proper and there is no justification to interfere therewith.

41. Consequently, I allow the 2nd Appellant's appeal **(Musau Kioko)**, set aside his conviction, quash the sentence and set him at liberty unless he is otherwise lawfully held. I however, dismiss the 1st Appellant's appeal **(Daniel Wambua Maingi)** and confirm his sentence.

42. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 3rd day of March, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngetich for the Respondent

The Appellant in person online

CA Geoffrey