

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 14 OF 2019

CHARLES MOCHAMA OMWOYO.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. B. M. Kimtai – PM Keroka dated and delivered on the 20th day of March 2019 in the Original Keroka Principal Magistrate’s Court Criminal Case No. 560 of 2017}

JUDGEMENT

The appellant is serving thirty (30) years imprisonment for the offence of **Robbery with violence contrary to Section 296 (2) of the Penal Code**. The particulars of the charge are that on the night of 7th and 8th May 2017 in Masaba South Sub-county within Kisii County, jointly with others not before court while armed with dangerous weapons namely a gun, axe and pangas robbed one **Alex Nyakeri Ngare** of Kshs. 47,400/= an LG Television, a television remote control, two mobile phones, two electric shaving machines, a travelling bag and assorted child clothing all the stolen property being worth Kshs. 68,400/= and at or immediately before or immediately after the time of the said robbery used actual violence against the said **Alex Nyakeri Ngare**.

It was also alleged that during the robbery the appellant and his brother the accused in the case **Gang-raped PMO** contrary to **Section 10 of the Sexual Offences Act** or that alternatively the two of them **committed an indecent act with an adult** namely **PMO** contrary to **Section 11 (1) of the Sexual Offences Act**.

The appellant also faced an alternative charge of **handling stolen goods** where it was alleged that on 28th June 2017 in Masaba North, him and his brother accused 2 and wife accused 3 otherwise than in the course of stealing dishonestly received and retained an LG television set, LG television remote control and two electric shaving machines the property of Alex Nyakeri Ngare knowing or having reasons to believe them to be stolen goods.

At the trial, the court heard that the complainant (Pw1), his wife (who did not give evidence) and her sister (Pw2) were in the house when eight people one armed with a gun and the others with axes, pangas and metal bars entered. Three of them then went where Pw2 was sleeping and one of them raped her before making away with Kshs. 47,000/=, a television, shaving machines, a travelling bag and assorted clothes. The complainant reported the matter to the police. Thereafter his sister-in-law (Pw2) was examined at Ibacho Hospital where she was examined by Clinical Officer Danson Nyamunde (Pw3). From his findings, it is evident that Pw2 was raped during the incident. The two witnesses testified that although they saw the attackers they did not identify any of them. The trial Magistrate upon an evaluation of that evidence found that although there was no direct evidence to connect the appellant to the robbery there was evidence that the television stolen from the complainant during the robbery was found in the appellant’s house a few days later and since he had not given any explanation on how it had come into his possession that was evidence of recent possession that connected him to the robbery.

This court has no doubt that on the night of 7th and 8th May 2017 a robbery occurred in the house of Alex Nyakeri Ngare. However, having analysed and re-examined the evidence in the trial court I am not convinced that there was any evidence to connect the appellant to the charge sufficiently to convict him on the charge. I have already stated the conviction against the appellant rests on evidence that he was found in possession of a television stolen from the complainant during the robbery. The alleged television was exhibited in court and was in fact identified by the complainant as his both physically and through a receipt. What is not convincing however is that that television was found in the possession of the appellant. The three officers who claim to have recovered the television from him were Chief Inspector Caleb Mutanyi (Pw4), Police Constable Maurice Mwanjia (Pw6) and Police Constable Martin Kuria (witness number not assigned). They were all in agreement that that television set was recovered on 5th July 2017. It was also their evidence that they found the appellant and his wife in the house where the television was found. All of them also testified that they found the appellant with his wife. Their evidence regarding the recovery was crystalized in an inventory dated 6th July 2017 which was admitted in evidence as exhibit 6. The evidence of these witnesses when examined more closely casts doubt on the prosecution’s case which doubt should go to the appellant. The first thing that one takes note of is that whereas it is alleged the television and remote were recovered on 5th July 2017 the charge sheet alleges that the appellant and his co-accused dishonestly received them on 28th June 2017. One may easily dismiss that as a variance between the evidence and the charge which is curable under Section 214 of the Criminal Procedure Code. However, there is proof as evidenced by the charge sheet that the appellant and his co-accused were arrested on 28th June 2017. The charge sheet and the court record also indicate that they were taken to court the next day i.e. 29th June 2017. The record further indicates that the appellant and his co-accused were not granted bond until 6th October 2017 when the trial Magistrate ordered that they could each be released on a bond of Kshs. 200,000/= with one surety. The same record further indicates that even then only the appellant’s wife who was the 3rd accused managed to post bond and that was on 5th June 2018. I have painstakingly perused the lower court record and I could not get a release order other than that dated 5th June 2018 in respect of Doris Ombati Nyaboke – the 3rd accused in the case. This effectively means that the appellant remained in custody from the date he was arrested, to wit, 28th June 2017 until he was sentenced on 20th March 2019. The evidence of the three police officers that they found him with the television in his house on 5th July 2017 cannot therefore be true and is nothing but a fabrication. Had the trial Magistrate addressed his mind to the discrepancies in the evidence of these three police officers he would most definitely not have found the appellant guilty of

recent possession and hence the robbery. The doubt arising from the evidence of the three police officers must be given to the appellant and accordingly **I find that neither the charge of robbery with violence nor the alternative charge of handling stolen property were proved beyond reasonable doubt.**

Accordingly, I allow the appeal, quash the conviction, set aside the sentence and order that the appellant shall be released forthwith unless otherwise lawfully held. It is so ordered.

Dated, signed and delivered in Nyamira this 26th day of September 2019.

E. N. MAINA

JUDGE