REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 02 OF 2019

DOMINIC MATOGO OUKO.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. B. M. Kimtai (SRM) Keroka Law Courts dated 20th December, 2018 in Keroka Principal Magistrate's Court Criminal Case No. 534 of 2017]

JUDGEMENT

The appellant was jointly with three others charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code.

In Count I the particulars of the charge were that on the night of 15th and 16th June 2017 at Sirorokwe Sub-location in Masaba South Sub-county within Kisii County, jointly with others not before court while armed with dangerous weapons namely rungus, an axe and pangas robbed Rose Nyaboke Onyangore cash Kshs. 2,500/=, two mobile phones, an axe and a panga all valued at Kshs. 5,300/= and at or immediately after the time of the said robbery killed the said Rose Nyaboke Onyangore.

The particulars in Count II were that on the same night and sub-location they robbed Abel Morang'a Hezekiah of cash Kshs. 5,633/=, assorted shop goods all valued at Kshs. 8,000/= and at or immediately before or immediately after the time of the robbery threatened to use actual violence against the said Abel Morang'a Hezekiah.

The appellant separately faced an alternative charge of Handling stolen goods contrary to Section 322 (1) as read with Section 322 (2) of the Penal Code. The particulars of this charge were that on the night of 15th and 16th June, 2017 at Sirorokwe Sub-location otherwise than in the cause of stealing having reason to believe that one mobile phone Nokia 1202 IMEI 353780/10/537937/2 was illegally obtained dishonestly undertook to retain it for his benefit, the said mobile telephone being the property of the deceased Rose Nyaboke Onyangore.

The appellant pleaded not guilty to the charges but after hearing and evaluating evidence from seven prosecution witnesses and the appellant's unsworn statement, the trial Magistrate found him guilty on Count I, convicted him and sentenced him to seventy-five (75) years imprisonment. The appellant was aggrieved by the conviction and sentence so he preferred this appeal.

The appellant prosecuted the appeal in person while Ms Okok appeared for the respondent and vehemently opposed the appeal on both the conviction and the sentence.

The appellant relied on written submissions to which prosecution Counsel replied orally.

I have considered the rival submissions but as the first appellate court I am obligated to evaluate the evidence in the court below so as to arrive at my own independent conclusion while making provision for the fact that I did not hear or see the witnesses give evidence **(Okeno Vs. Republic [1972] EA 22.**

There was no direct evidence to connect the appellant to the robbery against Rose Nyaboke Onyangore, deceased and the only evidence against him is that he was found in possession of a phone stolen from her during the robbery. The trial Magistrate found that that amounted to recent possession; that the appellant having been found with the stolen phone on the same night of the robbery, the doctrine of recent possession applied much as there was no other evidence to connect him to the robbery. Whereas I am satisfied that there is sufficient evidence to prove there was a robbery in the house of Rose Nyaboke Onyangore on the material night and that she died as a result of injuries inflicted upon her by the robbers, I am not satisfied that the evidence adduced proved that the appellant was one of those robbers. The burden to prove the charge lay with the prosecution and the standard of proof was one beyond reasonable doubt.

The prosecution's case was that the appellant was found in possession of a phone stolen from the deceased during the robbery. To prove this, they produced an inventory of items recovered from the possession of the appellant. Several things however stand out in regard to that evidence. Firstly, whereas in the charge sheet it is alleged, and the trial Magistrate found it a fact that the phone was recovered from the appellant on the very night of the robbery, the testimonies of the two police officers involved in the appellant's arrest and the purported recovery was that it was recovered on 5th July 2017. It is not even clear whether it was on 5th or 6th July but the exact date is immaterial. Secondly a closer scrutiny of the inventory reveals that the phone and its particulars were inserted after the inventory had been closed. In fact, the last item which was No. 11 on the list is amended/altered to read No. 12. The fact that the appellant signed the inventory is not therefore conclusive evidence that the phone was found in his possession. The alteration in the inventory creates a reasonable doubt that the phone may have been included after he had signed the inventory.

Moreover, although the children of the deceased identified the phone as hers and also stated it was the one stolen during the robbery they did not give cogent evidence of why they identified it as hers. It is instructive that even John Obande (Pw2), the deceased's son, gave a

conflicting description of the phone. First he described the deceased's phone as being black with a red back then he changed and said it had no back. It is not clear if he meant that the deceased's phone had no back or that the one exhibited in court had no back. Either way the question that begs an answer is how a phone without a back cover could be read at the back? The prosecutor ought to have asked the witness to elaborate as this lack of clarity in his testimony created not just a gap in the evidence but doubt as well. In the charge sheet as well as in the inventory the phone is given an IMEI number but nobody bothered to match that number to the phone produced in court. The investigating officer has been asked to read the IMEI number on the phone in order to match it with the one allegedly recovered from the appellant. He ought also to have during his investigations to visit the deceased's house to find if there was a receipt or box that could have conclusively assisted the court to arrive at a finding that the phone belonged to the deceased. The appellant may not have said much in his defence to exonerate himself but that was understandable given that he was unrepresented. His stating in his submission that he signed the inventory under duress came too late in the day. However, I find that there are gaps in the prosecution's case sufficiently to create doubt in the mind of the court. Moreover, even had the phone belonged to the deceased the investigating officer (Pw6) is on record as stating that the appellant gave an explanation on how it came into his possession. Although he did not expound on the nature of the explanation we can only give the benefit of doubt to the appellant and find it was a reasonable and satisfactory explanation.

In the upshot I find that the appellant is entitled to the benefit of doubt. The appeal is therefore allowed, the conviction quashed and the sentence set aside and he shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 13th day of June 2019.

E. N. MAINA

JUDGE