



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: Madan, Miller and Potter JJA)**

**CRIMINAL APPEAL NO 95 OF 1981**

**BETWEEN**

**JOHN WALIMBWA.....APPELLANT**

**CHARLES MUGOMA .....APPELLANT**

**SILVESTER MODOMO.....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nakuru (Mead J) dated 23rd March in**

**Criminal Appeal Nos.57, 58 & 59 of 1981)**

**JUDGMENT OF THE COURT**

**MADAN JA**

These three appellants were convicted of the offence of robbery, contrary to section 296(1) of the Penal Code. Their appeals to the High Court were summarily rejected under section 352(2) of the Criminal Procedure Code.

At about midnight on January 26, 1980 James Wanyoni and his wife Margaret were sleeping in their house at Mirembe fam, Kiwawai area. They heard a bang on their door and a voice said, “We are the police, open the door.” Wanyoni opened the door. He saw a group of about ten men outside. The three appellants walked into the house. They had a firearm. The third appellant had a torch. They told Wanyoni to sit down which he did on the floor. The first appellant struck Wanyoni on the head with an iron bar. They then tied his arms at the elbows. Maragaret was watching the scene from her bedroom. She recognised the three appellants in the torchlight. She had known them previously. They were frequent customers at their shop.

Wanyoni had also known the first and third appellants before. They lived on an adjoining farm. Although he had never seen the second appellant before he kept seeing him while he was collecting property in the shop where the other two appellants had left him.

The appellants and their companions robbed the Wanyonis of a considerable amount of property before leaving that night.

Wanyoni made a report to the police at Saboti next morning. He gave the police the names of the appellants John Walimbwa and Mugoma. He also gave the police the name of a third man. About two weeks later he himself arrested the third appellant on a neighbouring farm and took him to the police.

In his unsworn statement the third appellant said: "James knew our names because we used to drink beer together."

The trial magistrate appreciated the importance of satisfactory identification of the appellants. He analysed the prosecution evidence and was satisfied that the three appellants were identified satisfactorily. Having done so ourselves, we are also so satisfied. The appellants were properly convicted. We dismiss all three appeals against convictions.

The magistrate sentenced each of the three appellants to five years imprisonment and five strokes. He said the appellants were liable to "a mandatory minimum custodial sentence of five years." It is not so. Section 296(1) provides that any person who commits the felony of robbery is liable to imprisonment for fourteen years together with corporal punishment not exceeding twenty eight strokes.

We would also refer to the charge against the appellants. It read "Robbery with Violence." That would be a proper charge for an offence under section 296(2). Robbery contrary to section 296(1) is more appropriate and would suffice.

**Dated at Nairobi this 25th day of March, 1982.**

**C.B MADAN**

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**JUDGE OF APPEAL**

**C.H.E MILLER**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**