IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & SICHALE, JJ.A)

CRIMINAL APPEAL NO 88 OF 2014

BETWEEN

JANET KARAMANA GITUMA …….……………..…..….….1ST APPELLANT

EVANS OBANGI OTWORI ……….…………………………2ND APPELLANT

CLEMENT MUNYAO KATIKU ……….....….……………..3RD APPELLANT

ANDREW MUUA KIMOMO …….…………..………………4TH APPELLANT

ANTHONY MUTHII MATI …….………...……………….5TH APPELLANT

PETER MAINA KIBE ……………..………….……………6TH APPELLANT

AND

REPUBLIC…………………………………...…………………RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi, (Ombija, J.) dated 27th August 2013

in

H.C.Cr. Case 15 of 2010)

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JUDGMENT OF THE COURT

1. This is an appeal from the convictions of and sentences imposed upon **Janet Karamana Gituma** (the 1st appellant), **Evans Obangi** (the 2nd appellant), **Clement Munyao** (the 3rd appellant), **Andrew Muuo** (the 4th appellant), **Anthony Mati** (the 5th appellant) and **Peter Maina** (the 6th appellant). These appellants were charged alongside **Lawrence Kariuki Githinji**, with the offence of murder contrary to the provisions of **section 203** as read with **section 204** of the **Penal Code**, **Chapter 63** of the **Laws of Kenya**. The particulars of the offence were that on the 23rd day of October 2009 at Garden Estate in Nairobi within Nairobi province, they murdered Moses Mbaabu Gituma (hereinafter referred to as the deceased).

2. The genesis of this charge was the events of 23rd October 2009. On that night, Beth Wairimu Ndegwa (PW1), Kelvin Munene Gituma (PW7) and Beatrice Gaicugi (PW9) were in the deceased's house watching television. At about 8:30pm, the 1st appellant, the deceased's widow, arrived home and knocked on the door, which Beatrice opened. At that time, four masked men, all wearing dark glasses forced their way into the living room, and ordered them all to lie down. The intruders then demanded to know where the deceased was, but he had yet to arrive home. The robbers slapped Beth, Kelvin, Beatrice and the 1st appellant, and demanded their phones. Beth had a red Nokia 1208 phone which she handed over to them. Thereafter, one of the intruders took Kelvin, Beatrice and Beth to the bathroom, leaving the 1st appellant in the sitting room with the other three robbers. Shortly after, the 1st appellant was also brought to the same bathroom, and the four remained confined in the bathroom, with one of the attackers keeping watch over them. According to Beatrice, this assailant ordered them to undress, but the 1st appellant reasoned with him, telling him that since it was cold, they should not remove their clothes. The attacker obeyed the 1st appellant, so the captives were not forced to undress. As they were waiting for the deceased to arrive home again according to Beatrice, the same attacker threatened to shoot the hostages, but he was restrained by the 1st appellant. They remained confined in the bathroom until about 2:00am when they heard the deceased arrive home. From the bathroom, they could hear a scuffle and the deceased screaming. Sometime later, two of the attackers came and fetched the 1st appellant from the bathroom, and told her that they were going with her. As the

1st appellant was leaving the bathroom, Beatrice heard one of the attackers tell the 1st appellant that they had finished the job, and then they left. After the 1st appellant and the intruders had left, Beth, Beatrice and Kelvin emerged from the bathroom and found the deceased lying on the verandah. He had injuries and was bleeding from the head. They went and called for help from the neighbours, and they took the deceased to the Aga Khan Hospital where he received treatment.

3. That same night at about 3:30 am, Police Constable Mutuku Mackenzie, (PW17) was on duty manning the Police Station Desk at the Thika Police Station. While he was there, a man who claimed to be a petrol attendant at a service station in Thika came in with the 1st appellant; the 1st appellant reported that the previous night at around 8:00pm, she was accosted by four men who were armed with pistols. These men forced her to her house then held her family hostage. She also reported that the four thugs had robbed her of Kshs 27,000.00 and a model 2630 Nokia mobile phone. She also reported that during that robbery, she and her children had been locked in the bathroom, and her husband had been critically injured. After the robbery, she added, the four assailants ordered her to drive them in their family car up to Juja where they disembarked and drove away in a different car. PC Mackenzie recorded the report in the occurrence book at 3:50 a.m and directed one Corporal Elkana to investigate the matter. The 1st appellant was taken to the Thika Nursing Home for treatment. Later that morning, at approximately 7:00am, Chief Inspector Mbila of the Thika Police Station ordered that the vehicle of the 1st appellant, KAX 755 G Toyota Fortuner, be brought to the Thika Police Station from the Caltex Petrol Station where the 1st appellant had reported that she had left it. After the vehicle had been brought to the station, he booked the vehicle KAX 755 J as entry No. 11 of 24th October, 2009. The Occurrence Book of the Thika Police Station was produced by Chief Inspector Phineas Mutwiri, (PW18), the then OCS Thika Police station. In the entry for 24th October 2009, under OB19 the entry is headed ***"Motor vehicle collected"*** and reads that ***"Cpl Imo and PC Muchiri both now book the collection of motor vehicle registration no. KAX 755G Toyota Fortuner to Kasarani Police Station".***

4. **Terry Wanjira Munyi** (PW4) was working at the 1st appellant's salon. On 23rd October 2009, she reported to work as usual. She noted that the 1st appellant's car was parked in the car garage behind the salon, and at some point, the 1st appellant indicated to Terry that she would be walking or taking a taxi home. The next morning, she reported to work as usual when one Mrs Karanja, a neighbor to the 1st appellant, called her and informed her that the 1st appellant and her family had been attacked by thugs earlier that morning. She was therefore told not to open the salon for business, and instead head to the 1st appellant's house. Terry and the other employees went to the 1st appellant's house where they found many people gathered in the compound. At some point, the 1st appellant arrived; Terry noticed that she did not have any injuries on her body, but she was shivering and vomiting.

5. The log of the vehicles that moved in and out of the estate was examined by Corporal Moses Kiema (PW11) the initial investigating officer. He established that every vehicle that got into the estate was given a pass at the barrier gate, and an entry detailing the vehicle, its occupant, the registration of the vehicle and the time in and out of the estate was entered into a register. It was alleged that the 2nd appellant was working on the night in question, and he was the one who logged the entries into the register.

6. Corporal Kiema examined the register for the entries made on the 23rd October 2009. He noted that on the material day, a vehicle KBH 657J had been logged in at 20.19 while the time out of the vehicle was 20.17pm. He thought this was suspicious and sought details from the Registrar of Motor Vehicles on the ownership of the vehicle. He established that the vehicle belonged to the Pamoja Women Development Programme Ltd which had two directors: Julius Chege Muiruri (PW5) and Mary Muthoni Chege. Julius gave evidence to the effect that the vehicle was usually under the control of Kinyanjui Mbogo, one of the staff members. On 24th August 2009, Mbogo went to the Netherlands for further studies, so the vehicle was parked in Julius's compound for safe keeping and the keys left with him. Since he had taken possession of the car, it had only been used a few times. On 30th October 2009, an officer from the CID called Julius and told him that the vehicle had been involved in the commission of a crime and that he had to take it to the CID Headquarters.

7. Further investigations by Corporal Kiema revealed that mobile model Nokia 2360 phone, alleged to have been stolen from the 1st appellant, was in use within Kirinyaga District. The police tracked down that phone to Lawrence Kariuki, who was the third accused in the trial before the High Court. The said Lawrence Kariuki claimed to have purchased the phone from the 5th appellant, after the 5th appellant offered to sell it to him because he was short of money. Lawrence produced an agreement dated 24th October 2009 as evidence of the transaction.

8. On 13th November 2009, Corporal Kiema received a report that the phone stolen from Beth, a Nokia 1208, was in use at a location along Mombasa Road. Eventually, the phone was recovered from James Mutinda (PW3) who stated that he had obtained it from Virginia Nzomo (PW2) who was at the material time a resident of Kibera. Sometime in October 2009, the 3rd appellant, Virginia's neighbor, approached her and asked her for a loan of Kshs 1,000.00. In return, he gave his phone as security for the money. About two weeks later, Virginia's son became unwell so she went to the 3rd appellant and asked for her money back. The 3rd appellant said that he did not have the money, so she went and approached Justus Mutinda (PW3) for a loan, and she used the phone from the 3rd appellant to secure the sum of Kshs 1,000.00 from Mutinda. Mutinda begun to use the phone until 13th November 2009, when he was arrested.

9. The main gate to the Garden Estate was being patrolled by Corporal Martin Imo (PW15) along with Police Constable David Kingori, (PW16) Police Constable Gichuhi, Police Constable Muiruri, Police Constable Kegode and Police Constable Musamati. Other than the policemen, there were three security guards employed by Ivory Security. These were John Mateori, the supervisor, the 2nd appellant and Jared Omweno. According to Corporal Imo, the police officers provided additional security as the guards from Ivory Security gave motorists gate passes as they entered the estate.

10. On 24th October 2009, at around 2:00am Corporal Imo went to check on his fellow officers at the gate. The area was lit by security lights, and he saw the 2nd appellant take a gate pass from a vehicle that approached the gate. About fifteen minutes later, a young girl escorted by two other guards approached him and told him that her home had been attacked. He and the other police officers rushed to the scene where they found the deceased. He had deep cut wounds around his head, and he was still alive.

11. Due to his extensive injuries, the deceased was taken to the Aga Khan Hospital. He underwent treatment for one month and was discharged. He however could not walk, could not coordinate his words, and could not talk properly. Shortly thereafter, he started complaining of a stomach upset and he died shortly thereafter.

12. The body of the deceased was identified by his brother Reuben Gituma (PW10) for post mortem examination. After the initial attack of

23rd October, Reuben took the deceased to live at his house at the Kenya School of Monetary Studies because he was afraid that he would be attacked again. A post mortem on the deceased was conducted by Dr Jane Simiyu Wasike, whose report was produced in evidence by Dr. Peter Muriuki (PW13). According to the said report, the cause of death was peritonitis which means that the deceased suffered from an inflammation of the peritoneal or abdominal cavity due to a raptured appendix. In cross examination, Dr Muriuki stated that the raptured appendix could have been caused by physical injury or infection.

13. That was the evidence tendered by the prosecution. After an evaluation of the same, the trial court found that all the accused persons had a case to answer, and therefore placed them on their respective defences.

14. In her defence, the 1st appellant alleged that she and the deceased had always had a peaceful marriage. She stated that on the material day, she had spent the day in her salon with her workers, and she left at about 8:00 pm, she had the day's collection, as well as some money belonging to a women's group. In total, she had the sum of Kshs 27,000. On her way home, she took her usual route, when she met with four men, one of whom had a gun. The men told her that they had been waiting for her, and that they wanted to see her husband. She was in shock, so she first told her assailants that they were talking to the wrong person. When they insisted that she should direct them to her husband, she followed her assailants' direction to her house. When they got there, one of the thugs knocked on the door then stepped aside. When the door was opened, she was pushed inside, and the thugs followed her inside. The attackers then begun to push them into the bathroom, Beatrice was taken first, then her son Kelvin and then herself. She admitted to pleading with the guards not to harm them and, and that the thugs listened to her. The 1st appellant's testimony was that they stayed in the bathroom until about 1:00am when her husband arrived home. From the bathroom, they heard some commotion, after which the bathroom door was opened, and the thug who was guarding the bathroom pulled her out. She saw the deceased's body lying on the ground in a pool of blood. The thug with the gun ordered her to drive them to Thika in her husband's vehicle, a Toyota Fortuner registration number KAX 755J. The four attackers and she got into the vehicle and proceeded towards the estate gate. They stopped at gate so that she could give the gate pass to the gateman. The thug seated next to her had a penknife, and three of the other thugs were behind her, pointing a gun at her neck. She did not wait for the details of the car to be recorded. She instead drove off. When they got to the main road, the thugs instructed her to drive until Thika; however, when she got to Juja, the thugs told her to stop the vehicle and they jumped out. She was scared and went to Thika, and reported at the first petrol station on the Thika Highway. When she got to the petrol station, the petrol attendant said that he could only phone the G4S security who came and took her to Thika Police Station. At the station, the officer gave her a phone, so she called one Mrs Kirima, whose number she knew offhead. She then went to the Thika Nursing Home where she was admitted as she was ill.

15. Mrs Kirima arrived with her husband, her sister in law and her nephew as well as two officers from the Kasarani police station. They drove her back to the Garden Estate. The police were there and they questioned her about the incident. She was initially charged with the offence of attempted murder, but after her husband passed away that charge was substituted for one of murder. Due to the events leading up to the death of the deceased, the 1st appellant enlisted the services of Dr Emily Adhiambo Rogena (DW2), to be present during the post-mortem examination of the deceased. Dr Rogena's evidence was that the primary cause of death of the deceased was acute peritonitis due to peri-appendicular abscess due to acute appendicitis.

16. In his defence, the 2nd appellant testified that on the material night, he was going about his duties at the main gate at Garden Estate. He had reported on duty at 6.15pm, alongside his colleagues Jared Omweno and John Mateori. At about 8.19 pm, motor vehicle registration number KBH 657J arrived at the gate of Garden Estate. As was customary, the vehicles details and the occupant's details were entered in the Register. The 2nd appellant denied making the suspicious entry in the register or having any part to do with the deceased's death.

17. The third accused, Lawrence Kariuki Githinji, produced in evidence a written agreement that showed that he had purchased the mobile phone alleged to have been stolen from the 1st appellant. That agreement showed that he bought the phone from the 5th appellant on 24th October 2009.

18. The 3rd appellant also maintained that he had nothing to do with the crime. He stated that he had in fact left a Nokia 1200 mobile phone with Virginia in order to secure the sum of Kshs 1,000.00. He stated that before his arrest, he had been trying to secure employment for the 4th appellant. In order to do so, he had taken the 4th appellant to the Kenyatta National Hospital to get a medical certificate. The certificate cost Kshs 2,400.00 but the 4th appellant had only Kshs 1,700.00. The 3rd appellant loaned the 4th appellant the shortfall and took his Nokia 1200 mobile phone as security for the loan. In his statement, that was the extent of his connection to the 4th appellant.

19. The 4th appellant denied the charge as well. He also denied seeking a loan from the 3rd appellant. He stated that he accompanied 3rd appellant to the Kenyatta National Hospital where he was to get a medical certificate, but that the 3rd appellant borrowed his Nokia 2360 mobile phone and then disappeared with it.

20. The 5th appellant admitted to selling the Nokia 2360 mobile phone to Lawrence, but he claimed that he had gotten it from the 6th appellant in satisfaction of money owed to him. The 6th appellant on his part admitted to owing the 5th appellant money, but denied settling the debt with any mobile phone. He stated that he and the 5th appellant had agreed that he would settle the debt in weekly installments of Kshs 500.00.

21. A total evaluation of this evidence led to the conviction of the appellants herein. Being aggrieved, they have each appealed to this Court faulting their convictions and sentences.

22. The appeal was heard on 14th May 2015. Mr. Arimi Kimathi, counsel for the 1st appellant, faulted the conviction because the cause of death as given by the medical examiner was peritonitis due to a raptured appendicular mass. Counsel further submitted that there was no common intention. The evidence shows that the 1st appellant was holed up in the bathroom at all material times that the offence was alleged to be committed, stated counsel.

23. Counsel argued that the trial court was wrong in relying on the circumstantial evidence as the evidence did not in any way link the 1st appellant to the crime. There was no evidence of bad blood between the deceased and the 1st appellant, in fact, the evidence pointed to them having a good relationship. Counsel urged that the evidence showed that the 1st appellant was herself a victim of the act and was not an

accomplice. Counsel further urged that the court ought to have taken judicial notice of what happens during a robbery, it is not always possible to resist attack, and urged us to place no premium on the fact that the 1st appellant went with the attackers.

24. For the 2nd appellant, it was also urged by Mr. John Swaka that there was no common intention to commit any crime. The 2nd appellant admitted to entering the details in the register, but denied ever altering the entry to try and mask any wrong doing. Counsel submitted that the fact that none of the 2nd appellant's colleagues were called to give evidence as to the fact of overwriting, the inference here was that they would not support the prosecution's version of events. He therefore urged that the appeal be allowed.

25. For the 4th appellant, it was submitted again that the circumstantial evidence did not link him to the stolen mobile phone model 1280 nokia. The evidence showed that the phone was traced to Clement Munyao, the 3rd appellant, who said that he had bought the phone from a shamba boy at Gigiri. Counsel urged that the trial court erred in finding the 4th appellant guilty on the basis of the phone, yet the evidence showed that it was found with the 3rd appellant. Counsel also faulted the trial court for finding that the 3rd appellant was not a credible witness, but using his evidence to convict the 4th appellant.

26. Mr Nyachoti for the 3rd, 5th and 6th appellants also urged that the circumstantial evidence linking them to the commission of the crime was remote. Counsel submitted that the 3rd appellant, was linked to the murder by the recovery of a phone stolen from Beth (PW1) and traced back to him. Counsel urged that for the court to rely on the doctrine of recent possession, it must first be proved that the item recovered is the item that was stolen. Counsel urged that the requirements to prove the recent possession doctrine were not satisfied as Beth stated that she had lost a red Nokia 1200, but the exhibit recovered was a black Nokia 1208. Counsel therefore urged that the court erred in amending the evidence from a 1200 to a 1208. The burden of proof remained with the prosecution to provide the correct exhibits. Counsel also urged that the evidence linking the 3rd appellant to the exhibit was weak, and the prosecution should have provided the service provider data to prove that the 3rd appellant was found with the phone.

27. For the 5th and 6th appellants, counsel urged that they were convicted on the basis of the Nokia 2630 which was stolen from the 1st appellant. However, the court never made a determination as to how the phone was recovered or who it was recovered from. There was nothing to link the 5th and 6th appellants to the phone, and in the absence of data from Safaricom, the service provider, their respective defences were reasonable, concluded counsel.

28. Mr Omirera for the State opposed the appeals. He submitted that the chain of events is not broken so there was no weakening of the prosecution case. The 1st appellant declined a lift from PW12 and also refused to use her vehicle. It was easy to conclude that the four men did not subject her to harassment. There was a smooth conversation between the 1st appellant and the attackers, and she never raised alarm about them, in addition, her first report was that she had received serious injuries but it later emerged that she had none.

29. Counsel also submitted that the 3rd appellant was conclusively linked to the Nokia 1208 stolen from Beth, as Virginia testified that she had obtained the phone from the 3rd appellant, who did not give a reasonable explanation as to how he came about the phone.

30. Counsel further argued that the evidence against the 2nd appellant was sufficient. He admitted to being on duty and his colleagues saw him make the entries which omitted vital information and that made him culpable, and the trial court was right to find that he was involved.

31. On the cause of death, counsel submitted that there was no evidence that the deceased died of complications arising out of diabetes; the evidence showed that the deceased died of injuries arising out of the attack. Counsel further submitted that there was overwhelming evidence against all the appellants, and urged us to uphold the convictions and render the lawful sentence.

32. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence and make our own conclusions only bearing in mind the fact that we have not had the opportunity of seeing and hearing the witnesses and give allowance for that. In ***Mwangi V Republic [2004] 2 KLR 28*** at page 30 this Court stated:

> ***"In Okeno v R [1972] EA 32 at p. 36 the predecessor of this Court stated, inter alia:*** **'an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination…. It is not the function of**
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> **the 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…'"**

33. This duty was restated by this Court in ***Joseph Kariuki Ndungu & another v Republic [2010] eKLR (Criminal Appeal Nos. 183 & 188 of 2006)*** which rendered itself in the following manner:

> ***"This being a first appeal, we have a duty to re-appraise the evidence, subject it to exhaustive examination and reach our own findings. We, however, appreciate that the trial judge had the advantage of seeing and hearing the witnesses. We further appreciate that because of that advantage, the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law."***

34. We have summarized the evidence tendered before the High Court in order to do our duty as a first appellate court as enunciated above. We find that the following facts are not in dispute: on the night of 23rd October 2009, four men with the 1st appellant went into the house of the deceased. For several hours, at least between 8:30pm and 2:00 am the next morning, Beth, Beatrice, Kelvin and the 1st appellant were confined in a bathroom. At about 2:00 am, the deceased arrived home and he was attacked by the four assailants, which attack left him with severe injuries. The assailants then went, fetched the 1st appellant, and left with her. About two hours later, the 1st appellant arrived at the

Thika Police Station where she made a report of the incident.

35. As already stated the appellants herein had initially been charged with the offence of attempted murder contrary to **section 220** of the Penal Code. However, as the deceased died on 2nd March 2010, six months after the attack, the appellants were charged with murder contrary to **section 203** as read with **section 215** of the **Penal Code** in substitution of the earlier charge.

36. In order to sustain a charge and conviction on the offence of murder, the evidence must demonstrate three essential elements. First, is the death of the deceased, and the cause of his death; the second is that the person accused did commit the unlawful act which caused the death of the deceased, and third that in committing that act, the accused acted with malice aforethought. See the decision of this Court in ***Abdi Kinyua Ngeera v Republic*** ***[2014] eKLR (Criminal Appeal No. 312 of 2012)***

37. It is not in dispute that the deceased died on 2nd March 2010. We must first therefore establish what caused the death of the deceased person. It was the evidence of Dr Muiruri, who produced the post mortem report on behalf of Dr Simiyu, that the cause of death of the deceased was peritonitis due to a rapture of the appendix. In the doctor's opinion, if the appendix had not raptured, then the deceased would not have contracted peritonitis, and hence he would not have died. In the same breathe Dr Rogena attributed the death of the deceased to acute peritonitis due to acute appendicitis. Her secondary findings to which the death was attributable were the presence of diabetes mellitus as well as an old healing injury on the brain. In her opinion, the major cause of death was the acute appendicitis. We are therefore satisfied that the deceased's death was caused by appendicitis, and not natural causes as was proposed by counsel for the 1st appellant. This finding is reinforced by the testimony of Dr Vankwa Indeche (PW14), who was also present at the postmortem, who testified that even though the deceased had suffered from diabetes mellitus, he was under the care of a specialist and he generally had good health and did not suffer any health complications before October 2009 when he was attacked.

38. We turn now to consider whether the unlawful acts of the night of October 2009 caused the death of the deceased. That would be the only way in which a conviction of murder would be able to stand. According to Dr Muiruri (PW5), a rapture of the appendix can be caused by a number of things, such as physical trauma or infection. As has been borne out by the evidence, and in particular the medical evidence, the deceased underwent severe trauma at the hands of his attackers. We therefore find that the attack on the deceased directly contributed to the appendicitis that eventually led to his death. His diabetic condition was well managed as evidenced by the testimony of Dr. Vankwa (PW 14) and is not relevant to the cause of death.

39. Were the appellants herein responsible for the unlawful actions that caused the death of the deceased?

40. As correctly pointed out by the trial court, the evidence that links the appellants herein to the commission of the crime was circumstantial. The Court will rely on circumstantial evidence to sustain a conviction if there are no facts that weaken the chain of circumstances relied on. As was stated in ***Sawe v Republic*** ***[2003] KLR 364***:

> ***"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."***

41. In order to establish that there are no facts that would weaken the chain of circumstances that point to the guilt of the accused person, the court must look at each fact separately to establish if there is any link between them. In the words of this Court in ***Mwangi & another v Republic*** ***[2004] 2 KLR 32***,:

> ***"It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example*** *Rex vs Kipkering Arap Koskei & Another (1949) 16 EACA 135.* ***"***

42. There is no doubt in our minds that the attack on the morning of 24th October 2009 on the deceased was intended to cause him injury. There was no evidence that this was a robbery gone wrong; the available evidence points to the fact that the assailants were patient, that they asked for the deceased and waited until 2:00 am for him to arrive. The actions of the attackers on that fateful night therefore did amount to murder.

43. The theory put forth by the prosecution was that the 1st appellant acted in concert with the 2nd appellant to participate in the murder of the deceased. The circumstances that brought about this inference were that on the night in question, the 1st appellant refused a lift from her neighbour and customer, Rebecca Karanja (PW12) on the pretext that she was waiting for a carpenter to fix a leakage on the roof of the salon. However, it appears that the appellant walked home from her salon that day, and she claims that she used a footpath and not the main gate. She got to her house in accompany of the attackers and knocked on the door which was opened by Beth. The family were then all huddled off into the toilet. According to Beatrice, the assailants listened to the 1st appellant, first when one of them wanted his hostages to undress and she persuaded him that it was cold, and a second time when he wanted to shoot them but she persuaded him not to. Later on, when the attackers fetched her from the bathroom, Beatrice heard the attackers tell her that they had finished the work. Her conduct after the attack was also suspicious. When the 1st appellant drove to the gate, she never alerted any of the guards, in any manner at all, at the gate that she and her family had been attacked. We note that the 1st appellant in her defence stated that she never raised the alarm because she was instructed by one of the attackers to open the window just enough to give the gatepass. She stated that she was afraid that they would harm her as they had harmed her husband. She drove until Juja where the thugs told her to stop the vehicle and they jumped out. She however continued to drive until she reached Thika, a distance of about 20 kilometers. Even more suspicious is that by her own testimony, it took her about 2 hours to reach the petrol station in Thika, where she eventually made a report at 3:55 am.

44. We have also taken note of the trial judge's note in the record, after receipt of the 1st appellant's evidence:

"in line with section 119 of the Evidence Act, I make a finding that the accused is not telling the truth. She appears to me that she is very sly. The manner she is consistent with a habitual lier. She is saying less than she knows. She is cunning and a schemer per excellence."*(sic)*

45. This observation was made in line with section 119 of the Evidence Act which provides that:

> ***"119. 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."***

46. From the evidence on record, we are satisfied that the 1st appellant played a major role in the attack of 23rd October 2009. The evidence points irresistibly to her leading the attackers to her house, to them acting in concert to maim the deceased, and later, to her aiding their escape.

47. The circumstantial evidence linking the 2nd appellant to the commission of the crime related to his role in the recording of the vehicles that moved in and out of the estate on the material evening. He admitted that at around 8:19 pm a vehicle registration Number KBH 657J arrived at the gate, and he recorded that it was a taxi. He recorded that the destination of the vehicle was Gichea. The vehicle was not given a gate pass. He denied recording that the time out of the vehicle was 8:17pm. On cross examination he stated that he vehicle left about 30 minutes later, and therefore the time out should have been 8:49, but did not know how the time had been logged out as 8:17pm. In the course of investigations, the police had determined that the said Githea had not received the vehicle in his compound and further the owners of the vehicle testified that the vehicle had not moved during the time that it was alleged to have entered the Garden Estate. It is therefore apparent that the said entry must have been fraudulently entered. On the same night, at about 1:46am the motor vehicle registration No KAX 755G arrived at the gate. He recorded the full details of the vehicle and issued a gate pass No 255. The said vehicle left at 2:20 am but he never wrote down who the occupants of the vehicle were. The trial court found that the entries relating to the entry of the vehicle KBH 657J were suspicious, and we agree. However, we are not satisfied that these circumstances point to the 2nd appellant being involved in the attack at the deceased's home. There was no evidence that the vehicle ferried in the robbers, and neither was there any evidence that the vehicle was used in aiding the attack. This was a burden for the prosecution to discharge, and we find that the trial court erred when it shifted that burden to the 2nd appellant to explain away the suspicious entries. In any event his subsequent conduct in helping the victim of the attack does not point to his guilt or a cover up for guilt.

48. The evidence that linked the 3rd appellant to the crime regarded the phone stolen from Beatrice on that fateful night. The testimony of Virginia (PW2) was that in October 2009, the phone had been given to her by the 3rd appellant as security for a loan. She in turn gave it to Justus (PW3) to secure some money to take her child to the hospital. After the phone was recovered, Beatrice identified it as belonging to her. The 3rd appellant on his part, denied knowing the deceased or taking part in his murder. He stated that on 27th September 2009, he headed to his bar in Kibera. When he got there, he was told that his bar maid and some customers had been arrested the previous night. He therefore embarked on trying to raise some money to secure the release of the bar maid. He therefore approached Virginia for a loan. Virginia gave him the Kshs 1000 and he in turn gave her his Nokia 1200. He then claimed that on 30th October 2011, he was sent by his boss at the Kenyatta National Hospital to search for a worker at his canteen. One Mark Makau, his cousin, called the 4th appellant to come and apply for that job. The 4th appellant was told by the 3rd appellant that he needed a medical certificate for the job, but was short of Kshs 700.00, so the 3rd appellant agreed to lend him the sum but took the 4th appellant's phone, a Nokia 1200 in order to secure the sum of lent. It is noteworthy that the 3rd appellant admitted to giving a phone to Virginia, although he claims that it was a Nokia 1200. However, the credible evidence of Virginia was that the phone given to her by the 3rd appellant was a Nokia 1208. This evidence was strengthened by Mutinda's who testified that Virginia passed the phone along to him in exchange of Kshs 1,000.00. Therefore the evidence places the 3rd appellant as having the Nokia 1208 phone that had been stolen from Beth on the night of the attack.

49. It has been stated by this Court that in **Arum v Republic [2006] 2 EA 10**, concerning the doctrine of recent possession that;

> ***"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 prove, that is there must be positive proof, first; that the property was found with the suspect, secondly, that the property was stolen from the complainant, and lastly; the property was recently stolen from the complainant… in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice no matter how many witnesses."***

It is our considered view that the 3rd appellant is squarely caught in by this doctrine.

50. The burden immediately shifts to the person found in possession of stolen property to prove that the item in question is not stolen see **Paul Mwita Robi v R Ksm criminal appeal no. 200 of 2008**; wherein this Court differently constituted stated

> "Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of recently stolen property is especially within the knowledge of the accused and pursuant to **section 111(1)** of the **Evidence Act cap.80** the accused has to discharge that burden.

The provision states:-

> ***"when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."***

Thus while the law is that generally in criminal trials, the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, <u>however, in a case where one is found in possession of a recently stolen property like in this</u>

case, the evidential burden shifts to him to explain his possession. That explanation only needs to be plausible one but he needs to put it forward for the court's consideration." (emphasis ours)

51. In order to prove his innocence, the 3rd appellant therefore needed to provide an explanation as to how he came into possession of the phone. All he did was deny being in possession of the phone, and that mere denial cannot absolve him. In the absence of a satisfactory explanation as to how he had come into the possession of the phone so soon after the attack, it is reasonable to presume that the 3rd appellant was involved in the attack on the deceased's home. We find that the chain of possession of the phone from the 3rd appellant to PW2 and finally to PW3 was not broken. Mere denials cannot aid the 3rd appellant.

52. The 4th appellant on his part testified that he was called by the said Mark Mathaa for an employment opportunity. In pursuit of the said opportunity, he and Mark went to visit the 3rd appellant at a house in Kileleshwa, Othaya Road. They were joined by one Simon Soldier Thitu and a girl by the name Mary. The 3rd appellant then told them that they would need to get medical certificates, so they all went to the Kenyatta National Hospital. At the hospital, the 3rd appellant asked the 4th appellant to give him his Nokia 2310 phone, and the 4th appellant obliged. The 4th appellant also gave the 3rd appellant the sum of Kshs1700 as payment for the medical certificates. The 3rd appellant then went into the hospital to allegedly see a doctor; he never returned, and the 4th appellant realized that he had been robbed. It therefore appears that the only evidence linking the 4th appellant to the crime is the word of the 3rd appellant, which, like the trial court, we find to be unreliable. We also note that the phone that was recovered from Virginia and Mutinda was a Nokia 1208, and not a Nokia 1200 as 3rd appellant alleged that he had been given by the 4th appellant. As such, there is no evidence linking the 4th appellant to the commission of the crime on 23rd October 2009. We therefore find and hold that his conviction based on the stolen mobile phone was unsafe and cannot stand.

53. The 5th appellant was also convicted on the basis of the recovery of a mobile phone alleged to have been stolen from the 1st appellant during the attack on the deceased. In his defence, he stated that he had met the 6th appellant at the Githurai stage on 23rd October 2009 at around 11:00 am. He had earlier left the 6th appellant with some personal effects, but the 6th appellant lost them and therefore owed him the sum of Kshs 3,000.00. When he met the 6th appellant, the 5th appellant demanded his money as he wanted to visit his home in Kirinyaga. The 6th appellant stated that he had no money; the 5th appellant stated that he noted that the 6th appellant was holding a nokia phone, which he asked for in order to satisfy the debt. The 5th appellant thereafter admitted to selling this phone to Lawrence Kariuki Githinji, a transaction that was reduced into writing in an agreement dated 24th October 2009.

54. The 6th appellant on his part completely denied giving the Nokia 2630 to the 5th appellant. He admitted to owing the 5th appellant some money in respect of clothes of his that he had lost, but stated that he never gave him a phone, but that he entered into an agreement with him to pay the outstanding amount at the rate of 500.00 every week.

55. Our analysis of the evidence against the, 5th and 6th appellants leads us to conclude that there is direct evidence linking the 5th appellant to the commission of the crime. He was in possession of the phone the day after the incident. We do not accept the 5th appellant's version of events that he got the phone from the 6th appellant. In his own evidence, he stated that it was Lawrence who wanted to sell him the Nokia 2630, and that he did indeed make an agreement in respect of that phone. We do not understand how the 5th appellant could have procured the phone from the 6th appellant at 11:00am on the day of the incident. The only logical explanation is that the 5th appellant was involved in the attack on the deceased's home at the night of 23rd October 2009, and that the next day, he hurriedly sold the phone to Lawrence under the pretext of having no money to travel. The trial court was therefore right in finding that possession of the phone so soon after 1st appellant lost possession of it placed the 5th appellant at the scene of the murder of the deceased. Having established that the 5th appellant did not get the stolen Nokia 2360 phone from the 6th appellant, there remains no evidence to tie the 6th appellant to the crime. Accordingly we find and hold that his conviction was unsafe

56. In view of the foregoing, we find that in the case of Janet Karamana Gituma (the1st appellant), Clement Munyao (the 3rd appellant) and Anthony Mati (the 5th appellant), their convictions were safe and we hereby confirm the same. As regards the 2nd, 4th, and 6th appellants, the prosecution evidence was not sufficient to prove beyond a reasonable doubt that they were involved in the attack on the deceased. In the event, we allow their appeals and set aside their convictions, quash their sentences and direct that they be set at liberty unless they be otherwise lawfully held.

57. We now turn to the sentences meted out on the 1st, 3rd and 5th appellants. We have noted that the trial court sentenced them each to serve a term of 30 years imprisonment for the offence of murder. **Section 204** of the **Penal Code** provides that ***"[A]ny person convicted of murder shall be sentenced to death."*** This sentence was confirmed as being the lawful sentence in ***Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR (Criminal Appeal No 5 of 2008).***

Similarly **article 26(3)** of the **2010 Constitution** does not allow the death penalty when it provides thus;

> ***"A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."***

That other written law is **section 204** of the **Penal Code**, as quoted above.

58. As the sentences imposed by the trial court were unlawful, we hereby set them aside and in their place mete out the lawful sentence, and order that Janet Karamana Gituma (the 1st appellant), Clement Munyao (the 3rd appellant) and Anthony Mati (the 5th appellant) shall suffer death as by law prescribed.

It is so ordered.

Dated and delivered at Nairobi this 18th day of December, 2015.

G.B.M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. SICHALE

………………………..

JUDGE OF APPEAL

I certify that this is a

true copy of the original**.**

DEPUTY REGISTRAR