IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, MURGOR & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 77 OF 2016

BETWEEN

TOMITO TALALA DOMINIC ..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(*An appeal from the judgment and order of the High Court of Kenya at Kisii (J. R. Karanja, J.) dated 28th January 2016*

in

H.C. Cr. A No 62 of 2014)

****

JUDGMENT OF THE COURT

Background

1. This is a second appeal by **Tomito Talala Dominic** (the appellant) who was charged before the Principal Magistrate's Court at Kilgoris with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the Penal Code. The particulars of the offence were that on the night of 20th and 21st June 2013, jointly with others not before the court, within Shartuka Location in Transmara West District of the Narok County, while armed with a *maasai* sword and other crude weapons, he robbed **Wilson Sung Sung Murambi** of a brown leather hand bag, a brown canvas waist belt, two mobile phone batteries, six chicken eggs, cash of Kshs. 1,315/= and various household goods all valued at Ksh. 4,035/= and immediately before or immediately after such robbery, used actual violence which resulted in the death of the said **Wilson Sung Sung Murambi** (the deceased).

2. In brief, the facts culminating in this appeal were that at about 6:00 am on 21st June 2013, **John Kibichi Sang (John),** a *boda boda* (motor bike) rider was on his way to work when he heard screams coming from Njipiship area. He went to fuel his motorbike and a short while later, saw the appellant standing nearby who greeted him, and he noticed that the appellant who was wearing a white T-shirt, a sweater and black trousers, had blood stains on his T-shirt and that his trousers were wet. It was **John's** further testimony that since the appellant looked intoxicated, he made a report at the nearby Administration Police camp and directed the police where they could find the appellant. **John** went on his way and later on heard that a body had been recovered from the place where he had earlier heard screams.

3. **Joshua Sung Sung Murambi (Joshua)**, the deceased's brother, testified that on 21st June 2013, at about 7:30 am, he was at work when he was called and informed that the deceased had been killed. He proceeded to the deceased's home and saw the body of the deceased lying face up and there was a stab wound on his chin. **Joshua** further testified that the deceased and the appellant had had a prior incident where the deceased had claimed that the appellant had spent a night at his house and robbed him of Kshs 20,000/= and that the appellant had threatened to kill the deceased for reporting the matter to the police.

4. **Jane Rose Nashipai (Jane)** testified that she was at her home at 6.00 am on the material day when she heard screams coming from the area where the deceased lived. She walked in that direction and found the appellant lying on the ground. He appeared to be sleeping and was holding a reddish bag. She called one **Joshua Keter** who lived in the area that she thought the screams had come from and he informed her that the deceased had been killed.

5. It was **Jane's** further testimony that she proceeded to her house and the appellant followed her and asked her to buy him some food whereby she directed him to a hotel nearby and she entered into her house. The appellant followed her and when he attempted to get into her

house, she called one **Mama Manu** who asked the appellant to leave. The appellant was standing next to the door to **Jane's** house and **Mama Manu** and **Jane** noticed blood stains on the appellant's T-shirt. Jane went to inform her father that his brother, the deceased, had been killed. On her way there, she found the bag that the appellant had been holding and on looking inside, she found eggs, phone batteries and some sugar. **Jane** took the bag and hid it behind some thickets and proceeded to her father's home. In cross examination **Jane** denied that she had been in a love relationship with the appellant.

6. **Felix Sung Sung Letaya (PW4),** the son of the deceased who was aged 10 years testified that on the material day he was at his home with his aunt when they heard screams and proceeded to the deceased's home and found him dead. They found the house in a state of disarray, and the deceased's bag was missing. **Felix** testified that he knew the appellant and that he had been informed that the appellant had stolen some money from the deceased when he spent the night at the deceased's house.

7. **Andrew Tumbelia** (**Tumbelia**) testified that at 7 am on the material day he heard screams indicating that there had been a murder. He got out of his house and met with the appellant and they exchanged greetings. As he went towards the direction of the screams, he was informed that the deceased had been killed and his body removed from the scene. It was **Tumbelia's** further testimony that he knew the appellant who appeared drunk and was holding a small *rungu* (club).

8. **Inspector Johnstone Musyoki (Inspector Musyoki)** investigated the murder. It was his testimony that he and **PC Ngunjiri** went to the scene at 9:00 am where they found the deceased's body which had an injury on the chin from a sharp object and injuries on the neck, chest and leg. He and **PC Ngunjiri** took the body of the deceased to the mortuary and on their way there, they met with the Administration Police who had arrested the appellant and noted that his white T-shirt had red stains and was wet, while his grey trouser had blood stains. They took the appellant to the cells and upon taking an inventory they saw the appellant's inner wear which also had red stains. It was **Inspector Musyoki's** further evidence that he prepared and signed the inventory comprising the appellant's clothes and that the appellant also signed the inventory. **Inspector Musyoka** also forwarded blood samples taken from the deceased to the Government Chemist for analysis. It was **Inspector Musyoki's** further evidence that his investigations revealed that the appellant and the deceased had a bad relationship stemming from the deceased having reported to the police that the appellant had stolen Kshs 20,000/= from him.

9. A post mortem examination was carried out by the **Dr Misoi**, a senior medical officer at Kilgoris District Hospital. He noted that the deceased's body had a wound around his chin as well as strangulation marks. He concluded that the cause of death was *"strangulation causing cardio-pulmonary arrest."* **Dr** Misoi produced the post mortem report.

10. The blood samples taken from the body of the deceased were analysed by **Carolyne Njoki Wamae (Carolyne)** an assistant Government Chemist. **Carolyne** testified that her conclusion from the analysis was that the trouser, T-shirt and inner wear belonging to the appellant were stained with blood of human origin. It was her further testimony that she conducted **Deoxyribonucleic Acid** (DNA) analysis and concluded that the blood on the items of clothing matched the DNA profile for the DNA from the blood of the deceased. Her analysis indicated that the appellant's clothes had human blood stains which matched the blood taken from the deceased.

11. When placed on his defence, the appellant gave an unsworn statement and did not call any witnesses. He denied committing the offence for which he was charged and stated that he had gone to work on 20th June and been paid Kshs 5,000/= by his employer and thereafter went to a bar and got very drunk and could not recall what time he left the bar. He found himself at the administration police post where the police took him to Kilgoris where he was placed in the cells. The appellant denied ownership of the clothes which were produced by the Investigating Officer, **Inspector Musyoki** and claimed that he was wearing the same clothes which he was wearing in court at the hearing. The appellant further claimed that **Jane** who testified against him gave a false account as they had a previous love relationship which he ended and she therefore had a grudge against him. The appellant further stated that **John** and **Tumbelia** who associated with **Jane** also gave false testimony.

12. The trial court after considering the totality of the evidence found that the evidence adduced against the appellant was circumstantial as there was no eye witness evidence. The trial court found the appellant guilty of the offence charged as he had been seen in possession of the deceased's bag and also because his clothes were stained with the deceased's blood. The trial court convicted the appellant, and sentenced him to death by hanging.

13. Aggrieved by this decision, the appellant filed a first appeal to the High Court in which he faulted the judgment of the trial court on the grounds that the charge sheet was defective in that the act of robbery led to the death of the deceased yet the lower court had no jurisdiction to handle a murder case; that the trial court ignored the fact that the evidence adduced did not establish the charge of robbery with violence but that of murder; that the deceased died of a stab wound but no witness adduced evidence linking him with the violence meted against the deceased; that the prosecution evidence had many contradictions and inconsistencies which the trial court did not take into account; that the burden of proof was shifted to him to prove his alibi; and the trial court failed to consider that his blood samples were not taken to confirm that the blood stains found on the clothes belonged to him and not to the deceased. The appellant urged the High Court to quash his conviction and set aside the sentence imposed by the trial court.

14. The High Court found that the evidence against the appellant was circumstantial and was based on his alleged possession of the property stolen from the deceased and on the blood stains found on the appellant's clothes which stains matched the blood sample of the deceased. The Court held that there was no dispute that the deceased was the victim of a violent robbery; and that there was ample evidence that there had been a robbery at the deceased's home. The High Court however rejected the evidence of recovery of the stolen bag as evidence that the appellant was responsible for its theft.

15. The first appellate court found that the evidence against the appellant was based on the fact that the witnesses had seen him dressed in blood stained clothes, and when these clothes were recovered and subjected to DNA analysis, led to the irresistible conclusion that he was involved in the robbery and death of the deceased. As such, the court upheld the conviction and sentence and dismissed the appeal.

16. Undeterred, the appellant filed this second appeal. In his amended memorandum of appeal, the appellant impugns the judgment of the 1st appellate court on the grounds that the High Court: failed to re-evaluate the evidence; failed to appreciate contradictions in the

testimonies of the prosecution witnesses; and shifted the burden of proof to the appellant. It was the appellant's further claim that the charge sheet was defective for failing to indicate that the appellant was armed with an offensive or dangerous weapon; that there was insufficient evidence to convict the appellant; and that the sentence meted out against the appellant was unconstitutional thus violated his constitutional rights.

Submissions by Counsel

17. These grounds were expounded on by way of written submissions and oral highlighting during the hearing of the appeal by counsel for both parties. Learned counsel, **Mr. Obach**, represented the appellant and argued that the trial court shifted the burden of proof to the appellant in requiring him to explain how the deceased's blood was found on his clothes; that the appellant denied owning those clothes and testified that the only clothes that he had were those that he was wearing when he was arrested and which were the same ones he was wearing during the trial.

18. **Mr. Obach** further submitted that the prosecution witnesses contradicted themselves when they claimed to have seen the appellant. In particular, that **John** had claimed to have seen the appellant's clothes, but **Jane** testified that it had been dark at the time she saw the appellant. Counsel argued that it would not have been possible for **John** and **Jane** to see the blood stains on the appellant's clothes if it was dark. Based on these contradictions, counsel submitted that the two courts below erred in requiring the appellant to explain the source of the blood, and effectively shifted the burden of proof to him and used this evidence to sustain the appellant's conviction. In counsel's view, the totality of the evidence against the appellant was insufficient to sustain a conviction and did not irresistibly point to the appellant as the person responsible for the robbery and the deceased's death.

19. Counsel further contended that the charge sheet that the appellant was charged with was defective; that the appellant had been charged with being armed with a *maasai* sword and other crude weapons, but the same were not described in the particulars of the offence as either dangerous or offensive weapons.

20. Mr. Obach's final submission was on sentence where he urged us to reconsider the sentence on the ground that the sentence imposed on the appellant violated the appellant's inherent human right to life under **Article 26(1)(b) and Article 50** of the Constitution. In particular, the appellant urged that having been sentenced to death over five years ago, his rights against cruel and inhuman treatment under **Article 25(a)** of the **Constitution** were violated, and that he had suffered psychological torture in the period pending the sentence of death by hanging. Counsel urged us to reconsider the sentence imposed on the appellant by the trial court and upheld by the High Court and sentence the appellant in line with the jurisprudence laid down by the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015.**

21. Mr. Kakoi learned counsel for the State opposed the appeal by way of written submissions which he orally highlighted at the plenary hearing of the appeal. Counsel argued that all the issues raised by counsel for the appellant were issues of fact, and that this court ought not to consider them bearing in mind the limitation of its jurisdiction under **Section 361** of the **Criminal Procedure Code**. Counsel argued that the blood samples were taken from the body of the deceased by **Dr. Misoi** who carried out the post mortem examination on the body of the deceased. Counsel argued that the blood samples were properly analysed by **Carolyne** and that the appellant was therefore properly convicted. Counsel urged us to dismiss the appeal on sentence.

Determination

22. We have considered the record, the submissions, the authorities cited and the law bearing in mind that our mandate as a second appellate court is limited to the consideration of matters of law only. In **Dzombo Mataza v Republic [2014] eKLR (Criminal Appeal No. 22 of 2013)** this duty was spelt out by this Court in the following terms:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court***
>
> ***…. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

23. Further, as stated by this Court in **Chemagong V Republic [1984] KLR 213,** this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown to have acted on wrong principles.

24. It is not in dispute that the deceased sustained fatal injuries during a violent robbery. The question is who caused the deceased the fatal injuries? There was no eye witness to the commission of the offence. The evidence adduced before the trial court and relied on was therefore circumstantial.

25. In **Mwangi V R [1983] KLR 55,** this Court held that:-

> ***"In a case dependent exclusively on circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."***

26. In **Mwangi & another vs Republic [2004] 2 KLR 32**, this Court stated as follows:

"It may be asked: Why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case dependent 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 or 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."

27. Further, in **Erick Odhiambo Okumu vs Republic [2015] eKLR** this Court referred to **Ernest Abang'a Alias Onyango vs Republic**, (supra), where the Court identified the following as the threshold which circumstantial evidence must meet to justify a conviction:

"i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

ii) The circumstances should be of definite tendency, unerringly pointing towards guilt of the accused.

iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

28. The role of the prosecution is to prove, beyond a reasonable doubt, that the appellant was guilty of the offence that he was charged with. In a bid to do this, the prosecution led evidence that the deceased's blood was found on the appellant's clothes. We are satisfied that this evidence was properly on record, and that it was credible because the witnesses who saw the appellant that morning, namely **John** and **Jane** testified that he was wearing clothes that were stained with blood. **Jane** in particular, did clarify, that while it was dark, she was able to clearly see the appellant and described the manner in which he was dressed. The appellant's complaint on this score fails.

29. The clothes the appellant wore were obtained by the investigating officer, **Inspector Musyoki** who signed the inventory which was also signed by the appellant signifying that the clothes in the inventory belonged to him. Further, a forensic analysis was carried out by **Carolyne** which proved that the blood on the clothes was that of the deceased. At that point, the prosecution had discharged its burden, and it now fell on the appellant to explain how the deceased's blood was found on his clothes. **Section 111(1)** of the **Evidence Act** casts an evidential burden on an accused person to prove any facts that are especially within his knowledge as follows:

"111. (1) 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, or 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:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

30. In **Douglas Thiongo Kibocha versus Republic [2009] eKLR** this Court while construing **Section 111** (**1**) of the **Evidence Act** stated as follows:

"When parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111(1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact."

31. Further, in **Rafaeri Munya alias Rafaeri Kibuka v Reginam (1953) 20 EACA 226** the predecessor to this Court observed as follows:

"The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts whichhe may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disproved or disbelieved become of substantive inculpatory effect.

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence." *[Emphasis supplied].*

32**. Section 111(1)** of the **Evidence Act** therefore creates a rebuttable presumption. In the instant appeal the rebuttal presumption is that since the appellant's clothes had blood stains which DNA analysis proved belonged to the deceased the onus was on the appellant to explain how that blood found its way to his clothes.

33. In trying to distance himself from the crime, the appellant denied that the clothes produced in evidence belonged to him; however, in light of the evidence of **John** and **Jane** who saw him wearing a white T-shirt and dark coloured trousers, both of which were stained with blood, and **Inspector Musyoki** who collected the blood stained T-shirt, trouser and inner wear the Court is entitled to presume that those

clothes were not only his, but that they got stained during the robbery during which the appellant sustained fatal injuries. It is notable that the appellant was found wearing the blood- stained clothes shortly after the body of the deceased was found in the same vicinity. From all these pieces of circumstantial evidence, the facts adduced in this case are incapable of any other explanation upon any other hypothesis except that of the appellant's guilt. They point irresistibly to the appellant as the person who inflicted the fatal injuries on the deceased. His alibi defence fails to pass muster given the strong circumstantial evidence led by the prosecution. The appellant's complaint that the trial court convicted him on weak circumstantial evidence which was upheld by the first appellate court cannot therefore stand.

34. Turning to the question whether or not the charge sheet was defective as alleged by the appellant for failing to describe the weapons used in the course of the robbery as *'offensive weapons.'* The purpose of the charge sheet and the particulars of the charge contained therein are to ensure that the accused person has an opportunity to know the charges leveled against him to prepare his defence. In the appeal before us, the appellant was charged with the offence of robbery with violence, the ingredients of which are set out in **Section 296(2)** of the Penal Code as follows:

> ***"296(2) If the offender is armed with any dangerous or offensive weapon or instrument, 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, he shall be sentenced to death."***

35. This Court succinctly laid down the ingredients of the offence of robbery with violence in **Oluoch v Republic [1985] KLR 353** and held that:

> ***"Robbery with violence is committed in any of the following circumstances:***
>
> ***a) The offender is armed with any dangerous and offensive weapons or instrument; or***
>
> ***b) The offender is in company of one or more person or persons; or***
>
> ***c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."*** *[Empasis supplied].*

36. This Court in **Daniel Muthoni V Republic [2013] eKLR** found that proof of any of the three ingredients of the offence of robbery with violence would be enough to sustain a conviction under Section 296(2) of the Penal Code.

37. Applying the above principles to the instant appeal, it is evident from the evidence on record that the ingredients for the offence of robbery with violence were proved. The evidence of **Tumbelia** that he saw the appellant holding a *rungu* (club), and the evidence of **Dr Misoi** who produced the post mortem report that the victim of the robbery, the deceased, sustained fatal injuries are sufficient to prove that the ingredients of the offence of robbery with violence were present.

38. This Court in **Juma Mohamed Ganzi & 2 others v Republic [2005] eKLR** stated as follows:

> ***"The offence of robbery with violence under Section 296(2) of the Penal Code is proved if the prosecution proves any of those three elements. Firstly, the mere omission of the words "dangerous or offensive weapon or instrument" in the particulars of the six charges of robbery that were under consideration does not make the charges defective because as the charges show, the prosecution was also relying on the other two elements of a charge of robbery with violence. Secondly, the particulars of the six charges say that the appellants were armed with "G3 rifles, bow and arrows."***

In **John Maina Kimemia and Another V Republic Criminal Appeal Nos 105 & 110 of 2003** (unreported) this Court held that the words

"dangerous or offensive weapon" in **Section 296(2)** of the **Penal Code** bear the same meaning as defined in **Section 89(4)** of the **Penal Code** thus:

> ***"any article made or adopted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use."***

39. By parity of reasoning, in the instant appeal, the charge sheet indicates that the appellant was armed with a *maasai* sword. A *maasai* sword is adoptable for causing injury to a person.

In **Juma Mohamed Ganzi and 2 others v Republic** (supra) this Court stated as follows:

> ***"A firearm is made for causing injury. Similarly, a (sic) bow and arrows are made for causing harm to a person. It is not necessary to state in the charge sheet that such weapons are dangerous or offensive weapons as they are inherently so…In any case such a defect as complained of by the appellants has not been shown to have caused a failure of justice and is indeed curable under Section 382 of the Penal Code."***

In the circumstances, we see no merit in this ground and it therefore fails.

40. From the foregoing, we are satisfied that the offence of robbery with violence was proved beyond reasonable doubt against the appellant

and that the 1st appellate court properly directed itself in upholding the conviction against the appellant. Accordingly, we find that there is no basis to interfere with the findings of the 1st appellate court on the appellant's conviction for the offence of robbery with violence.

41. Regarding the sentence that was meted out on the appellant on the charge of robbery with violence, the appellant urged us to set aside the death sentence on the ground that it is unconstitutional. **Section 296**

(2) of the **Penal Code** provides that the sentence for the offence of robbery with violence is death.

42. Following the decision of the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015** (Muruatetu's case), held at para 69 that;

> ***"… section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."***

43. Similarly, this Court, in **William Okungu Kittiny v Republic [2018] eKLR** held that:-

> ***"…the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296 (2) and section 297 (2) of the Penal Code. Thus the sentence of death under Section 296 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with the Constitution."***

44. We observe that the appellant was a first offender and that in mitigation stated that he is a single parent and sole breadwinner. We also take into consideration the fact that the victim of the offence sustained fatal injuries. The trial court stated that it had no discretion as regards sentence and that the only punishment for the offence of robbery with violence was the death sentence. In the circumstances, and in light of recent jurisprudence, we find that a sentence of thirty (30) years imprisonment would meet the ends of justice.

45. The upshot is that the appeal against conviction is dismissed while the appeal against sentence is allowed. Accordingly, the sentence of death by hanging is set aside and in substitution therefor, the appellant is sentenced to thirty (30) years imprisonment with effect from 8th August, 2014 when he was sentenced by the trial court.

Dated and delivered at Nairobi this 22nd day of May, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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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.

Signed

DEPUTY REGISTRAR