

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.E036 OF 2025

BRIAN WAFULA.....

APPELLANT

VERSUS

REPUBLIC.....RESPONDEN

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JUDGMENT

1. This is an appeal against the judgment of Hon S.M. Mokuu, Chief Magistrate delivered on 29/5/2025 vide Kitale CMC CRC No.E2965 of 2024. In that case the appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on the night of 9/10/2024 at Kananachi in Kiminini Sub County within Trans-Nzoia County the appellant with others not before court armed with knives assaulted and robbed Rebecca Nasimiyu one Neon Ray smart phone valued at Kshs.12,000/- and cash Kshs.3000/-.
2. The appellant denied the charge and the prosecution presented six witnesses to prove their case. The appellant defended himself on oath that he did not commit the

offence. Below is a summary of the testimonies of the prosecution witnesses as well as the defence case.

3. Rebecca Nasimiyu (**PW1**), the complainant in the case testified that on 9/10/2024 at around 9.30pm she was from the market and heading home when she was confronted by two men one short and the other tall. That the short one hit her with a blow while the tall one took her mobile phone and some money in her purse. She stated that the tall assailant also bit her on her shoulder.
4. She stated that there were lights emanating from a nearby building and was able to identify them though none of them was familiar. She stated that she flashed light on the direction of one of the assailants the tall one and the appellant herein and he called for a knife from his accomplice which he used to stab her because he had been seen and she bit his small finger. She stated that the appellant was at very close proximity when she flashed the light towards him. That she screamed prompting the appellant to run.
5. She stated that she went to hospital the following day and was treated. She stated that the appellant was later arrested and she identified him in an Identification Parade.
6. Mary Kwamboka Michura (**PW2**) stated that she was in the company of the complainant (**PW1**) at the material time and that she saw the appellant and one Kefa emerge from behind before attacking the complainant. She stated that

she saw one of the attackers bite the complainant on the shoulder and identified him as the appellant. She also said that she identified the other attacker as Kefa. She insisted that she recognized the appellant clearly and screamed when she saw him attacking the complainant.

7. Byron Nabiswa **(PW3)** a police officer based at Kiminini police station testified that the robbery incident was reported at the said station and managed to arrest the appellant and his accomplice Erick Wafula. He stated that he was the investigating officer in the case and that an Identification Parade was conducted on 17/10/2024 and the complainant managed to identify the appellant herein. He stated that the appellant was arrested with a mobile phone and cash of Kshs.3000.
8. Josephine Okumu Wekoga **(PW4)** a clinical officer based at Matunda Sub County Hospital testified that the complainant was treated at the said facility and that she had injuries on the face, chest, nose and shoulder. That she had been bitten on the shoulder and the cheek. That she was put on medication and tendered P3 Form as **Pexhibit 2**.
9. Rajab Oketch **(PW5)** also testified and stated that the complainant was a neighbour and that on 9/10/2024 he assisted with first aid as she was bleeding from the face after attack by the appellant.
10. Inspector Albert Luseno Likoba **(PW6)** testified that he was a police officer based at Kiminini. That on 17/10/2024 he

conducted an Identification Parade and the complainant was able to identify the appellant positively and recognized the shoes he had and even a bite mark on the appellant's right palm. He stated that the appellant had suffered the injury during the robbery incident. He affirmed that he followed all the procedures required in an Identification Parade.

11. When placed on his defence, the appellant simply denied committing the offence.

12. The trial court evaluated the evidence tendered and found that the identification of the appellant was positive, free from error owing to the circumstances and that the prosecution had proved its case to the required standard. It then convicted the appellant and sentenced him to serve 50 years in jail.

13. The appellant felt aggrieved and filed this appeal against both conviction and sentence. He has raised the following grounds namely;

(i) That the learned magistrate erred in law and fact by convicting the appellant when the identification of the appellant was not proved.

(ii) That the learned magistrate erred by relying on circumstantial evidence.

(iii) That his defence was rejected without reasons been given.

(iv) That the trial magistrate sentenced him without considering mitigating circumstances.

(v) That the learned magistrate erred by failing to analyze the evidence tendered.

14. In his written submissions the appellant has raised further additional grounds albeit without leave of court as required under section 350(b) of the Criminal Procedure Code.
15. On the question of identification, the appellant submits that identification was not proved because in his view the lights from nearby buildings were insufficient for positive identification.
16. He further contends that the complainant testified that her phone was taken away and wonders how she could flash the light from a phone that had already been stolen.
17. He submits that the prosecution's case was not proved because it was marred with contradictions. He contends that **PW2** gave contradicting evidence as compared with **PW1**. He contends that **PW2** stated that she saw one of the attackers bite the complainant on the shoulders and that there is no way she could have stood and faced the robbers in face of immediate dangers.
18. He further contends that his mitigation was not considered by the trial court after he had denied committing the offence.

19. He further contends that his defence was not considered which breached his constitutional and human rights.

20. The respondent on the other hand has opposed this appeal through written submissions dated 15/10/2025 by learned counsel Vivian Ratemo. The respondent submit that its case against the appellant was proved as all the ingredients of the offence were proved. It cites the decision of **Johana Ndungu -vs- R (Criminal Appeal No.116/95) (unreported)** where the ingredients of the offence as defined under section 296(2) of the Penal Code were listed as follows;

(i) Where the offender is armed with any dangerous or offensive weapon or instrument or

(ii) If the offender is in company with one or more persons or

(iii) If at or immediately before or after the time of robbery he wounds, beats, strikes or uses any other violence to any person.

21. The State submits that **PW1** was attacked by two men with one assailant striking her with a blow while the other bit her. Counsel points to the medical evidence tendered by **PW4** as confirmation that the complainant indeed was attacked and suffered injuries.

22. The State further contends that the complainant was robbed of a mobile phone and Kshs.3000 in cash and therefore it is their view that the two elements of robbery were proved beyond reasonable doubt.
23. On identification, the respondent submits that an Identification Parade was conducted which led to the appellant being identified and relies on the evidence of Inspector Albert Luseno **(PW6)**. The State points out that the appellant was identified owing to a human bite scar on his palm which corroborated the evidence by the complainant that she bit the finger of one of the attackers.
24. This court has highlighted the background of the case at the lower court. The appellant's case and the opposition by the respondent. This is a first appeal and role of a 1st appellate court is to re-evaluate the evidence tendered and make own conclusion bearing in mind that the trial court is usually in a better position because it has the advantage of observing the demeanor of the witnesses as they testify.
25. The appellant herein as observed above was charged and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. Section 295 of the Penal Code defines what constitutes the offence of robbery. It states;

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use

actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

The provisions of section 296(2) of the Penal Code defines the ingredients of the offence of robbery with violence. It states;

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

It is therefore well settled that for a charge of robbery with violence contrary to section 296(2) of the Penal Code to be sustained the prosecution is required to establish either the combination or any of the following elements;

- (i) *That the offender was armed with a dangerous or offensive weapon or instrument or*
- (ii) *That the offender was in company of two or more or*

(iii) It at the time before, during or after the robbery used any sort of violence against the victim.

26. The other important ingredient of the offence is positive identification of the offender.
27. In this instance to begin with dangerous weapon or instrument or use of violence. The evidence tendered at the trial court reveals that the complainant who testified as **PW1** was injured during the robbery incident. She stated that she was attacked and bitten on her shoulder. The complainant's evidence regarding the attack and injuries sustained was corroborated by **PW4**, a clinical officer who tendered P3 Form (**Pexhibit2**) and Rajab Oketch (**PW5**), a neighbour who first came into contact with the complainant after the robbery incident. He stated that the complainant, a neighbour screamed that she had been attacked and when he responded he found her bleeding from her face.
28. The element of use of actual violence on the victim was therefore well proven by the evidence tendered.
29. There was evidence tendered by both **PW1** and **PW2** that the complainant was attacked by two assailants who robbed her and attacked her. The robbery incident occurred and the attack and the robbery were actualized by more than one person.
30. On the question of identification, the appellant has strongly submitted that it was not possible to be identified given the circumstances and that the complainant could not

have used the mobile flash light if it had already been snatched from her. I have looked at the evidence tendered at the trial court with respect to identification and finds that contrary to appellant's contention the question of identification in my considered view was settled by the following evidence;

- (i) The complainant (PW1) says that as she left (PW2), two young men emerged one tall and one short and that the short one hit her as the tall one snatched her mobile phone and her purse. That she did flash using mobile phone at the direction of the appellant. What is not very clear is the sequence of events that is whether she did flash the mobile phone on direction of appellant who was the tall one before he snatched the phone. What is clear is that she was firm that she flashed the light from her phone towards the appellant and saw him.*
- (ii) Secondly, the complainant stated that she bit the appellant on his finger and when the Identification Parade was conducted, she was able to amongst other things like shoes to identify the appellant. she left a mark on the appellant during the robbery which was a human bite.*
- (iii) The identification parade was conducted and the appellant was easily picked out by the*

complainant. The incident occurred on 9/10/2024 and Identification Parade was conducted the following day. There was very minimal chance of a mistake or error in the identification of the appellant.

(iv) *Fourthly, **PW2** apparently knew both the assailants by name because in her evidence she gave their names as Brian (appellant) and Kefa. She even saw the appellant biting the complainant.*

This court finds that the lights of the nearby buildings must have been sufficient for both **PW1** and **PW2** to see the attackers well. The Identification Parade was conducted and the appellant was positively identified. The parade was conducted properly and the appellant has not faulted the process.

31. This court having re-evaluated the evidence with respect to identification finds that the trial court was right to come to the conclusion it did that the identification of the appellant was positive.

32. On sentence, it is pertinent that the provisions of section 296(2) of the Penal Code provides for death penalty. The trial court sentenced the appellant to 50 years in prison. The appellant should count himself lucky because going by the Supreme Court's decision in **MURUATETU 2** and the

subsequent guidelines, the trial court's hands were tied by the Statute and could not exercise discretion even after considering the mitigating circumstances. However since the State did not seek for enhancement of the sentence, this court will not interfere.

In short this appeal for the aforesated reasons fails. The conviction and sentence are upheld.

DELIVERED, DATED and SIGNED at KITALE this11th day ofMARCH....., 2026.

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Mugun for the Respondent

The appellant in person

Duke/Chemosop- court assistants