



IN THE COURT APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 15 OF 2014

BETWEEN

STEPHEN ONYANGO AGWANDA APPELLANT

AND

REPUBLIC RESPONDENT

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

dated 10th December, 2013

in

H.C.C.R.A. NO. 94 OF 2010)

JUDGMENT OF THE COURT

1. The appellant was charged with robbery with violence contrary to **section 296(2)** of the Penal Code. The prosecution case was that at around midnight on 7th April, 2009, Washington Omolo Auko, PW1, (the complainant) was asleep in his house with his family when he heard noise from his cowshed. He peeped through the window and saw about 10 people, one of whom was the appellant, with torches in his cowshed. Realizing that they had been seen, those people threw stones to the complainant's house and smashed his glass windows. Thereafter they stole his two head of cattle valued at Ksh.30,000/=.
2. The complainant reported the matter to police but the appellant could not be traced at his home. He surfaced after several days, was arrested and later charged with the said offence.
3. After trial the appellant was convicted and sentenced to death. His appeal to the High Court was dismissed thus provoking this second appeal.
4. Having perused the record, we agree with Mr. Okoth, learned counsel for the appellant, and Mr. Ogoti, learned Senior Assistant Director of Public Prosecutions, that the appellant's identification cannot be relied upon. PW1 did not say what made him recognize the appellant. PW2 on her part said she recognized him from the way he walked. Without seeing his face, we doubt that PW2

could identify the appellant from his gait alone. All these coupled with the fact that the brightness of the moonlight that allegedly enabled the two witnesses to see the appellant was not given renders the appellant's identification doubtful. Consequently, we allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Kisumu this 20th day of November, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR