



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. E025 OF 2024**

**ZEPHANIA CHACHA WANDERA.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.424 of 2023 of the Senior Principal Magistrate's Court at Kehancha by Hon. M.O. Obiero – Senior Principal Magistrate)*

**JUDGMENT**

1. Zephania Chacha Wandera, the appellant herein, was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars were that on the 10<sup>th</sup> day of May 2023, at Motemorabu village, Kuria West sub-county, in Migori County, while armed with metal rods, robbed Peter Boke Samuel of his motorcycle registration number KMFT 460H valued at Kshs. 115,373/=, and immediately before the time of the said robbery, wounded the said Peter Boke Samuel.
3. The appellant was sentenced to death. He was aggrieved and filed this appeal. He raised the following grounds of appeal:
  - a) The appellant's rights under Article 50(2) (g) and (h) of the Constitution of Kenya were disregarded and violated.
  - b) The learned magistrate disregarded my right to mitigation and pre-sentence report, thus against the tenets of fair trial.
  - c) The learned trial magistrate disregarded all the open discrepancies in the particulars of the offence as captured by the prosecution.
  - d) The sentence meted out herein is overly harsh, excessive and inordinate in spite of the appellant being a first offender.

4. The respondent did not file any grounds of appeal or submissions.
5. As a first appellate court, I have thoroughly analyzed and evaluated all the evidence presented in the lower court. It is important to note that I did not see or hear any witnesses. In my evaluation, I will be guided by the influential case of **Okeno vs Republic [1972] EA 32**
6. Article 50 (2) (g) and (h) of the Constitution of Kenya provides:

***Every accused person has the right to a fair trial, which includes the right—***  
***(g) to choose and be represented by an advocate, and to be informed of this right promptly;***  
***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
7. Although the appellant claimed that the trial court failed to follow this Article, the record shows otherwise. He was informed of his rights and stated he was ready to proceed. Additionally, he was provided with the relevant documents, which he confirmed he had received. Therefore, this argument is unfounded.
8. The ingredients of the offence of robbery under section 296 (2) of the Penal Code were enumerated by the Court of Appeal in **Johana Ndungu vs Republic [1996] eKLR**, when it stated as follows:

***Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2), which we give below and any one of which, if proved, will constitute the offence under the subsection:***

  - 1. If the offender is armed with any dangerous or offensive weapon or instrument,***  
***or***
  - 2. If he is in company with one or more other person or persons, or***
  - 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.***
9. These are the ingredients I will endeavour to establish if the prosecution proved any one set to the required standards.
10. Peter Boke Samuel (PW1) testified that about 7 p.m., he was at Maberu. The appellant approached him and requested that he be transported to Motemorabu on his motorcycle.

When they arrived at the destination, the appellant asked him to wait on the road. He then returned with two others. The appellant was armed with a metal rod. He struck him on the head, rendering him unconscious.

11. The incident happened during the night. Usually, it is dark at that time. It is a trite principle of law that a conviction may be based on the evidence of a single witness. However, great care must be taken before such a conviction is made. In the case of **Abdullah Bin Wendo vs Rex 20 EACA 166**, the Court of Appeal emphasized the need for such care in the following words:

*Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.*

12. The investigating officer did not inquire who was present when the complainant stated the appellant approached him. This omission could have clarified any doubts regarding the incident.

13. The prosecutor did not elicit from the complainant any evidence regarding the lighting conditions at the stage and at the place where the robbery occurred. Given that it was at night and there was no evidence regarding the lighting conditions at the time, we can only conclude that it was not favourable to a positive identification. In the well-known case of **R v Turnbull and others [1976] 3 All ER 549**, Lord Widgery CJ stated as follows:

*Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?*

...

*Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.*

14. The upshot of the analysis of the evidence on record is that the conviction was unsafe. The same is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

**Delivered and signed at Migori, this 26<sup>th</sup> day of February 2026**

**KIARIE WAWERU KIARIE**

**JUDGE**