



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Madan, Law & Miller JJA)

CRIMINAL APPEAL NO. 70 OF 1981

BETWEEN

YUSUF LWENGELE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Madan JA The appellant was convicted with two co-accused by the Resident Magistrate, Bungoma, on two counts of robbery contrary to Section 296(1) of the Penal Code.

The two counts respectively charged that on the night of March 16, 1980, the appellant and his two co-accused jointly with others not before the court robbed George Muhoro of cash Kshs 500, and Festus Wanyonyi Simiyu of a radio cassette, two blankets and three bed sheets, value Kshs 4,210. His appeal to the High Court was summarily rejected under Section 352(2) of the Criminal Procedure Code.

At about 11 pm on the night of March 16, Police Constable George Muhoro went to a night club in Bungoma for refreshments. He had Kshs 500 a part of his salary in his pocket. He was a stranger in Bungoma and observant. He saw the three accused and observed them in the electric light of the bar. He decided to leave a few minutes past midnight by the rear door as the front door was closed by then. When he reached it the appellant deliberately poured a glass of beer on his face. Muhoro sensed danger and did not want to enter into an argument. He wiped his face and went for the main road to the police station. The appellant and his two coaccused stopped him, the appellant and the third accused from the front and the second accused caught him at the waist from behind. He could recognise them clearly in the bright street light which shone on their undisguised faces, though it was dark at the spot where he was attacked. The appellant and his two companions beat him with an iron bar. The appellant also stabbed him with a small knife. Muhoro ran when he got the opportunity and fell into a deep hole. When he got up the three accused sighted him, and chased him to near the Bungoma Tourist Hotel. They kicked him, he fell down and pretended to be unconscious. He was stabbed again and robbed of Kshs 500 and his shoes. He did not dare look at them lest he might be killed. He was able to see the three accused by the reflections of lights from the Tourist Hotel building.

Muhoro gave detailed descriptions of the clothes the three accused were wearing that night. He had also previously said that the subsequent conduct of the three accused made their appearance more fixed in his memory over and above other persons who may have been in the bar. He also later identified the appellant at an identification parade.

At about 8 pm on the same evening the appellant and his two coaccused together with a fourth person not in court, had robbed Simiyu of his radio, two blankets, and three bed sheets, during the course of which Simiyu was cut with a knife on the back of his hand. Simiyu said there was moonlight though not very bright which enabled him to observe his assailants properly, and he would have had no difficulty in identifying them later. On March 24 he identified the appellant at an identification parade.

We agree with the magistrate that the evidence of the appellant's identification was overwhelming, also that there was no cause for the prosecution witnesses to incriminate the appellant falsely. We do not see any possibility of a mistake in the appellant's identification. The magistrate was further satisfied beyond reasonable doubt that the prosecution had proved all the material elements in the two counts against the appellant. We also think so. Therefore, the appellant's alibi that he was at his brother's house which he did not leave at any time on the night of March 16 and March 17 could not possibly be true. His alibi was false. We agree with the magistrate that the appellant's defence was an after thought, or at best a made up story.

The appellant was properly convicted. His appeal is ordered to be dismissed.

As **Law** and **Miller JJA** agree, it is so ordered.

Dated and Delivered at Kisumu this 2nd day of December 1981.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

I certify that this is a true copy of the
original.

DEPUTY REGISTRAR