IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 61 OF 2017

BETWEEN

FESTUS MURKOMEN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. H. M. Nyaberi, SPM dated 22nd May 2017 at the Magistrates Court in Iten in Criminal Case No. 1373 of 2015)

JUDGMENT

1. The appellant, **MURKOMEN FESTUS**, was charged, convicted and sentenced to death of two counts of offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on 18th July, 2015 at Kapsowar Trading Centre within Elgeyo Marakwet County, jointly with another not before the court, he robbed **MICAH CHELUGO** a mobile phone make Tecno 605 valued at Kshs. 5,000/=and during such robbery used actual violence on the said **MICAH CHELUGO**. It was also alleged that together with other not before the court, he robbed **MERCY JEROTICH KIPTOO** of Kshs 300 cash and Samsung Galaxy J1 valued at Kshs. 10,000/- and immediately after the time of such robbery used actual violence on the said **MERCY JEROTICH KIPTOO**.

2. The offence of robbery with violence under **section 296(2)** of the ***Penal Code*** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (***see Dima Denge Dima & Others v Republic*** **NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR,** ***Oluoch v Republic*** **[1985] KLR 549** ***and Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52**).

3. The fact that a robbery took place is not in dispute and the issue in this appeal is whether the appellant participated in the robbery as he was not identified by the witnesses. The evidence implicating him was circumstantial as his blood was found at the scene of the incident. The thrust of his appeal and his complaint against his conviction is that the prosecution did not establish that he was one of the assailants. He complained that the procedure of connecting him to the offence by use of DNA from his blood samples was procedurally and fatally flawed and could not be relied upon to support the conviction.

4. As a matter of background, the facts of the case were as follows. Micah Chelugo (PW 1), Mercy Cherutich (PW 2), Mercyline Jeruto Kendagor (PW 3) and Gilbert Cheburet Toroitich (PW 4) testified that on night of 18th July 2015, they were all at home together with Philemon Kiplagat (deceased). PW 4 left the house to take a phone call and was followed by PW 1 and the deceased. PW 1 saw someone entering the house and at the same time, PW 2 heard PW 1 and the deceased shout *"mjambazi"* while PW 3 heard them say *"tumekufa leo"*. PW 1 and the deceased rushed back to close the door. PW 1, PW 2, PW 3 all heard a gunshot. PW 1 realized the deceased and as he was hiding he could hear the assailants beat and cut the deceased. PW 3, who was also hiding, could hear the assailants cut the deceased while demanding to know the money was kept. PW 1 testified that thereafter the attackers came and cut his left hand. PW 3 was cut on the shoulder while PW 2 pleaded with the assailants and took them to the bedroom where they searched for money but did not find any. PW 1 testified that after the incident he realized that his phone had been stolen while PW 2 told court that the assailants took her phone.

5. PW 4 testified that when he was outside receiving a phone call from his wife, he heard screams coming from the house. He went to seek help from a neighbour but the neighbour demanded that he remain silent. When he returned after 30 minutes, he found the deceased on the floor while PW 1 and PW 3 were injured. Elijah Kitui Kenei (PW 9) testified that he was in Eldoret on 18th July 2015 when he was called and informed that thugs had entered the house. He immediately traveled home and was informed that the deceased had died while PW 1 and PW 3 were receiving treatment for injuries sustained.

6. The area chief, Jacob Maiyo Chebet (PW 10), who went to the scene after the attack, testified that he saw a pool of blood at the door of the sitting room. Police from Kapsowar Police Station arrived at the scene after about an hour and ordered the house to be securely locked. On

the following day, police officers arrived at the scene, took photographs and blood samples from the fence. Another sample of blood was taken at Cheptongei forest after the police and members of the public followed footsteps from the home where the attack took place. More blood samples were taken at Yemit area were there was more blood.

7. Corporal David Ongwenyi (PW 12) testified that on 18th July 2015, he was instructed to proceed to the scene of the robbery where he observed a pool of blood, bullet marks on the wooden door to the sitting room and all the rooms ransacked. The investigating officer, Corporal Elias Kariuki (PW 13), told court that when he arrived at the scene he found PW 1 and PW 2 nursing injuries while the deceased was lying on the ground seriously injured. PW 1 narrated the ordeal and also informed him that as the assailants left, he heard one of them say *"you have cut me"*. The victims were taken to hospital where the deceased was confirmed dead. When he returned to the scene on the following day, he identified a place on the fence with blood stains which he believed was the point of entry and exit by the assailants. He followed the blood stains, some of which were on the grass and leaves, which led to Cheptongei forest. Upon reaching Yemit Boys High School, PW 13 also noticed massive blood on the soil off the road. The officers collected the dry blood stains.

8. Corporal Simon Kivani (PW 16) testified that on 2nd September 2015, together with other police officers, received a tip from the Assistant Chief of Jerusalem in Eldoret that the suspect in the subject robbery was in a house in the area. They stormed the house and arrested the appellant. They did not find any firearm when they searched the house. PW 13 told court that on 3rd October 2015 after the appellant had been booked in custody, he realized that he had injuries on his hand. After conducting a search in his house, he found a small computer printout that showing that the appellant had received treatment from Kapenguria County Referral Hospital on 19th July 2015. He requested the appellant to give a blood sample and he consented. PW 13 wrote to Chebiemet Sub-County Hospital to assist in getting the blood sample from the appellant.

9. Dr John Sugut (PW 5) testified that on 14th October 2015, the appellant was brought by police officers who wanted the DNA sample taken. PW 5 explained to the appellant the purpose of the intended DNA sample and that he was required to consent. The appellant consented to blood being drawn by Samuel Kipkeu (PW 8). PW 8 took the blood sample and put it in a container with EDTA and stored it in the fridge. On the next day, PW 13 took the sample for analysis in Kisumu.

10. A government analyst working at the Government Chemist, Kisumu, Richard Kimutai Lagat (PW 11) testified that on 15th October 2016 he received a police exhibit memo forwarding sample A (blood collected from the scene of the crime) and sample B (blood sample from the appellant). He was requested to examine the exhibits and determine their genetic relationship. After analyzing the two samples he concluded that the DNA profile generated from the blood sample from the scene matched the blood sample generated from the appellant's blood sample.

11. Dr Limo Ibrahim (PW 14) testified that the appellant reported at the casualty department with injuries on the left thumb on 19th July 2015 and was taken to theatre where his left thumb and index finger were removed. The appellant was discharged from the hospital on 27th July 2015. He testified that he received a letter from DCIO Marakwet West requesting for documents pertaining to the medical treatment of the appellant and he availed the treatment notes, discharge summary, admission notes, daily notes in the ward and nurse hand form which were produced in evidence.

12. Dr Wilfred Kimosop (PW6) testified that he conducted the post mortem on the deceased on 24th July 2015 at AIC Kapsowar Mortuary at 4:30 p.m after the body had been identified by Jeremian Ruto Mumor (PW 7). After examining the body, which had multiple cuts all over, he concluded that the cause of death was multiple organ injuries due to sharp and blunt trauma. PW 6 also produced P3 form for PW 1 and PW 3. He confirmed that PW 1 had a deep cut wound on the right hand between the small and ring finger which he assessed as grievous harm while PW 3 had a stab wound on the left shoulder which he classified as harm.

13. A ballistic analyst, Chief Inspector Charles Koilege (PW 15), testified that on 24th September 2015 he received 4 spent cartridge cases and a fired bullet from Corporal. Dan Owiti for examination. He told court in the cause of his examination the 4 spent cartridges were rifle ammunition in caliber 7.62 x39 mm. He testified that microscopic examination revealed that each of the cartridges bear identifiable firing pin marking, ejector marking and breech face impression, markings were all consistent with those produced by a firearm discharge. He testified that the fired bullet was damaged on the nose which could have been occasioned by hitting a hard object after being fired. He told court that it bears 4 rifling situations which is an indication that it passed through a riffle firing barrel firearm. He testified that he came to the conclusion that it passed through a firing barrel firearm and was discharged from an AK 47 caliber 7.72mm.

14. When put on his defence, the appellant in his sworn testimony denied the charges against him. He told the court that he did casual work for the Uasin Gishu County Government. He recalled that on 19th July 2015 at 10.00am he was in his rural home at Kapsait Location where he was cutting grass for his cattle when he cut accidentally cut his left thumb and fore finger. He went to Kapenguria County Hospital where his two fingers were amputated. He remained in hospital until 27th July 2015 when he was discharged. He went back to Eldoret on 5th August 2015 and was given sick off for a month. He remained in his home in Jerusalem until 2nd October 2015 when he was arrested. He admitted that he consented to his blood being drawn at Chebiemit Hospital.

15. Turning back to the issues raised in this appeal, it is clear that the prosecution case rested on circumstantial evidence. In ***Sawe v Republic*** **NRB CA Criminal Appeal No 2 of 2002 [2003] eKLR**, the Court of Appeal summarized the principles governing the use of circumstantial evidence as follows:

> *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.*

16. PW 10 and PW 13 testified that the assailants had left through the fence and had left behind a trail of blood. They followed the trail to the forest where they took blood samples. They were led to Yemit Boys High School where they found a lot of dry blood. PW 8 testified that he took the blood sample from the appellant and put it in a container with EDTA and stored it in the fridge. PW 13 collected the sample and took it to the Government Chemist. PW 11 came to the conclusion that the DNA profile generated from the blood sample from the crime scene matched the blood sample from the appellant. The trial court based its conviction after the analysis of this evidence by holding that;

> *It is also not sheer coincidence when he voluntarily donated his blood sample for DNA, the results matched with the blood DNA sample that was collected near Yemit High School. I am satisfied that PW13 and other members of the public followed the blood stains and it was properly collected and stored. This therefore makes me believe that Pw1 told Pw13 in the course of his investigations that one of the assailants claimed to have been cut. I am of the view that the accused is well connected with the offence of robbery with violence.*

17. The appellant urged the court to find that the DNA evidence was obtained contrary to **sections 122A** of the ***Penal Code*** which provides as follows:

> *122A(1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.*
>
> *(2) In this section -*
>
> *"DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of -*
>
> > *(a) the taking of a sample of saliva or a sample by buccal swab;*
> >
> > *(b) the taking of a sample of blood;*
> >
> > *(c) the taking of a sample of hair from the head or underarm; or*
> >
> > *(d) the taking of a sample from a fingernail or toenail or from under the nail,"*
>
> *122B.…...*
>
> *122C. (1) Nothing in section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made:*
>
> *Provided that every such consent shall be recorded in writing signed by the person giving the consent.*
>
> *(2) Such consent may, where the suspect is a child or an incapable person, be given by the suspect's parent or guardian.*
>
> *122D. The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given.*

18. **Section 122D** of the ***Penal Code*** is clear that the results of the DNA analysis shall not be admissible in evidence unless the prosecution proves that either the order for collecting the samples was given or that the accused consented to the test. From the evidence, the order for obtaining a sample under **section 122D** was contained in the letter dated 13th October 2015 signed by Elias Kariuki (PW 13) who was the investigating officer and an officer of the rank of corporal. The statutory requirement is that the order must be made by, "*an officer of or above the rank of inspector …..*" Since the order for taking the DNA test was made by PW 13, who was a corporal, the provisions of **section 122A** of the ***Penal Code*** were not complied with.

19. The prosecution was also entitled to rely of the consent of the appellant. The appellant, in his defence, agreed that he voluntarily gave his blood sample. This was confirmed by PW 5 who testified that she explained to the appellant the purpose and procedure for which his blood sample was being taken and PW 8 drew the blood sample. The evidence is clear that the appellant never gave his consent in writing as required by the proviso to **section 122C(1)** of the ***Penal Code***. The prosecution therefore failed to comply with the mandatory provisions of **section 112A** and **C** of the *Penal Code* hence and by reason of **section 122D** of the ***Penal Code*** the evidence connecting the appellant to the robbery incident was inadmissible.

20. Since the DNA evidence was the only evidence connecting the appellant to the robbery and there being no other independent evidence to link the appellant to the felonious act, the inevitable result is that I must allow the appeal. The appeal is allowed, the conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at ELDORET this 11th day of June 2019.

H. OMONDI

JUDGE

Appellant in person.

Ms Mumu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.