REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 62 OF 2014

TOMITO TALALA DOMINIC……..……...…APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

(Being appeal from the conviction and sentence in Kilgoris SPM CR NO. 441 of 2013) (Hon. B.O. Ochieng Ag. SPM.)

JUDGMENT

1. The appellant, **Tomito Talala Dominic**, appeared before the Senior Principal Magistrate at Kilgoris facing a charge of robbery with violence, contrary to **Section 295** read with **Section 296** (2) of the penal code, in that on the night of 20th/21st June, 2013 at unknown time jointly with others not before the court within **Shartuka location, Transmara West District, Narok County,** while armed with a maasai sworn and other crude weapons, robbed **Wilson Sung Sung Murambi** of a brown leather handbag, brown canvas waist belt, two mobile phone batteries, six (6) chicken eggs, cash Ksh.1,315/= and household goods all valued at Kshs.4,035/= and immediately before or immediately after such robbery used actual violence resulting in the death of the said **Wilson Sung Sung Murambi**.

2. After a full trial, the appellant was convicted and sentenced to death. He was dissatisfied with the said outcome and preferred the present appeal on the basis of the grounds of appeal contained in the petition of appeal filed herein on 14th August 2014, and the supplementary grounds of appeal filed herein on 12th October 2015 by the firm of **H. Obach & Partners Advocates**.

Learned counsel, **Mr. Obach**, appeared for the appellant at the hearing of the appeal while the learned prosecution counsel, **Mr. Otieno,** represented the state/respondent.

3. In his submission, the appellant through his learned counsel stated that he appellant was convicted on a charge which was defective in that the act of robbery led to the death of the victim yet the lower court had no jurisdiction to handle a murder case. That, the learned trial magistrate ignored the fact that the evidence adduced did not establish the charge of robbery with violence but that of murder.

That, the victim died of stab wound but no witness adduced evidence linking him with the violence committed against the victim.

4. The appellant further submitted that the prosecution witnesses only testified on the "*bad blood*" that existed between him and the deceased. That, the trial magistrate erroneously failed to observe that some of the exhibits i.e. B1, B2 and B3 were produced without being identified by pw1, 3, 8 and 10 yet they were relied upon by the trial court. That, the issue of identification came into play when pw1 reported the

incident to the police and stated that he found him (appellant) standing while drunk wearing a trouser which had a red spot but he could not identify the color of the trouser.

5. The appellant went on to submit that there was a lot of contradiction and inconsistencies in the prosecution evidence yet the trial court found him guilty of the offence. That, the burden of proof was shifted to him when he said that he was asleep at a market place on the material date such that he was left to prove the alibi. That, the learned trial magistrate failed to consider that his blood samples were not taken to confirm that the blood stains found on his clothes belonged to him and not necessarily the deceased.

The appellant therefore urged this court to allow the appeal.

6. The learned prosecution counsel opposed the appeal and submitted that the charge sheet was not defective and the mere fact that the deceased died as a result of the robbery did not negate the offence of robbery with violence. That, it was enough for the prosecution to prove the violence such that it did not matter that the victim died or not. That, the offence of robbery with violence was complete and the evidence adduced pointed to the fact rather than murder.

That, it was proved that the appellant robbed and stole a bag and other items belonging to the deceased and in the process he stabbed the deceased and caused his death.

7. The learned prosecution counsel also submitted that the stolen bag was found with the appellant and was identified by a son of the victim (i.e. pw4). That, upon being arrested the appellant was found with blood stained clothes which included a white shirt, a pair of trousers and inner parts. That, the government analyst (pw 11) confirmed that the blood stains on the appellant's clothes belonged to the deceased.

The learned prosecution counsel contended that the ingredients of the charge were fully established and submitted that pw1, 3, 8 and 10 confirmed the clothes worn by the appellant at the time of his arrest and in particular pw1 and pw3 confirmed that they saw the clothes when they had blood stains.

8. The learned prosecution counsel further submitted that the failure to identify the clothes in court was not fatal as the appellant's inner pant (B3) was also blood stained and it was confirmed that the stains matched the deceased's blood. That, the evidence by the prosecution was consistence as it was proved that the appellant robbed the deceased and was seen wearing blood stained clothes and with items belonging to the deceased. That, there was no contradiction in the evidence of pw1 as he clearly stated that the appellant had a T-shirt which was white and a trouser which was black, looked wet with a spot which looked like blood. That, pw3 confirmed the evidence by pw1 and that pw4 confirmed that the appellant was found with a bag that belonged to the deceased.

9. The learned prosecution counsel submitted that the burden of proof was never shifted to the appellant during the trial and that the evidence by all the witnesses showed that the appellant attacked and stole from the deceased such that he was never called upon to explain why he was at the scene. That, the appellant's blood samples were unnecessary as he had no visible injuries on his body and was suspected of killing the deceased after being found with blood stained clothes and therefore the blood samples required were those of the deceased for purposes of comparing them with the stains on the cloth. That, if the stains did not match then the appellant would have been exonerated but because there was a match he was charged.

The learned prosecution counsel urged this court to dismiss the appeal while contending that although the appellant was convicted on circumstantial evidence the same irresistibly pointed to the fact that he participated in the robbery which led to the death of the deceased.

10. Having given due consideration to the rival submissions in the light of the grounds in support of the appeal, the duty of this court was to re-visit the evidence and draw its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (see, **Okeno vs Republic [1972]**

EA 32].

Briefly, the case for the prosecution was that on the 21st June 2013 at about 6.00a.m., a scream emanating from the direction where the deceased lived was heard by **Jane Rose Nashipal (pw3)**. She thought that a person was in distress and decided to enquire by moving towards the direction of the scream from her shop at a place called Shartuka. After walking a few yards from her shop, she found the appellant whom she previously knew lying motionless on the ground asleep.

11. **Jane (pw3**), called one Amos and they both approached the motionless appellant. She did not talk to the appellant but noted that he had a reddish brown leather bag which he was holding. He also had a one litre bottle. She (pw3) did not know the contents of the bag. She did not proceed to the place where the scream emanated but instead called by phone one Joshua Keter, who informed her that the deceased had been killed. She became shocked and called one Moi to the scene where she was. Moi arrived at the scene and was heard by the appellant who now stood up but appeared stranded and confused. She (pw3) became more shocked when the appellant replied to her enquiry as to why he was walking upto the morning yet the deceased had been killed.

12. The appellant asked for food from Jane (pw3) and she directed him to a nearby hotel after he gave out Kshs.100/= for the food.

She then proceeded to her place to sleep but the appellant followed her there. She then called one Mama Manu who pointed to her a bloody reddish substance on the T-shirt worn by the appellant. She (pw3) left her house and stood outside with Mama Manu when she saw **Tumbelia (pw8**) bending at the spot where the appellant had been lying. It then that they locked inside the reddish brown bag and saw some eggs, small sugar, eye ointment and two phone batteries. The appellant approached them and this caused Jane (pw3) to take away the bag and hide it in some thickets. She then proceeded to see her father who was brother to the deceased. She later saw the body of the deceased and noted a stab wound on the chin. She also learnt that the police had taken away the bag from where she had hidden it and that the appellant had been arrested.

13. **John Kibichi Sang (pw1**), was on the material 21st June 2013, heading to work at 6.00a.m. He was a motor cycle (boda boda) operator and had gone to collect his motor bike when he heard screams which he was told emanated from Shartuka side. As he was going to fetch fuel, he met **Jane Rose (pw3).** He also saw the appellant standing near the house of Rose at a shopping centre. He exchanged greetings with the appellant and noted that he was wearing a white T-shirt and a pair of black trousers which had red spots resembling blood. He (pw1) also noted that the trouser was wet. He thought that since the appellant was a drunkard he may have been assaulted as he appeared intoxicated. He (pw1) that decided to report the matter to a nearby administration police camp and later pointed out the appellant to the police only to hear that the deceased had been killed and his body was found at the place where screams had emanated from. He was told that the appellant was a suspect in the killing.

14. **Joshua Sungsung Murambi (pw2**), a brother to the deceased, was on the material date (21st June 2013) at 7.30a.m. informed that the deceased had been killed. He proceeded to the scene and found many people there. The body of the deceased was outside his house with a stab wound on the chin and facing upwards. He learnt that a suspect was arrested with a bag belonging to the deceased. He was told that the suspect was the appellant whom he knew and who was alleged to have previously stolen a sum of Kshs.20,000/= belonging to the deceased. He (pw2) was aware that the appellant had threatened the deceased on account of the theft incident which was reported to the police.

15. The son to the deceased, **Felix Sungsung Letaya (pw4**), indicated that he was at the home of his aunt when they heard screams and proceeded to the home of the deceased where they found him dead. His household items were scattered all over and his bag which he had inherited from his deceased wife was missing. The bag was used to keep his items and was normally kept at the headboard of his bed.

Felix (pw4) knew the appellant who once came to their house while drunk and requested for a place to spend the night only to later steal money belonging to the deceased. He never saw the appellant on the

night the deceased was killed or a day before.

16. **Abdulatiff Tobiko Saera (pw5),** was at a hotel on the material date at 7.00a.m. when he was informed that the deceased had been killed and that the appellant had been arrested as a suspect after being found with the deceased's bag and wearing blood stained clothes. He (pw5) knew that the appellant had been reported to the police for stealing money belonging to the deceased but the police had not taken any action up to the time the deceased died.

Salim Leshan Ololngasas (pw7), merely alleged that it was the accused who killed the deceased while **Alice Cheptanui (pw6),** indicated that she was the one who informed the deceased to report to the police when his money was allegedly stolen by the appellant.

17. **Andrew Tumbelia (pw8**), found the appellant standing ten (10) yards away from a hotel at Shartuka centre. It was about 7.00a.m. and they exchanged greetings. He was aware of screams indicating that a murder had occurred. He proceeded towards the directions of the screams and found that the deceased had been killed and his body removed from the scene. He knew the appellant and when he found him standing he had a small "*rungu"* (club) and appeared to be nursing a hangover. He (pw8) did not see the appellant with any bag although he saw a bag ten yards from him. He did not see the appellant drop the bag down.

Dr. Misoi (pw9), carried out a postmortem on the body of the deceased and completed the necessary postmortem report indicating that the cause of death was cardiopulmonary arrest due to strangulation.

18. **APC Hillary Kipngeno Mutati (pw10)**, arrested the applicant on the material date after being alerted that he had blood stained clothes and a brown leather bag. He (pw10) noted that the appellant was wearing T-shirt, long trousers and shoes which were stained with dry blood. He (appellant) appeared drunk and was suspected to have been involved in robbing and murdering the deceased as he was also found with a leather bag containing eggs and sugar all belonging to the deceased. A Government Analyst, **Carolyne Njoki Wamae (pw11)**, examined the blood stains found on the pair of trousers, T-shirt and inner wear allegedly worn by the appellant at the time of his arrest and compared them by way of DNA profiling with a sample of blood belonging to the deceased and found that they matched.

19. **IP Johnstone Musyoki (pw12**), on receipt of the necessary information commenced investigations of the case. He visited the scene of the offence and found the body of the deceased lying down with an injury on the chin suspected to have been caused by a sharp object. The neck had black strangle marks. The house door was forced open and items were strewn all over the house thereby suggesting a struggle. The left side of the deceased chest had visible bruises caused by a blunt object.

IP Johnstone (pw12) was informed that the appellant had already been arrested as a suspect. He was later shown a leather bag said to belong to the deceased and containing some eggs, sugar and Kshs.1,300 as well as eye ointment and two old batteries including belts. A plastic bottle smelling of illicit alcohol was also shown to him.

20. It was noted by **IP Johnstone**, that the appellant wore a T-shirt and a pair of trousers which had blood stains and that he appeared tired and sleepy but without injuries. Members of the public were baying for his blood on suspicion that he was responsible for killing and terrorizing people. IP Johnson forwarded the blood stained clothes to the Government Analyst for necessary examination together with blood samples from the deceased. He gathered that the relationship between the appellant and deceased was bad due to the alleged theft of money belonging to the deceased by the appellant.

The present charge was preferred against the appellant on completion of investigations.

21. The appellant's defence was a denial and a contention that he was framed by the prosecution witnesses and in particular **Jane Rose Nashipai (pw3)** who are all related to the deceased. He contended that **Jane Rose** was his lover with whom they differed and separated. He said that he was given Kshs.5000/= by his employer on the 20th June 2013. He thereafter went to Shartuka where he continued

drinking alcohol at Shartuka Best Bar and became intoxicated. He could not recall what time he left the bar but later found himself at the administration police post where he was beaten up and taken to Kilgoris before being charged in court with the present offence which he knew nothing about.

22. All the foregoing evidence was given due consideration by the trial court which ultimately concluded that the charge was proved against the appellant beyond any reasonable doubt. In this court's opinion, the fact that the deceased was violently attacked and property stolen from him was not in actual dispute. The appellant in his defence did not really dispute the occurrence of the offence. He only denied his alleged responsibility for the same and implied that he was implicated especially by Jane Rose (pw3) after the two fell out in a love relationship. The necessary ingredients of the charge under **Section 296 (2)** of the penal code are that the offender must be armed with any dangerous or offensive weapon or instruments or is in company with one or more other person or persons or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

23. Herein, there was ample evidence from the prosecution showing that the deceased was confronted in his house by a person or group of persons who attacked or used personal violence on him and ended up stealing his properly and killing him.

The intention of the attacker or attackers was clearly to steal from the deceased using any violent means to achieve as much. They therefore came into conflict with **Section 295** of the penal code read together with **Section 296 (2**) of the penol code.

The particulars of the charge were this established by the prosecutor mostly through the evidence of Joshua (pw2), Felix (pw4), APC Hillary (pw10) and IP Johnson (pw12).

24. Those particulars were suitable for an offence of robbery with violence contrary to **Section 295** read with **Section 296(2)** of the penal code rather than an offence of murder contrary to **Section 203** read with **Section 204** of the penal code. The argument by the appellant that he was convicted on a defective charge sheet or that the trial court had no jurisdiction to handle the matter is clearly unsustainable. The case against the appellant was that of capital robbery and not murder.

25. Basically, the contentious issue in the whole case was the alleged responsibility of the appellant in the case. His defence was a denial. He had no obligation to prove his innocence as the burden of proof lay with the prosecution (see, **Chemagong vs Republic (1984) KLR 611 and Mkendeshwa vs Republic [2002] 1 KLR 461).** There was no direct evidence against him as nobody saw him at the scene of the offence while in the act.

By and large, the evidence against him was based on suspicion and indirect or circumstantial evidence based on his alleged possession of the property stolen from the deceased and on blood stains allegedly found on his clothes which stains matched the blood sample of the deceased.

26. Suspicion, however strong, cannot be used as evidence in a criminal case especially of a capital nature (see, **Faith Lucas vs Republic Msa Criminal Appeal No. 274 of 2006 (C/A**)).

It mattered not that the appellant was suspected within his community of having committed previous criminal acts or of generally being a person of bad conduct of "*terrorizing*" people, the prosecution had the burden of proving facts which justified the drawing of an inference of guilt against the appellant. The suspicion cast upon him was irrelevant and of no probative value if not supported by credible evidence tending to establish his alleged culpability.

27. The guiding principles that would enable a court to convict on circumstantial evidence were set out in the case of **Republic vs Kipkering Arap Koske & Another (1949) 16 EACA 135**. Thus, the inculpating facts would be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt. **(**see, also**, Musoke vs Republic (1958) EA 715).**

In **Sawe vs Rep (2003) KLR 364,** it was held that circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied upon.

28. Herein, the inculpating facts are firstly that the appellant was found in recent possession of property stolen from the deceased and secondly, that he was found wearing clothes with blood stains matching the blood of the deceased who had been injured during the offence. All these, no sooner had the deceased been attacked and robbed.

In the case of **Isaac Nanga Kahing'a alias Peter Kahig'a vs Republic Criminal Appeal No. 272 of 2005, the Court of Appeal** with regard to the doctrine of recent possession stated that:-

> ***"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case the possession must be positively proved. In other words, there must be positive proof, that the property was found with the suspect and secondly that, the property is, positively the property of the complainant, thirdly, that the property was recently stolen from the complainant…….***
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> ***In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."***

29. In convicting the appellant the trial court apparently relied on the fact that a bag belonging to the deceased together with its contents was found in the possession of the appellant. The said bag which was reddish brown in color was produced in court (p.Ex6) by the investigations officer (pw12) after being identified as the property of the deceased by his son (pw4). However, the evidence of its recovery allegedly from the appellant was not credible. Jane Rose (pw3) said that she called a neighbor called Amos when she found the appellant lying down on his side, motionless and sleeping and in possession of the bag. She also called a person known as Moi. However, neither Amos nor Moi were called as witnesses to corroborate her (pw3s) evidence with regard to the bag.

30. Jane Rose said that she took the bag and hid it in some thickets only later to learn that it had been taken or given to the police. She referred to a lady called Mama Manu who also saw the bag and where it was hidden. But, the said Mama Manu was not also called to testify. The arresting officer (pw10) was not clear on how the bag was recovered and from whose possession. In essence, there was no credible evidence of possession of the bag by the appellant or its recovery from him. Infact, Andrew (pw8), stated that the appellant was not in possession of the bag.

It is clear from all the foregoing factors that the appellant's conviction ought not have been grounded on his alleged recent possession of the bag stolen from the deceased as there was no positive proof of his possession thereof and there was also no proof that the bag was recovered from him. The doctrine of recent possession could not therefore apply in the circumstances of this case.

31. The other factor said to have linked the appellant to the offence was that immediately after the offence he was found a distance from the scene in a stupor and wearing clothes which had blood stains linked to the deceased. He did not deny the fact of being in a stupor but he denied that he was found wearing the said clothes. He implied that the blood stained clothes were "*planted"* on him by the police. However, the arresting officer (pw10) and the investigations officer (pw12) confirmed that the appellant was wearing the blood stained clothes at the time of his arrest and that he was allowed to change them so that they could be used in this case.

32. John (pw1) and **Jane Rose (pw3**) also confirmed that that the appellant was indeed wearing the material blood stained clothes.

It was therefore dishonest for the appellant to deny his ownership of the said clothes and the fact that he was wearing them at the time of his arrest. The clothes included a T-shirt, a pair of trousers and an inner wear (P.ex. 10,11 & 12). These were forwarded to the Government chemist for analysis to determine

whether the blood on them belonged to the deceased. A sample of the deceased blood had already been obtained by the investigations officer (pw12) and was provided for purposes of the determination.

33. The Government Analyist (pw11) examined the clothes and the blood stains thereon by DNA profiling and concluded that the stains matched the blood sample from the deceased.

This meant that the appellant was found wearing clothes stained with the blood of the deceased no sooner had the deceased been violently robbed of his property and killed in the process.

There was no explanation from the appellant of the presence of the deceased blood on his clothes thereby implying that he was found with the blood of the deceased in his hands meaning that most likely that not he was the person or one of the persons responsible for the catastrophy that befell the deceased on the material date.

34. It could not have been a coincidence that the applicant was found near the scene of the offence in a stupor wearing clothes with stains of blood from the deceased only a few minutes after the deceased had been attacked, injured, robbed and eventually killed. The circumstantial evidence adduced against him based on the blood stains on his clothes was cogent and credible. It irresistibly pointed to his guilt so as to justify his conviction by the trial court.

The basic inculpating fact i.e clothes sustained with the blood of the deceased was incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

35. The argument that the appellant's blood samples were not subjected to forensic analysis did not hold water as what was required to be determined was whether the blood stains on the appellants clothes came from the blood of the deceased.

Indeed, if the blood stains did not come from the deceased or that the analysis was negative, then there would have been no case against the appellant based on blood trail. It was the positive forensic analysis which confirmed the initial suspicion that the appellant was involved in the material offence.

Consequently, this court upholds his conviction by the trial court and finds that this appeal is lacking in merit. It is hereby dismissed.

J.R. KARANJA

JUDGE

[Delivered and signed this 28th day of January 2016].