



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA)

CRIMINAL APPEAL NO. 10 OF 2017

BETWEEN

JAMES LOKOYEN ETIBOR.....1<sup>ST</sup> APPELLANT

BENARD KIPKORIR CHERUIYOT..... 2<sup>ND</sup> APPELLANT

JOHN MWANGI ALIAS SAMMY DOO.....3<sup>RD</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An Appeal from the Judgment of the High Court of Kenya at Kitale,*

*(J. R. Karanja & E. Obaga, JJ) dated 19<sup>th</sup> November, 2013*

in

HCCRA. NOS. 88, 89, 90 OF 2010)

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JUDGMENT OF THE COURT

[1] The three appellants were convicted by the Principal Magistrate Kitale of the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code and sentenced to death. All the appellants appealed to the High Court against conviction and sentence. The three appeals were consolidated and heard by **J. R. Karanja** and **E. Obaga, JJ** who dismissed the consolidated appeals on 19<sup>th</sup> November, 2013.

[2] All the appellants filed a notice of appeal against the judgment of the High Court. By **Rule 59(1)** of the Court of Appeal Rules, a notice of appeal constitutes an appeal. The three notices of appeal were registered as one consolidated **Criminal Appeal No. 10 of 2017**.

[3] The 1<sup>st</sup> appellant herein was the 1<sup>st</sup> accused at the trial. The 3<sup>rd</sup> appellant **John Mwangi** alias **Sammy Doo** was the 2<sup>nd</sup> accused and the 2<sup>nd</sup> appellant **Bernard Kipkorir Cheruiyot** was the 3<sup>rd</sup> accused while one **Robert Matanda Khisa** was the 4<sup>th</sup> accused (*co-accused*).

The particulars of the offence alleged that on the night of 6<sup>th</sup> and 7<sup>th</sup> December, 2006 the four accused jointly with others not before the court robbed **John Daniel Kipruto Some (deceased)** of an unknown amount of money, television set, cooker, mobile phone and motor vehicle Reg. No. KAD 731Q Peugeot 405 valued at Shs. 300,000/= and immediately after the robbery killed John Daniel Kipruto Some.

[4.1] The prosecution case was briefly as follows:-

The deceased was a businessman and a farmer and lived in his house at Milimani Estate, Kitale. He also had also a rural home at Naisambu.

On that morning of 7<sup>th</sup> December, 2006, **Shem Kibitok Amaya** - the Chief of Kibomet location, Kitale received a report from the deceased's relatives that the deceased was missing and that his vehicle had been abandoned at Moi's Bridge. He reported this matter to the Criminal Investigations office Kitale. Meanwhile, on the morning of 7<sup>th</sup> December, 2006 **Corporal Jacob Kisaine** of Moi's Bridge Police Station and another police officer were on traffic duties along Moi's Bridge, Cherangani road. At about 10 a.m., he spotted motor vehicle Reg. No. KAD 731Q Peugeot 405 saloon which belonged to the deceased at the road side. All the doors of the vehicle were open. On checking, he saw that the ignition key was there. Personal documents were scattered and there was a panga, knife, sword and broken rungu. He opened the boot and saw blood stains. He formed the opinion that the vehicle had been abandoned. He reported to his superiors and the motor vehicle was towed to Moi's Bridge police station.

[4.2] Upon receiving a report from the chief, **Sgt George Otieng** of CID Kitale went to the deceased's home at Milimani Estate in the company of **Sgt John Lelei** - a Scene of Crimes Officer; the chief and family members of the deceased. There was nobody in the house but the door was open. There was a lot of blood at the verandah of the house. The properties in the house had been disturbed and family members of the deceased reported that some properties were missing. Sgt John Lelei lifted finger prints from the house. Later he went to Moi's Bridge police station and lifted finger prints from the deceased's vehicle.

On 11<sup>th</sup> December, 2006, the body of the deceased was recovered from Kiminini River. The body had injuries including a broken skull.

[4.3] Investigations led to the arrest of the three appellants and the co-accused. Their finger and palm prints were taken. The finger prints lifted from the deceased's house and the appellant finger and palm prints were analysed by **Patrick Ngandu** - a finger prints expert. The identification of the appellants' and co-accused's finger prints were found to be positive. In addition, investigations revealed that the 3<sup>rd</sup> appellant - **John Mwangi** had called one **Samwel Wabuge Soita** on the night of 6<sup>th</sup> December, 2006 and on the morning of 7<sup>th</sup> December, 2006 using the deceased's mobile phone which was missing. Investigations also revealed that the 1<sup>st</sup> appellant **James Lokoyen Etibor** was a watchman at the deceased's compound on the material night guarding a tenant who was living in the compound and that the 1<sup>st</sup> appellant disappeared from 7<sup>th</sup> December, 2006 until he was arrested.

[5] The three appellants denied the robbery at the trial. The trial magistrate convicted the three appellants mainly on the basis of finger print evidence and acquitted the co-accused.

The High Court reviewed the evidence and in dismissing the appeals made findings in part:

**“The evidence by Sgt Lelei (PW1) and the finger prints expert (PW8) pertaining to the lifting of the finger prints from the scene of the offence and the examination and comparison of the said finger prints with similar impressions obtained from the three appellants was cogent and credible enough for the conviction of the three appellants alongside other strong circumstantial evidence against them.”**

[6] The appellants who are represented by a counsel, **Mr. Miyienda** - have filed a supplementary memorandum of appeal citing nine substantive grounds of appeal. In the first ground they contend that the trial, conviction and sentence of the appellants was null and void for the reason that **Obaga, J.** who participated in the hearing of the appeal did not have capacity to hear criminal cases since he was a judge of the Environment and Land Court. The appellants rely on the decision of this Court in **Karisa Chengo & 2 others v. Republic - Criminal Appeals Nos. 44, 45 and 75 of 2014 (Karisa Chego case)**. Mr. Miyienda submitted that the appellants have served 5 years and have been in custody for 11 years and that a re-trial would be against the right to fair trial. He urged the Court to quash the conviction; set aside sentences and set the appellants at liberty.

[7] On his part, **Mr. Oyiembo** for the respondent conceded that Obaga, J. is a Judge of the Environment and Land Court and therefore had no jurisdiction to determine the appeal in the High Court. However, he submitted that the prosecution is not to blame for the vitiated proceedings; that the appellants were facing a serious charge; that the evidence was weighty and that in the interest of justice the appeal should be remitted to the High Court for rehearing.

[8] This appeal can conclusively be determined on the basis of the ground of jurisdiction of the judges who determined the appeal.

The composition of the High Court bench which determined the appeal was the same as in **Karisa Chengo case**. The decision of the Court of Appeal that the bench comprising of a judge of the High Court and a judge of the Environment and Land Court had no jurisdiction to hear and determine a criminal appeal was affirmed by the Supreme Court in **Republic v. Karisa Chengo & 2 others - Petition No. 5 of 2015**. Pursuant to the decision of the Supreme Court, aforesaid the judgment of the High Court subject of the appeal before us is a nullity *ab initio* and we so find.

[9] The evidence outlined in paragraph 4[1] - 4 above show that this was an aggravated robbery in which the victim was killed.

Neither the prosecution nor the appellants were to blame for the mistake in constituting the bench.

In the circumstances of this case, the interest of justice will be manifestly served by remitting the case to the High Court for the rehearing of the appeal by a competent bench.

[10] For the foregoing reasons, the appeal is allowed. The judgment of the High Court is set aside. The case is remitted to the High Court for rehearing of the appeal by a competent bench.

Orders accordingly.

**DATED and Delivered at Eldoret this 8<sup>th</sup> day of November, 2018.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**