**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 145 OF 2010**

**(CONSOLIDATED WITH CRIMINAL APPEAL NO. 148 OF 2010)**

**LESIIT and MUSYOKA JJ**

**GEORGE MIRITI KALUNGE……..……1ST APPELLANT**

**MOSES MUTEMBEI KIRIMI……2ND APPELLANT**

**VERSUS**

**REPUBLIC……RESPONDENT**

**(From the original conviction and sentence in Criminal case No. 1689 of 2008 of the Principal Magistrate Nkubu Hon. S. M.Githinji – Principal Magistrate)**

**JUDGEMENT**

The appellants in this matter were convicted by the Principal Magistrate in Nkubu Principal Magistrate's Court criminal case number 1689 of 2008 and sentenced to death. They had been charged of robbery with violence contrary to **section 296(2) of the Penal Code**. The particulars were that the appellants had on 4thNovember 2008 at Gakutha Village, Kioru Sub-Location, Kithirune West Location inMeru Central District within Eastern Province jointly being armed with dangerous weapons namely stones, robbed Peter Gatobu Muriuki of Kshs. 52, 000.00 and at or immediately before or after the time of such robbery injured the said Peter Gatobu Muriuki. They pleaded not guilty, were tried and convicted of the offence charged.

They were aggrieved by the said conviction and sentence, and filed the current appeal in person. In the appeal, they listed several grounds. At the hearing of the appeal, the appellants were unrepresented. They presented hand written submissions and relied on them and their grounds of opposition.

The state, represented by Mr Mungai, opposed the appeal. Mr Mungai asked the court to consider that the complainant was attacked by persons he knew, he even shouted their names as they attacked him.

This being a first appellate court we are bound to follow the guidelines set by the Court of Appeal in ***Kinyanjui vs. Republic*** **(2004) 2 KLR 364**, with respect to criminal appeals. It was said that the first appellate court must look at the evidence presented before the trial court afresh and re-evaluate and re-examine the same, and thereafter reach its own conclusions. The first appellate court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant. We also remind ourselves of the point made in ***Buru vs. Republic*** **(2005) 2 KLR 533** and ***Republic vs. Oyier*** **(1985) KLR 353**, that a first appellate court will not

normally interfere with the finding of a lower court on the credibility of witnesses unless it is shown that no reasonable tribunal could make such findings.

We have perused the record of the lower court. It is our view that the evidence was overwhelmingly against the appellants. It was direct and damning. There is nothing that can be faulted about it. The complainant was attacked by persons who were known to him. He recognised them and called them by their names. These persons were the appellants. He gave the name of the first appellant to those who came to his aid shortly thereafter. The caps recovered at the scene were also positively linked with the appellants. There was evidence that several other witnesses met with the appellants shortly after that running away from the scene. The appellants were therefore clearly and positively identified as the assailants of the complainant space. This evidence was not shaken on cross-examination.

We also find that all the elements of the offence of robbery with robbery with violence as defined in section 296(2) of the Penal Code was established. There was a theft of Kshs. 52, 000.00 as there was a taking of the money from the complainant. There was an assault on the complainant as he was beaten and pushed around and therefore the theft amounted to robbery. It amounted to robbery with violence as the robbery was committed by more than one person, who used violence to achieve their aim, theft. It is alleged that they were armed with a stone, which was used to hit the complainant. That made the stone a dangerous or offensive weapon.

We have carefully gone through the grounds set out in the petitions of appeal as well as written submissions. We have weighed the said grounds as against the evidence recorded and we are satisfied that there is nothing in the grounds and the submissions that take away from the weight of the evidence on record.

The upshot of this is that the conviction of the appellants of robbery with violence is upheld. Regarding the sentence, we note that the court held that there was only one sentence for the offence charged, death as stipulated by the law. The Court of Appeal recently in *Mutiso vs. Republic* (2011) 1 EA 342, appeared to hold that the death penalty is not mandatory, and that a court confronted with a provision which imposes mandatory death as a sentence ought to consider other sentences. It is our view with respect to this case that given the circumstances of the offence, the injuries instituted by the complainant as well as the value of the property stolen, other sentences ought to be considered. We hereby set aside the sentence of death imposed on the appellants by the trial court, and in its place substitute a sentence of imprisonment. The appellants are hereby sentenced to serve twenty-five years imprisonment. It is so ordered.

**DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2013.**

**J LESIIT**

**JUDGE**

**W MUSYOKA**

**JUDGE**