Ndung'u v Republic (Criminal Appeal 44 of 2018) [2022] KECA 643 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 643 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 44 OF 2018

PO KIAGE, A MBOGHOLI-MSAGHA & F TUIYOTT, JJA

APRIL 28, 2022

BETWEEN

SIMON GAKUO NDUNG'U .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret (Ngenye, J.) delivered on 2nd October 2014 in Eldoret High Court Criminal Case No. 61 of 2009)

JUDGMENT

1. The appellant was arraigned before the High Court at Eldoret on a charge of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars set out in the information were that between 20th October 2009 and 25th October 2009, at Kapseret village in Uasin Gishu District within Rift Valley Province, the appellant jointly with other not before the court murdered Wilson Kiprop Simei. The appellant pleaded not guilty to the charge and a trial ensued.

2. The prosecution lined up 12 witnesses. PW1 testified that he knew neither the deceased nor the appellant. On 20th October 2009, at 11:00 am, he was with his wife at Small Town inspecting his farm. Along the road at Ndalat, at the junction near Raiply, PW1 saw a car registration number KAM 516Q make Toyota Starlet with the bonnet open. There was also a motorcycle. On the side, PW1 saw three men holding a man down who was crying for help. They bundled him into the car. There were a total of four persons. A motorbike rider led the way and they drove towards Rivatex. The wife of PW1 told him that the person had caused an accident and they were taking him to the police station. Later PW1 was visited by the police and was asked to write a statement. PW1 stated that he could not identify the persons who were wrestling. He was called to Divisional Headquarters and shown a person who he identified as the appellant. On cross examination, PW1 stated that he and his wife were about 100 – 150 metres away from where the incident took place. There were three persons and the victim, as well as another person, who was not involved and, who rode the motorcycle.

3. PW4 testified that on 20th October 2009 at 11:00 am, she had gone to her shamba with her husband (PW 1) to inspect her maize. As they headed for home, they saw three persons fighting with one person. There was another person behind on a motorcycle. They were about 50 metres from the scene of fighting. They got to the junction of Ndalat/Rai Road. The persons forced one person into a car and sat on either side. The person on the motorcycle sped past them; they were unable to stop him. They tried to stop the car and shouted to inquire what was happening. The occupants shouted that the person had been arrested for knocking someone down at Langas and they were taking him to the police station. PW4 could not remember the registration number of the car but stated that it was a small maroon car. Later the police and relatives of the person came to the house of PW4 on 22nd October 2009. PW4 confirmed that she had been present on the day of the incident. She was called by the police to write a statement the next day. PW4 could not identify the persons because the incident happened so fast.

4. PW11 testified that on 20th October 2009 at 11:00 am, he was waiting for a vehicle along the Rivatex/ Ndalat Road when he saw two people on a boda boda go to where a vehicle was parked. He did not see the registration number of the vehicle but it was a maroon Starlet. The bonnet of the car was open. He was about 20 – 30 metres away and could see what was happening. The boda boda passenger got off and the rider was grabbed. There were two other persons outside the car. The two struggled with the boda boda rider while the passenger looked on without doing anything.

5. The boda boda rider was put into the vehicle and the passenger took the motorcycle and rode it. Someone inside the vehicle shouted "fire". The car and motorcycle were driven away. PW11 later heard that a boda boda rider had been killed and recalled the incident. On 10th November 2009, PW11 went and made a report at Eldoret Central police station. He told them that he could identify the people that were in the maroon car. He attended an identification parade and picked out the appellant as the person who was driving the car. PW11 confirmed that he had seen the appellant and wrote a statement. On cross-examination, PW11 stated that he was standing about 20 -30 metres from the car and that there were three people before the boda boda arrived. PW11 stated that he could properly see the five persons and would be able to identify four of them. The rider and two people were the ones fighting and that he could positively identify the three occupants of the car.

6. PW2 stated that the appellant was the driver of his car KAM 516, a Toyota Starlet taxi. He had employed the appellant for 6 months. On 18th October 2009, the appellant took the car to work. On the morning of 19th October 2009, the appellant gave PW2 Kshs. 700 and left with the motor vehicle. PW2 did not see the appellant on 20th October 2009 but the appellant later gave money to PW2's brother. On 21st October 2009, the appellant told PW2 that the vehicle was at the garage. PW2 went to the garage, paid and left with the car.

7. On 21st October 2009, PW2 unsuccessfully tried to call the appellant so he went to the appellant's residence and was told that the vehicle had been taken by the police. PW2 found the vehicle at Kiamumbi police station where he was arrested and told to produce the driver of the vehicle. PW2 was told that the vehicle was associated with a crime. PW2 gave the police a copy of his identity card and was taken to court before being released. The appellant was found three weeks later in Nakuru and arrested.

8. PW3, the elder brother of the deceased, stated that the deceased was a boda boda rider employed by one Isaac Sato. On 20th October 2009, the deceased left for town to repair the motorcycle registration number KMCF 091H. The deceased did not return home. After 3 days, they started looking for the deceased. They heard the deceased had been arrested by some people and taken to Kiamumbi Police Post. They went there but did not find him. They found the body of the deceased in a maize plantation at Kapseret on 25th October 2009. PW3 escorted the body to the mortuary and identified it. The post mortem was done on 29th October 2009.

9. PW5, Chief Inspector Joshua Emrom, at the material time stationed at Langas Police station as OC Crime, testified that on 22nd October 2009 he overheard police communication circulating on a wanted motor vehicle registration number KAN 516Q Toyota Starlet maroon in colour. PW5 went around the estate to do normal checking and on reaching Mwanzo estate in Langas, he spotted the vehicle parked unattended. PW5 made enquiries from the public about the driver and was directed to where the driver lived. PW5 called Sergeant Kisemebe who was stationed at Kiamumbi Police Post where the communication originated.

10. When Sergeant Kisemebe arrived, they went to the residence of the driver and found the wife Zipporah Wairuguru who stated that the driver had left after lunch a few minutes before they arrived. They obtained the driver's phone number from the wife and tried to call him but he did not respond. The wife accompanied them to where the vehicle was parked. PW5 left Sergeant Kisemebe towing the vehicle to Kiamumbi police station and took the wife for further interrogation. After 3 days, members of the public from Keiyo area came to the police post to demand the whereabouts of the deceased. They combed the area for two days in vain. On 25th October 2009, members of the public reported a dead body found in Kapseret. They proceeded there and found the body lying on the stomach with hands tied on the back. The body was taken to MTRH Mortuary.

11. PW6, Sergeant Kisembe stated the vehicle's owner was charged and later discharged when the driver showed up. The matter was handed over to the Flying Squad. PW7, PC Simon Likonyi of Crime Scene Support section in Eldoret recalled that on 20th October 2009 at 3:00 pm he was requested by Officer Commanding Flying Squad, Chief Inspector Karu, to proceed to Kiamumbi Police post to photograph a motor vehicle registration number KAN 516Q Toyota Starlet maroon in colour.. On 24th October 2009,PW7 complied.

12. PW7 was also requested by Deputy DCIO, Inspector Wachira and OC Flying Squad, Chief Inspector Karu to proceed to Kapseret area. On arrival, there were several people at the scene and the police were shown a decomposed body of a male adult lying in a maize plantation. The deceased wore black shoes, brown socks, a blue jumper and a blue shirt. His hands had been tied from behind with a rope. There was a tight knot around his throat and a piece of cloth was tied around his forehead. PW7 took various photos of the scene and of the deceased.

13. PW8, Dr Macharia Benson a pathologist at MTRH was on 27th October 2009 requested to do an autopsy on the deceased. The deceased's tongue showed lack of oxygen and the rope around his neck measured 289 cm long. There was a wound around the anterior back of the deceased's head, a bruise on the left side of his chest and a 4 cm bruise on the head. The opinion of PW 8 was that the cause of death was asphyxia due to strangulation

14. PW9 Corporal Simon Lubya, who was at the material time based at Eldoret – Flying Squad, testified that on 23rd October 2009, he was called by his superior to go to Kiamumbi Police Post to carry out investigations. The OCPD Inspector Emorom showed him a motor vehicle registration number KAN 516Q Toyota Starlet maroon in colour. The vehicle was towed, photographed and returned to the owner, one James Mwangi who wrote a statement that the appellant had the vehicle from 20th October 2009, including the date the crime was said to have been committed. Both PW9 and the owner of the vehicle tried to call the appellant but his phone was off.

15. On 7th November 2009, PW9 got news that the appellant had surrendered himself to Nakuru Police Station. The accused was brought back to Eldoret. PW9 interrogated the appellant. The appellant stated that on 20th October he heard rumours that the motor vehicle was involved in murder so he fled first to Nanyuki and then to Nakuru because he feared for his safety. A witness, Joshua Metto (PW11), told PW9 that he could identify the persons connected to the murder. IP Kiambi (PW12)

later conducted an identification parade in which PW9 was also present. The appellant was identified by PW11 and charged with murder.

16. PW12, Inspector Simon Kiambi who was attached to Eldoret CID carrying on investigations at the material time, testified that on 9th November 2009, he was requested to conduct an identification parade by the Investigation Officer for the appellant who was charged for murder. Eight persons were arranged for the parade. The appellant had no objection to the parade and when asked if he wanted representation at the parade he said no. The appellant chose the position he wanted to be in the parade. The witness was called and he identified the appellant positively by touching the appellant. The appellant was satisfied with the conduct of the parade and signed the form.

17. PW10, Dr Joseph Embenzi who represented MTRH in medical and legal issues, produced a medical examination report for the appellant prepared by one Dr Nyaura. Dr Nyaura concluded that the appellant was mentally fit to plead to the charge.

18. In his defence, the appellant made a sworn statement. The appellant stated that he was employed by PW2 as a taxi driver of the Toyota Starlet registration number KAN 516Q. The appellant denied involvement in the murder of the deceased. His account was that on 20th October 2009, he was hired by two men from Eldoret town to Kipkaren Estate. After driving them to their destination, the men asked the appellant to wait for them as they were waiting for some people after which the appellant would drive them to Langas.

19. As they waited and as the appellant was opening the bonnet to check the water and engine, two people came on a motorcycle. The appellant’s passengers asked the motorcycle passenger to get into the car. The appellant was asked to follow the motorcycle. The motorcycle rider led them towards Langas. At Langas, they stopped along the road and picked up other people waiting. The appellant’s passengers spoke in a language he did not understand. They stopped near the shops and the appellant was paid Kshs. 750. The appellant then took Kshs. 700 to his boss’s brother in town and resumed his work.

20. On 22nd October 2009, the appellant left the car parked outside a shop and proceeded to visit a friend. When he returned, the appellant did not find the car and was informed by onlookers that the police had towed the car. The appellant went home and found that his wife and child had been arrested. He went back to his sick friend who advised him not to go home as he would also be arrested. The appellant spent the night at the friend’s house.

21. The next day, the appellant went to his uncle’s house in Nakuru. The uncle asked him to report the matter and accompanied the appellant on 24th October 2009 to the PCIO. The appellant informed the PCIO what had transpired and the PCIO called Eldoret Police Station. The PCIO told the appellant that the people who hired him had committed a crime. The PCIO told the appellant to go home until the police would require him.

22. On 7th November 2009, the appellant was arrested in Nakuru and escorted to Eldoret Police Station cells. The police told the appellant to wait until the suspects are arrested. The appellant recalled an investigation parade conducted where one man identified him. On cross examination, the appellant stated that on the day of the incident, one of the passengers was forced to board the car while the motorcycle passed the car at high speed. At Langas they found two people with a pick up talking to the motorcycle rider. The passengers spoke in Kalenjin which he did not understand. He was used to carrying the first two passengers but did not know where they worked. He had the telephone number of one of the passengers but the police never asked the appellant about it.

23. In the judgment of the High Court, Ngenye J held that the description of the vehicle seen by PW1, PW4 and PW11 exactly fitted the vehicle owned by PW2 and in the control of the appellant on 20th

October 2009. PW1, PW4 and PW11 gave corroborative evidence on how a boda boda man was bundled into the car after a brief struggle. Although the three witnesses never strictly identified the boda boda man, their evidence was tallied with the evidence of PW3 that, his brother, a boda boda rider, had left home that day with his motorcycle never to return. PW11 positively identified the appellant as the man driving the maroon car. The appellant was described by PW1 and 4 as having participated in forcing the man on a motorcycle into the car. The learned judge held the identification of the appellant in the identification parade was proper.

24. The learned judge found that although the evidence of PW1, PW4 and PW11 tallied with the account of the appellant, the appellant was unable to account for his whereabouts between 20th and 22nd October 2009. The appellant interestingly did not report the incident of the missing vehicle to his boss or the police and when he found that his wife and child had been arrested, he opted to flee far from his home which, in the opinion of the judge, was a character of a guilty man. If the appellant had nothing to fear, he would not have fled.

25. The learned judge held that the accused's character and behaviour preceding the discovery of the deceased's body pointed a guilty finger at him. The learned judge also pointed to the appellant's statement that he never bothered to tell the police that he knew the person who had hired him and that he had the telephone number of one of them. The learned judge concluded that such behaviour could only be construed to mean that he did not want to implicate his friends with whom he had committed the heinous act; and that all of them shared a common intention to do harm to the boda boda man.

26. The learned judge held that even though the appellant noticed that there was a struggle between the passengers as one of them was bundled into the vehicle, he did not bother to dissociate himself from the assailants. The appellant helped to bundle the boda boda man into his vehicle. There was another indication that something was amiss with someone in the vehicle shouting "fire" as stated by PW11. It would be absurd not to conclude that the whole incident was pre-meditated and well-planned before its execution and the appellant was in on the plan.

27. The learned judge concluded that the man who was bundled into the car must have been the deceased and must have been killed by the same gang that snatched him away. The behaviour of the appellant on realising the vehicle was missing and his wife and child were arrested, though circumstantial, was so strong that it left no doubt that the appellant was guilty and had worked in cahoots with others to eliminate the deceased. The learned judge found the appellant guilty of the offence and sentenced him to suffer death.

28. Dissatisfied with the judgment, the appellant lodged the present appeal challenging the conviction and sentence. His memorandum of appeal dated 14th October 2014 set out the grounds of appeal that the learned trial judge erred in law and in fact by:

a) Holding that the appellant was an accomplice in the murder of the deceased without an iota or shred of evidence supporting her finding.

b) Holding that PW1 and PW4 saw the appellant participate in forcing the man on the motorcycle into the car when the witnesses actually never said anything to that effect.

c) Holding that the appellant's character and behaviour preceding the discovery of the deceased's body points a guilty finger at the appellant without giving any backing evidence.

d) Misapplying the law relating to common intention and holding that the appellant shared a common intention with those who actually committed the murder without ascribing any evidence in support of such a finding.

e) Contradicting herself when she on one hand vindicates the appellant from the assembly or association of those who committed the murder and on the other hand she again links the appellant to the common intention, presence and actions of the actual murderers.

f) Absurdly holding that the whole incident of the murder of the deceased was pre-meditated and well planned before its execution and that the appellant was in on the plan without basing such a finding on any evidence.

g) Holding that the appellant possessed the intention (mens rea) to carry out the crime without any evidence to support such a finding.

h) Failing to notice that the discrepancy in the evidence on the registration number of the motor vehicle allegedly involved in the murder does not agree between KAM 516Q and KAN 516Q.

i) Disregarding defence evidence and holding that the same was a concocted story that could not bail out the appellant.

j) Relying on a faulty and flawed identification parade.

29. Mr Miyienda, learned Counsel for the appellant, submitted that none of the prosecution witnesses ever pointed out the appellant as having been an accomplice to the commission of the offence. He contended that the appellant was simply hired and the appellant had no prior knowledge of what his passengers were going to do. The murder took place after the appellant had dropped off the passengers and left. The prosecution did not prove that the appellant participated in forcing the deceased into the vehicle. PW1 and PW4 admitted that they did not identify the persons involved in the incident.

30. On the trial court's finding that the appellant's character and behaviour was questionable preceding the discovery of the deceased's body, Counsel submitted that this conclusion is erratic and lacks in material evidence. The appellant, on finding the vehicle towed away and his wife and child arrested, feared and went to his uncle's home to report. The appellant presented himself to the police in Nakuru. The appellant's evidence was candid and straightforward.

31. On common intention, Counsel submitted that it was absurd for the court to have concluded that the whole incident was pre-meditated and well planned before its execution and that the appellant was in the plan, and participated in bundling the deceased into the vehicle. Counsel submitted that the persons who bundled the deceased into the car were the two who hired the car and the pillion rider. Mr Miyienda contended that the prosecution deliberately tried to cover the fact that the three people superbly planned to steal the motorcycle from the deceased and ultimately have him killed. The appellant left his passengers at Langas and was paid Kshs. 750 which he handed over to his boss's brother.

32. The appellant was not at the scene of the murder which happened later. He did not know what was to happen thereafter and thus there was no common intention. He told the police he had the phone number of one of his passengers and could remember them by appearance but the police did not believe or make use of this information.

33. Counsel submitted that the learned judge on one hand vindicated the appellant from the assembly or association of those who committed the murder and on the other hand again linked the appellant to the common intention, presence and action of the murders.

34. Counsel also took issue with the conclusion that the appellant possessed the mens rea to carry out the crime and contended that there was no evidence to support such a finding. That there was nothing to show the guilty mind on the part of the appellant. The appellant fled for fear of being arrested,

not because he was behind the murder and that was a normal tendency by any person in similar circumstances.

35. Counsel also pointed out the discrepancy in the description of the vehicle, particularly the registration number. While PW1 and PW2 refer to registration number KAM 516Q, PW5, PW7 and PW 9 refer to registration number KAN 516Q.

36. Mr Miyienda faulted the learned judge for disregarding the defence evidence and holding that the same was a concocted story. The sequence of events as stated by the appellant from the time he was hired by two people to the point the passengers alighted at Langas was not challenged by the prosecution in cross-examination. Up to that point the murder had not taken place and there was no evidence to link the appellant to the murder which took place in a maize plantation at Kapseret.

37. Regarding the identification parade, Counsel contended that the parade was flawed and faulty and ought not to have been relied upon. Counsel submitted that the PW11 at first testified that he did not know the appellant and then proceeded to tell the police that he was able to identify those who were in the maroon car. The identification parade was unnecessary as the appellant did not deny from the onset that he was hired to take the persons to their destination. The issue was not the identification of the appellant but whether the appellant participated in the murder of the deceased.

38. Ms Okok, learned Counsel for the respondent submitted that the evidence was circumstantial and was strong enough to convict the appellant with murder. The offence of murder was proved beyond reasonable doubt. PW1, PW4 and PW11 all saw a boda boda rider being abducted and bundled into a maroon Toyota Starlet later confirmed by PW2 to be his vehicle. The boda boda rider happened to be the deceased. The appellant was described by PW1, PW4 and PW11 as being among the people who were fighting or struggling with the deceased before eventually bundling the deceased into the car and driving off, with the pillion passenger at the lead on the motorcycle. The appellant was properly identified by PW11 in the identification parade conducted by PW12. The appellant's defence was weak and could not dislodge the prosecution's case.

39. On whether the appellant had malice aforethought, Counsel submitted that it was established that the deceased died through strangulation; and that the appellant and his accomplices knew that the act of strangulation would definitely cause death. The appellant's own behaviour of fleeing after the incident points to his guilty mind.

40. On of common intention, Counsel submitted that the circumstantial evidence is so strong that it leaves no doubt that the appellant took part in the killing of the deceased. The appellant participated in bundling the deceased into the car and took the assailants to the place they wanted to be taken.

41. Regarding the contradiction as to the registration number of the vehicle they saw, Counsel submitted that the discrepancy was not fatal as the vehicle's colour and make were properly described by the witnesses. There was no confusion throughout the trial regarding the vehicle used to commit the offence, and the appellant did not deny being in control of the vehicle on the material day.

42. Regarding the sentence, Ms Okok submitted that this was a case that had met the threshold for the death penalty as a sufficient and deterrent sentence. Instead of taking the deceased to the police if he had knocked someone down as they had told PW4, the assailants took the law into their own hands and killed the deceased. That cases of abduction have been on the rise and among the objectives of sentencing include retribution, deterrence and protection of the community.

43. We have set out the evidence at length because as this is a first appeal, the duty of this Court is to carefully consider and evaluate the evidence afresh and draw its own conclusions; taking into account

the fact that the trial court had the advantage of observing the witnesses. As was held in *Okeno v Republic* [1972] EA 32:

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E.A. 424*."

44. The elements to be proved by the prosecution beyond reasonable doubt on a murder charge under Section 203 of the *Penal Code* are; (a) the death of the cause of that death;

    b. that the appellants committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit & 4 others v Republic* [2015] eKLR.

45. In the present case, the evidence of PW7 indicated that the deceased's death was caused by asphyxia due to strangulation. However, there is no evidence from an eyewitness who actually saw the appellant murder the deceased. The prosecution case was therefore hinged on circumstantial evidence. In *Joan Chebichii Sawe v Republic* [2003] eKLR, this Court held:

> "In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

46. In *Abanga alias Onyango v Republic* Cr. App No. 32 of 1990 (UR) this Court emphasized that in such cases, "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".

47. The conclusion of the trial court that the evidence PWs 1, 4 and 11 coupled with that of PW3 was sufficient to conclude that it was the deceased who had been bundled into the maroon Toyota Starlet on 20th October 2009 was largely undisputed by the appellant. The discrepancies in the witnesses' testimonies about the registration number of the vehicle were excusable given the uniform description of the vehicle, as well as the appellant's own admission in his sworn statement regarding his presence with the vehicle on the material day when the incident occurred. There is also no evidence that the identification parade in which PW11 identified the appellant was improperly conducted.

46. The appellant's main contention is that the evidence on record was not sufficient to arrive at the trial court's conclusion that the appellant was an accomplice and shared a common intention with others to murder the deceased.

    Section 21 of the *Penal Code* defines common intention as follows:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence

> is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

In *Njoroge v Republic* [1983] KLR 197, this Court held that:

> " If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of the assembly...
>
> Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault. R v Tabulayenka s/o Kirya (1943) 10 EACA 51."

49. This Court in *Eunice Musenya Ndui v Republic* [2011] eKLR however cautioned against hastily making a presumption of common intention where there is evidence that may displace this presumption. In that case, this Court was not convinced that the appellant's mere presence in a taxi in the company of a man who later attempted to rob the taxi in conjunction with others who ambushed the taxi from outside was sufficient to link her to the predetermined plan of the conspirators:

> " In our view the principle of common intention is based on a presumption, which should not be too readily applied as has happened in the matter before us. Thus if there is evidence or circumstances which may displace the presumption this must be taken into account and it was clearly not taken into account by the two courts below... In the current case, in our view as stated above, the evidence of carrying the heavy carton and being found in the car that was intended to be robbed is grossly insufficient to support a presumption of common intention. In addition, the level of the appellant's participation is minimal when viewed from the standpoint of her defence and the prosecution's burden of proof beyond reasonable doubt."

50. In the present case, the circumstances that led to the trial court drawing the inference that the appellant shared a common intention with others to murder the deceased are the appellant's participation in bundling the deceased into the vehicle, and the appellant's conduct preceding the discovery of the deceased's body. However, an evaluation of the evidence surrounding these give circumstances presents a challenge that has to be addressed.

51. With regards to the appellant's participation, there is a variance as to the number of people seen struggling with and bundling the boda boda rider into the car. PW1 and PW4 stated that they saw three people struggling with the boda boda rider; while PW11, who was closest to the scene, stated that there were three occupants of the car and two of them struggled with the boda boda rider. PW11 was the only witness who identified the appellant and described the appellant as the one who was driving the vehicle. The fact that PW11's identification distinguished the appellant as the driver of the car and the fact that PW11 did not also confirm that the appellant was among the two people he saw bundling the deceased into the car raises doubts as to whether the appellant participated in struggling with the deceased.

52. The learned judge pointed out that the appellant did not bother to dissociate himself with his passengers as they forced the boda boda rider into the vehicle in what was equal to a dramatic kidnap. She concluded the appellant's failure to report this unusual behaviour of his customers meant that he possessed the intention to commit the crime. This was the only aspect of the incident that was not sufficiently explained by the appellant.

53. The learned trial judge also focused on the appellant's conduct after the incident to draw an inference of the appellant's guilty mind. The learned judge noted that the appellant "was however unable to explain about his whereabouts between 20th and 22nd October, 2009." Interestingly, the appellant was never put to task to explain his whereabouts on those dates during cross-examination. Nonetheless, PW2 testified that on 21st October 2009, the appellant had told him that the vehicle was at the garage. On 22nd October 2009, the appellant stated that he had been visiting a sick friend and later found the vehicle had been towed away by the police; and when he went home, he found that his wife and child had been detained.

54. The learned judge further concluded that the appellant's conduct revealed the character of a guilty man because the appellant "did not report the incident of the missing vehicle either to his boss or the police. And when he went home and found his wife and child arrested, he opted to flee far from his home… If indeed he was innocent, he would have had nothing to fear and would not have fled."

55. On the other hand, the appellant's explanation was that he fled out of fear of being arrested if he went to the police station alone. This explanation is plausible, considering that on 24th October 2009, he voluntarily went to the police at Nakuru accompanied by his uncle and reported the matter. He was also available for arrest and return to Eldoret on 7th November 2009. This conduct is not consistent with a guilty mind.

56. The learned judge finally faulted the appellant for not telling the police that he knew those who had hired the vehicle and that he even had the phone number of one of them. The appellant was however, clear that the police never bothered to ask him to assist them in investigations. According to the appellant's statement, his mobile phone and SIM card were taken away by the police. The failure of the police to interrogate and investigate the appellant's familiarity with the persons who hired the vehicle on the material day is not an omission that the appellant was responsible for. On the contrary, this points to an investigation that was less than satisfactory given the serious nature of the crime.

57. The chain of circumstances that emerges through the evidence on record does not lead to the inescapable conclusion that the appellant shared a common intention with others to murder the deceased in a pre-mediated plan. The extent of the appellant's participation in the bundling of the deceased into the vehicle is unclear; the appellant's action of surrendering himself in Nakuru accompanied by his uncle for fear of his safety is plausible; and the investigations carried out by the police leaves a lot to be desired. The upshot is therefore that there are other circumstances displacing the presumption that the appellant shared a common intention with others to murder the deceased.

58. After careful evaluation of the evidence presented against the appellant, we have come to the conclusion that there are glaring doubts as to the involvement of the appellant in the crime of murder as charged.

59. It follows therefore that this appeal is allowed. The conviction is quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR