



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.2, 5 6 & 8 OF 2015

STEPHEN KASMIL RAKWOMI.....1ST APPELLANT

CHRISTOPHER RIBUTHI CHARU.....2ND APPELLANT

IBRAHIM HASSAN ALI.....3RD APPELLANT

PASCAL AHADI ONGAIO.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Mrs. J. Wanjala CM

delivered on 15th December 2014 in Kibera CM CR. Case No. 4536 of 2012)

JUDGMENT

The 1st Appellant, Stephen Kasmil Rakwomi, the 2nd Appellant, Christopher Ributhi Charu, the 3rd Appellant, Ibrahim Hassan Ali and the 4th Appellant Pascal Ahadi Ongaio were jointly charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 1st October 2012 at Ongata Rongai within Kajiado County, the Appellants jointly robbed Wilson Ngure of motor vehicle registration number KBP 186J Toyota Probox white in colour valued at Ksh.600,000/- and immediately after the time of such robbery murdered the said Wilson Ngure (the deceased). When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged and were each sentenced to death. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved by the trial court's decision stating that the circumstantial evidence relied upon was not sufficient to sustain a conviction. They asserted that the prosecution failed to establish the doctrine of common intention as envisaged in **Section 21** of the **Penal Code**. They were of the view that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. They faulted the trial court for failing to consider their respective defence statements in arriving at its decision. They took issue with the trial court's decision stating that it was based on a defective charge sheet. They were aggrieved that the trial court failed to comply with the mandatory provisions of **Section 200** of the **Criminal Procedure Code** when the convicting magistrate took over the proceedings from the previous magistrate. They complained that the evidence of the prosecution witnesses was inconsistent and full of contradictions that it could not form a basis for a conviction. They asserted that the evidence of identification was not sufficient to sustain a conviction. They therefore urged the court to allow the appeal, quash their respective appeals and set aside the sentences that were imposed on them.

The four separate appeals were consolidated and heard together as one for the purpose of this appeal. The 1st and 4th Appellants presented to court written submission in support of their respective appeals. They urged this court to allow their respective appeals. This court also heard oral submissions from Mr. Muchiri for the 2nd Appellant, Mr. Swaka for the 3rd Appellant and Ms. Atina for the State. Mr. Muchiri was of the opinion that the charge sheet was fatally defective since the particulars did not disclose the offence of robbery with violence. He averred that none of the prosecution witnesses identified the 2nd Appellant as one of the robbers. He asserted that the 2nd Appellant was found in possession of the motor vehicle the next day after the offence had already been committed. He stated that the 2nd Appellant explained that he was hired by the 1st Appellant to drive them to Ongata Rongai. He submitted that the doctrine of recent possession did not apply in that instance. He urged this court to allow the 2nd Appellant's appeal.

Mr. Swaka for the 3rd Appellant asserted that his client's defence was cogent and unshaken by the prosecution. He submitted that the

circumstantial evidence relied on by the trial magistrate was insufficient to sustain a conviction. He averred that the police failed to conduct an identification parade when the 3rd Appellant was arrested. The evidence of identification that was used to convict the 3rd Appellant was therefore unsafe. He maintained that none of the evidence presented by the prosecution pointed to the guilt of the 3rd Appellant. In the premises, he urged this court to allow the 3rd Appellant's appeal.

Ms. Atina for the State opposed the appeals. She submitted that the particulars of the charge sheet brought out the offence of robbery with violence. She asserted that the trial court complied with the provisions of **Section 200** of the **Criminal Procedure Code**. She was of the opinion that the prosecution proved their case to the required standard of proof beyond any reasonable doubt. She stated that PW2 saw the motor vehicle (subject matter in the present appeal) dump a body on the road. PW3 picked the deceased from the road side and took him to the police station. He afterwards took him to Nairobi Women's Hospital where he was pronounced dead on arrival. She averred that the deceased had earlier informed PW4 that he was in the company of the 1st Appellant. He was hired to help him transport his household goods. Learned State Counsel asserted that the pathologist stated that the deceased's injuries were inflicted using a blunt object. She submitted that the arresting officer arrested the Appellants at Loitoktok in the deceased's motor vehicle. The said officer testified that the 2nd Appellant was the driver while the 1st Appellant was the co-driver. The 3rd Appellant was found wearing blood stained clothes. Shoes belonging to the deceased were also recovered in the vehicle. She averred that the defence statements of the Appellants corroborated the prosecution's case. She pointed out that the trial court relied on the evidence of recent possession to convict the Appellants. All the Appellants were apprehended inside the deceased's motor vehicle when it was recovered. There was therefore no need for an identification parade to be conducted. She therefore urged this court to dismiss the Appellants' respective appeals.

The facts of the case according to the prosecution are as follows: PW1, Jonah Wanjohi, was the deceased's employer. He was in the transport business. He stated that he owned the vehicle that was stolen from the deceased. The deceased was one of his drivers. On 2nd October 2012, at about 8.00 p.m., one of his drivers informed him that the deceased was missing. He got further information from the deceased's wife. PW1 went to Ongata Rongai Police Station and reported that the deceased was missing. He was at the time driving a Toyota Probox registration number KBP 186J. Police officers informed him that his vehicle had been spotted at Kimana area being driven towards Kajiado. The vehicle was impounded at Kimana and taken to the police post at the border. He accompanied police officers to the said station. He identified the stolen motor vehicle as his. He produced a logbook for the same. He found a shirt, jacket and shoes inside the vehicle. He stated the shoes belonged to the deceased. The police officers informed him that four people had been arrested inside the vehicle when it was impounded. He later found out that deceased had been killed.

PW2, Peter Mworira Kinuthia, was a taxi driver based at Ongata Rongai. On 1st October 2012, he picked up a client at the Ongata Rongai stage. The said client was Lucille Mukira (PW11). They started driving towards the City of Nairobi. It was about 11.00 p.m. Just before they got to Nazarene Junction, they saw a motor vehicle registration number KBP 186J. The vehicle slowed down as it approached the junction. PW2 stated that he was about 50 meters away from the said vehicle. They saw the vehicle drop something off the road. When they approached that area, they were able to see that it was a person who had been thrown out of the vehicle.

PW2 drove fast and caught up with the vehicle that had dropped off the body. PW11 asked the men who were in the said car why they had thrown out the person from the vehicle. The driver of the vehicle told her that the said person was drunk. They however assured him that they would go back, pick him and take him to the hospital. PW2 drove off. However, PW11 insisted that they drive back and ensure that the men actually picked up the person they had thrown out of the car. When they got there they did not see any one. PW2 told the court that the 1st Appellant was the driver of the said vehicle who had a conversation with his client.

PW3, Anthony Gachimu Mwangi, and his friend were driving from Nairobi to Rongai on the material day of 1st October 2012. At about 11.00 p.m., as they approached Multimedia University, they saw a body lying on the left side of the road. They stopped the vehicle and went to check on that person. The person was still alive although he was not able to talk. He was wearing khaki trousers and a vest. He had no shoes. His clothes were blood stained. They took him to Ongata Rongai Police Station and later to Nairobi Women's Hospital where he was pronounced dead on arrival. Police officers took his body to the City Mortuary.

PW4, Joyce Wachera, was the deceased's wife. She told the court that the deceased was at work on 1st October 2012. At about 8.00 p.m., the deceased called her and informed her that he was waiting for the 1st Appellant. He was hired to drive the 1st Appellant from Rongai to Nairobi. She spoke to him again at about 10.00 p.m. The deceased informed her that he was in a pub with the 1st Appellant. He told her that they were going to load the 1st Appellant's goods in the car. He would then take them to Nairobi the following day. He informed her that he would be home in about 30 minutes. She slept. At about midnight, she called the deceased but his phone was off. She called PW5, Samuel Gitau, who was also unable to reach the deceased. She could not locate the deceased the following day.

She sought help from PW7 Josephat Kioko. They went to the police station and reported that the deceased was missing. The police officers informed them that the vehicle the deceased was driving had been recovered at Loitoktok. They also informed them that the deceased's body was recovered the previous night. PW4 identified the clothes and shoes that the deceased was wearing on the material day. She stated that the 1st Appellant was known to her prior to the robbery. He had visited her house twice in the company of the deceased. She however did not know the other Appellants.

PW5, Samuel Gitau Nganga, was the deceased's uncle. He identified the deceased's body on 4th October 2012 at the City Mortuary during the postmortem examination. PW6, Dorothy Njeru, is a Forensic Pathologist. She conducted the deceased's post mortem on 5th October 2012. She stated the deceased succumbed to multiple injuries which were caused by a blunt object.

PW7, Josephat Kioko, was a taxi driver based at Ongata Rongai. PW4 called him on 2nd October 2012 and informed him that the deceased was missing. She also informed him that he was with the 1st Appellant the previous day. The 1st Appellant was known to PW7. He was his customer. He managed to get the 1st Appellant's phone number from his brother. He called the 1st Appellant who informed him that he was in Kirago driving towards Loitoktok. The 1st Appellant's phone then went off. He called PW7 back after about 20 minutes. The 1st Appellant informed PW7 that he had been stopped by police officers at a road block. They were claiming that the vehicle he was using was stolen. PW7

asked him about the deceased's whereabouts. The 1st Appellant told him that he did not know where the deceased was.

PW7 and PW4 went to the police station where they reported the matter. PW7 told the court the 1st Appellant had earlier asked to hire him to help him transport his household goods from his house. He however declined. The 1st Appellant informed him that he would ask the deceased to help him transport the said goods. PW7 stated that he had known the 1st Appellant for about four years prior to the robbery incident.

PW8, Caroline Njoki Wamai, is the Government Chemist. On 8th October 2012, she received a blue checked shirt and a blue-grey jacket from Ongata Rongai Police Station for examination. The clothes were bloodstained. She also received blood samples of the four Appellants as well as the deceased. She carried out a DNA analysis. Her findings indicated that the blood stains on the jacket matched the deceased's blood sample. She was not able to generate any other DNA profiles from the shirt as the same had been contaminated.

PW9, Johnson Maina, was the arresting officer. He was based in Loitoktok at Nameok AP Post. On 2nd October 2012, he was on duty at Kimana road block along Emali-Loitoktok Road with his colleague AP Sintoinia Kimasi (PW10). They stopped a motor vehicle registration number KBP 186J Toyota Probox. The 2nd Appellant was driving the said motor vehicle. The 1st Appellant was on the co-driver's seat. The 3rd and 4th Appellants were seated on the rear passenger seat. The Appellants gave contradicting information about their destination. PW9 and PW10 stated that there was a bloodstained blue checked shirt under the co-driver seat. The 3rd Appellant was wearing a blue and grey jacket that was bloodstained. They asked the driver to open the boot. They recovered black shoes, a jacket and baby shoes from the boot. They told the court that the Appellants seemed suspicious and unsure of their destination. They apprehended the Appellants and took them to the CID office at Loitoktok for further investigations.

PW15, Cpl. Hassan Aresi, was based at CID Loitoktok. He testified that he got a call from administration police officers manning a Road Block at Kimana. He was informed that a vehicle registration number KBP 186J suspected to have been stolen had been intercepted. He interviewed the four suspects who were arrested when the vehicle was intercepted. The 3rd Appellant claimed that they had been given the motor vehicle by a driver who was in Ngong. He searched the vehicle and recovered a blue checked shirt which was bloodstained. The 3rd Appellant was also wearing a grey blue jacket which had blood stains. PW15 called the DCIO at Ongata Rongai Police Station to inquire if they had any knowledge of the vehicle. He was informed that the vehicle had been reported stolen the previous night. The driver of the said vehicle was also killed. He arrested the four suspects. They were picked up by police officers from Ongata Rongai Police Station and transferred to the said station.

PW12, Corporal Mbwana Riko, was based at Ongata Rongai Police Station. He stated that PW1 and PW4 came to the police station on 2nd October 2012 accompanied by a group of people. PW1 reported that his driver, Wilson Njure (the deceased), was missing. He was driving motor vehicle registration number KBP 186J which was also missing. PW4 told him that the deceased had been hired the previous day by the 1st Appellant to transport some goods for him. PW2 informed him that he had seen the said motor vehicle at Masai Lodge the previous night at about 11.30 p.m. PW12 perused the Occurrence Book. He discovered that a hit and run accident had been reported the previous night. He inquired about the accident from the Traffic Department. He was informed that the victim of the accident was taken to Nairobi Women's Hospital where he was pronounced dead on arrival. His body was later transferred to City Mortuary. The body turned out to be that of the deceased, Wilson Njure.

PW13, PC Joyce Muchigi, who was based at the Traffic Department in Ongata Rongai Police Station, confirmed that the deceased was brought to the station on the night on 11th October 2012 by two good samaritans. He was alleged to have been a victim of a hit and run accident. He advised them to take the victim to the hospital. He was however pronounced dead on arrival at the hospital. PW12 later received information that PW1's motor vehicle was impounded by police officers at Kimana in Loitoktok. The vehicle had four occupants who were all arrested. The arrested persons together with the said vehicle were transported to Ongata Rongai Police Station. PW12 recorded witnesses' statements.

PW14, Cpl. John Namuwoso from Ongata Rongai Police Station was the investigating officer in the present case. He told the court that PW1 and PW4 made a report at the station that the deceased was missing. He was a taxi driver operating motor vehicle registration number KBP 186J owned by PW1. PW4 informed him that she had communicated with the deceased the previous night on phone. The deceased told her that he was with the 1st Appellant. He however did not come home that night. She was not able to reach him. The following day, she sought help from PW7 in locating the deceased. PW7 managed to get the 1st Appellant's phone number from his brother. He called the 1st Appellant who informed him that he had been arrested by police officers at a road block in Loitoktok. When the police called the 1st Appellant using the same phone number, he lied that he was at Buruburu in Nairobi.

PW14 learnt from police officers in Loitoktok that four suspects had been arrested when PW1's vehicle was intercepted at a road block in Kimana, Loitoktok. PW14 accompanied by PW1 and other police officers went to Loitoktok. They collected the stolen vehicle and transferred the four Appellants to Ongata Rongai Police Station. A blue checked shirt that had blood stains as well as a pair of black shoes were recovered from the said vehicle. The shirt and shoes were identified as the clothing the deceased was wearing the previous day. The 3rd Appellant was arrested wearing a grey blue jacket that had blood stains. PW14 forwarded the blood stained shirt and jacket to the Government Chemist for forensic analysis. The Government Chemist (PW8) also obtained blood samples from the four Appellants and the deceased. PW8 confirmed that the blood stains on the 3rd Appellant's jacket matched the blood sample obtained from the deceased. After his investigations, PW14 charged the Appellants with the present offences.

The 1st Appellant was put on his defence. He told the court that he was a resident of Ongata Rongai. Sometime in 26th September 2012, he was looking for a vehicle for hire to help transport his belongings to a bus station. He approached PW7 and his brother Kioko but they were not able to assist him. He then asked the deceased if he could help him ferry his goods. He testified that he had known the deceased for about seven years. He met the deceased the following morning. They managed to transport part of the luggage to the bus station at Nairobi. The 1st Appellant came back to Nairobi on 29th September 2012. He called the deceased so that they could agree on when he would help him

transport the remaining goods. He met with deceased on 1st October 2012 at about 8.00 p.m. at a club known as Kiss 50. The deceased informed him that he was picking a client from the airport the following morning. They agreed to pass by the 1st Appellant's house that evening, pack the remaining items and spend the night at the deceased's house so that they could leave for the bus station very early the next morning.

While at the bar, PW2 came to see the deceased at about 9.30 p.m. He borrowed the deceased's car since he needed to pick a client. PW2 returned the car at about 10.00 p.m and left. As the 1st Appellant and the deceased were leaving the bar, PW2 called the deceased. He requested him to pick some clients who were at Masai Lodge bus stop and drop them at Nazarene University. The 1st Appellant and the deceased went to Masai Lodge bus stop. They met PW2 with three people. They entered the car and sat at the rear passenger seat. On their way, PW2 asked the deceased to stop the motor vehicle since he needed to relieve himself. When the vehicle stopped, someone grabbed his neck from behind. The 1st Appellant and the deceased were ordered out of the vehicle. Their hands were tied and they were hurled to the rear passenger seat.

The 1st Appellant told the court that as they approached Nazarene Junction, the deceased was thrown out of the car. After driving for a short distance, the driver stopped the car, left and came back with the deceased. As they were driving off, he stated that he was forced to take a laced drink that was in a bottle. He passed out. When he woke up, he was seated at the co-driver's seat. There were three men in the car. He could not tell where they were. The vehicle was stopped at a road block by the police. They were arrested and taken to the CID offices at Loitoktok. He told the police that he did not know the three men who were in the car. He stated that PW7 was an accomplice of the three men. He denied the charges against him.

In his sworn statement, the 2nd Appellant stated that he came to Nairobi on 1st October 2012 to see his wife at her cousin's house in Kibera. He went to the said house to wait for his wife. At about 1.00 p.m., the 1st Appellant came to the house. The 1st Appellant was the boyfriend to his wife's cousin. He was known to him. The 1st Appellant asked him to accompany him to Loitoktok for his friend's burial. The 1st Appellant informed him that he would pick him from the house at about 7.00 p.m. The 1st Appellant came to pick him at about 11.45 p.m. When the 2nd Appellant entered the vehicle, he found the 1st Appellant with two of his friends. The 2nd Appellant asked him to drive the vehicle. They proceeded to Loitoktok. They were stopped by police officers at a road block at Kimana, Loitoktok. They were arrested and taken to an AP Camp. At the AP Camp, PW15 interrogated them. He informed them that the vehicle had been reported stolen. They were later transferred to Ongata Rongai Police Station. He denied any involvement with the robbery in question.

The 3rd Appellant was also put on his defence. He stated that on 1st October 2012, he boarded a bus to Loitoktok at 2.00 p.m. He was going to see his friend who had lost his sister and help with the funeral arrangements. He left Loitoktok the following day. He was however an excess passenger in the vehicle that he boarded. The vehicle was stopped by police officers at a road block at Kimana. The police officers instructed him to alight from the vehicle since he was an excess passenger. He was put in a white vehicle that was parked on the road side. There were other people in that vehicle. They were all taken to Kimana AP Camp. He informed the police that he was coming from a funeral and was on his way back to Nairobi. They were later transferred to Ongata Rongai Police Station. He denied the charges against him. He produced in evidence a receipt that was issued to him when he paid for his bus ticket to Loitoktok on 1st October 2012.

When the 4th Appellant was put on his defence, he told the court that he operated a business of selling onions. He used to buy his onions at Loitoktok. On 2nd October 2012, at about 4.00 a.m., he proceeded to the bus stop to board a vehicle to Loitoktok. He however missed the bus. A vehicle came and the driver offered to drop him at Loitoktok. They agreed that he would pay him Ksh.200/-. There were three people inside the vehicle. The vehicle was stopped at a road block at Kimana. The police officers instructed them to alight from the vehicle. They were taken to a police post. He informed the officers that he was going to Loitoktok to buy onions. They were later transferred to Ongata Rongai Police Station. He told the court that he did not know any of his co-accused persons.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination is whether the prosecution established the Appellants' guilt with regard to the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on the doctrine of recent possession as well as other circumstantial evidence to secure the conviction of the Appellants. From the evidence on record, the robbery took place at night, some minutes to 11.00 p.m. There was no direct evidence of identification since the deceased died. He succumbed to the injuries he sustained during the robbery. The prosecution established that the deceased was driving motor vehicle registration number KBP 186J Toyota Probox which was white in colour on the material day of 1st October 2012. His employer PW1 told the court that he employed the deceased as a taxi driver for the said vehicle. The deceased was robbed of the said vehicle. He was fatally injured during the robbery and his body was dumped near Multimedia University in Ongata Rongai. The stolen vehicle was intercepted by police officers at a road block in Kimana, Loitoktok on 2nd October 2012 at about 6.00 a.m.

It was the prosecution's evidence that the four Appellants were inside the motor vehicle when it was intercepted by police officers. PW9 and PW10 were the arresting officers who were at the road block at Kimana. They told the court that they saw the motor vehicle KBP 186J approaching the road block. They stopped it. There were four occupants in the vehicle. The 2nd Appellant was the driver. The 1st Appellant was seated at the co-driver's seat while the 3rd and 4th Appellants were seated at the rear passenger seat. The Appellants gave contradicting answers when they were asked about their destination. The 2nd Appellant who was the driver did not have a driving licence. The 3rd Appellant was wearing a jacket that was blood stained. They also found a pair of black shoes and a blue checked shirt that was blood stained inside the vehicle. PW1 as well as the deceased's wife (PW4) identified the shirt and the black shoes as some of the clothing the deceased wore on 1st October 2012.

The Appellants were arrested in possession of the deceased's motor vehicle so soon after the robbery occurred. They had driven the vehicle from Ongata Rongai to Loitoktok where the vehicle was intercepted at 6.00 a.m. the following morning. In the case of Arum -Vs - Republic [2006] 2 EA 10 the Court stated as follows:-

***“Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. There must be positive proof; first that the property was found with the suspect; second that the property is positively identified as the property of the complainant; thirdly that the property was recently stolen from the complainant.*”**

The above elements were established by the prosecution. The motor vehicle that was stolen from the deceased was recovered from the Appellants so soon after the robbery occurred. This was a few hours after the robbery incident. Other than the doctrine of recent possession, other circumstantial evidence implicated the Appellants in the robbery. In Abanga alias Onyango v. Republic Cr. Appeal No.32 of 1990 (unreported), the Court of Appeal set out the principles to apply in order to determine whether circumstantial evidence adduced in a case is sufficient to sustain a conviction. It stated thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the 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.”

It was the prosecution's evidence that the 1st Appellant was the last person to be seen with the deceased. The deceased's wife (PW4) talked to the deceased on the night the robbery occurred. The deceased called her at about 8.00 p.m. and informed her that he was going to meet the 1st Appellant, who had hired him to transport his household goods. He called her again at about 10.00 p.m. and informed her that he was at a bar with the 1st Appellant. The 1st Appellant was known to PW4 prior to the robbery incident as he had previously severally visited their home. They had agreed that he would load the 1st Appellant's items in the vehicle and transport them the following morning to Nairobi. He informed her that he would be home in about 30 minutes. PW4 fell asleep. She called the deceased at about midnight but his phone was off. The deceased's body was discovered by PW3 at 11.00 p.m. by the road side near Multimedia University. The deceased was alive though he was bleeding and was seriously injured. He was pronounced dead on arrival at the hospital.

The 1st Appellant in his defence does not deny meeting with the deceased at the said bar. The 1st Appellant claimed he was hijacked together with the deceased. He told the court he was drugged and he woke up in the vehicle at Loitoktok. However this court notes that the 1st Appellant did not inform the police officers at the road block that he was hijacked. He went along and lied that they were going for a visit. If he was indeed hijacked, the logical thing to do was to inform the police of the same. In addition, when PW4 informed PW7 that the deceased was missing, he called the 1st Appellant. The 1st Appellant informed him that he was on his way to Loitoktok. He called back PW7 after about 20 minutes and informed him that he had been stopped by police officers at a road block in Loitoktok. When PW7 reported the matter to the police, the police officers called the 1st Appellant using his phone number that was provided by PW7. The 1st Appellant lied that he was in Buruburu. The 1st Appellant's conduct clearly indicated that he was involved in the robbery. His defence that he was a victim of a carjacking was not plausible and the same was displaced by prosecution's cogent evidence.

The evidence by PW2 and PW11 established that there were several people in the stolen vehicle when they saw a body being dumped from the said car near the Nazarene Junction. The 2nd Appellant in his defence denied being involved in the robbery. He claimed that he was only hired as a driver by the 1st Appellant. He however failed to avail his wife's cousin to corroborate his evidence that he was hired as a driver by the 1st Appellant. He had earlier stated that he was to meet his wife on that day but he somehow ended up driving the 1st Appellant to Loitoktok. His evidence was contradictory. He was also unable to provide a driving license when he was arrested. His presence in the stolen vehicle, in the circumstances of this case, implicated him in the robbery. The defence by the 3rd Appellant was to the effect that he was not in the vehicle when it was intercepted at the road block by the police. However, the evidence of PW9 and PW10 who were the arresting officers displaced his defence. In addition, the 1st and 2nd Appellants' evidence was to the effect that all four Appellants were present in the vehicle when it was intercepted by the police.

The 3rd Appellant was arrested wearing a jacket that had blood stains. After a forensic analysis, PW8 who was a Government Chemist established that the stains of blood found on the 3rd Appellant's jacket matched that of the deceased's. The deceased was bleeding and seriously injured when his body was recovered. This clearly showed that the 3rd Appellant was involved in the robbery of the motor vehicle from the deceased. In his defence, the 3rd Appellant denied being arrested when the motor vehicle was intercepted by the police officers. He stated that he was arrested at the road block because he was an excess passenger in a public vehicle that he boarded from Loitoktok to Ongata Rongai. However, forensic evidence by PW8 implicated him in the robbery. He failed to give an explanation of how the deceased's blood ended up on his jacket. The 4th Appellant claimed that he was on his way to Loitoktok to buy onions. He however failed to provide any proof of the said business. The Appellants were obviously adducing evidence in a bid to exonerate themselves from the crime.

The Appellants were arrested at about 6.00 a.m., a few hours after the robbery incident occurred. They were all arrested in possession of the stolen motor vehicle. The deceased's bloodstained shirt and shoes were recovered in the said vehicle. The 3rd Appellant's jacket was stained with blood that matched that of the deceased. There is no doubt that the Appellants robbed the deceased person and seriously injured him in the process before dumping his body by the road side. This court is of the opinion that the trial magistrate properly analyzed and acted on the circumstantial evidence that was adduced. The circumstantial evidence taken in totality irresistibly pointed to the guilt of the Appellants as the persons who robbed and fatally injured the deceased person. **Section 119** of the **Evidence Act** provides thus;

“The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

The Appellants did not give an explanation which could exonerate them from the presumption that they were the robbers when they were found in possession of the stolen motor vehicle so soon after the robbery occurred. As regard to whether the prosecution established the elements of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**, this court holds that the prosecution was required to establish that the Appellants robbed the deceased and in the course of the robbery either wounded, beat, struck or used any personal violence to the said person. In the present appeal, the prosecution established that the Appellants robbed the deceased of the motor vehicle and in the course of the robbery fatally injured him.

The Appellants' appeals against conviction lack merit. Their respective defence statements were justifiably dismissed by the trial court as self-serving. The Appellants' respective appeals on conviction are hereby dismissed. The convictions of the Appellants are upheld.

The Appellants were sentenced to death by the trial court. Following the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, this court has discretion to re-sentence the Appellants on the basis of severity of the offence. In the present appeal, the deceased person sustained fatal injuries occasioned by the Appellants during the robbery. This court notes that the Appellants have been in lawful custody for five (5) years since their conviction by the trial court. In the premises, this court sets aside the death sentence imposed by the trial court. The same is substituted with an order of this court sentencing the Appellants to serve twenty (20) years imprisonment with effect from the date of this judgment. This court has taken into consideration the period that the Appellants were in lawful custody both before their conviction and after their conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF JULY 2019

L. KIMARU

JUDGE