



Case Number:	Criminal Appeal 6 of 2014
Date Delivered:	17 Dec 2015
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	David Kenani Maraga, Daniel Kiio Musinga, Agnes Kalekye Murgor
Citation:	Johannes Ochieng Odhiambo & another v Republic [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.CR.A. NOS. 36 & 37 OF 2008
Case Outcome:	Appeal is allowed
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A.)**

**CRIMINAL APPEAL NO. 6 OF 2014**

**BETWEEN**

**JOHANNES OCHIENG ODHIAMBO .....1<sup>ST</sup> APPELLANT**

**COLLINS OUMA OSOLLO.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(An Appeal from a Judgment of the High Court of Kenya at Kisumu, (Muchelule & Chemitei, JJ.)**

**dated 10<sup>th</sup> December, 2013 in H.C.CR.A. NOS. 36 & 37 OF 2008)**

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**JUDGMENT OF THE COURT**

1. On 15<sup>th</sup> October 2011 at about 11.30 pm, Lucas Rateng, (the complainant) was awakened by barking dogs. When he peeped through the window, with the aid of moonlight, he saw four people, one of whom had a slasher and another had a torch with bright light. They broke into his house, cut him on the thigh and attempted to strangle him. He fell unconscious. When he came to, he found that those assailants had stolen his mattress, Sonitec radio cassette and a bag and had disappeared.

2. The following day, after treatment, the complainant reported the matter to Ugunja Police Station. He claimed he knew the attackers as they all came from his locality. Following a tip-off from the appellants' brother, two days after the robbery police went to the houses of Pamela Achieng Wuaw, PW5 and Eunice Aoko Ojoo PW6. In PW5's house they found the complainant's stolen mattress and in PW6's house they recovered the complainant's radio cassette.

3. The two women apparently gave the names of the appellants as the people who had sold to them those items. The appellants were later arrested and charged with the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the Penal Code. They pleaded not guilty but after trial, they were convicted and sentenced to death. Their appeals to the High Court having been

dismissed, they have come to this Court on a second appeal.

4. In both their joint memorandum of appeal and their learned counsel Mr. Njoga's submissions before us, the appellants complained that their identification was flawed. Counsel further submitted that having found PW5 and PW6 were accomplices, absent corroboration, the High Court erred in failing to find that there was no credible evidence to support the appellants' conviction.

5. Mr. Ketoo, learned Prosecution Counsel, conceded the appeal on the grounds that the identification of the appellants as being among the people who robbed the complainant was doubtful and there was no corroboration of the two women's evidence.

6. Having considered the matter, we agree with counsel for the appellant and the learned prosecution counsel that the appellants' conviction cannot be sustained. As the High Court correctly found, although the complainant claimed he knew his assailants, PC Enock Koskei, PW4, testified that he did not give the attackers' names to the police. When, in cross-examination, he was challenged on that, the complainant said he wanted to recover his stolen properties first.

7. The High Court also found that PW5 and PW6 were accomplices whose evidence required corroboration. Having dismissed the identification of the appellants as flawed, we find that the High Court erred in upholding the appellants' conviction on the uncorroborated evidence of those two women. In **Kinyua v. Republic [2002] 1 KLR 256**, this Court reiterated the law that to found a conviction, accomplice evidence requires corroboration which lacked in this case.

8. For these reasons, we find that the appellants' conviction cannot be sustained. In the circumstances, we allow this appeal, quash the conviction and set aside the sentence. The appellants shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 17<sup>th</sup> day of December, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**



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