**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 166 OF 2005**

**STEPHEN KIBERENGE *ALIAS* ZAKAYO MURIITHI ……. APPELLANT**

**VERSUS**

**REPUBLIC ……. RESPONDENT**

***(Being an appeal from the judgment of R.N. Muriuki,***

***Senior Resident Magistrate in Senior Resident Magistrate's Court***

***Criminal Case No. 1667 of 2004 at Nanyuki)***

***CONSOLIDATED WITH***

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 169 OF 2005**

**DAVID MUGUNA …… APPELLANT**

**VERSUS**

**REPUBLIC ….……. PROSECUTOR**

***(Being an appeal from the judgment of R.N. Muriuki,***

***Senior Resident Magistrate in Senior Resident Magistrate's Court***

***Criminal Case No. 1667 of 2004 at Nanyuki)***

**JUDGMENT**

The court at the hearing of the above appeals consolidated the same making Criminal Appeal No. 166 of 2005 as the lead file and the appellant thereof as the 1st appellant. The appellant in the Criminal Appeal No. 169 of 2005 was made the 2nd appellant. The appellants were charged before Senior Resident Magistrate Court at Nanyuki with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that the two appellants on 28th September 2004 at Karuri village jointly with others who are not before court while armed with dangerous weapons namely pangas, rungus and a spear robbed Samuel Gitonga Musa of cash Kshs.16,400/- and at or immediately or immediately the time such robbery used actual violence to the said Samuel Gitonga Musa. The appellants were found guilty as charged at the lower court and both were sentenced to death as provided by the law. They were aggrieved by the conviction and sentence and have therefore preferred this appeal before court. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

"***As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570)."***

PW 1 Samuel Gitonga Musa the complainant herein on 29th September 2004 at about 11 p.m. had just retired into his bed when he heard his door being broken down. Immediately he saw the two appellants walking into his house. At that time the hurricane lamp was on. He said that the lamp gave sufficient light. He was therefore able to clearly see both appellants. He said that he had known the first appellant since 1996. The first appellant was his neighbour at Karuri. He also previously knew the second appellant. He noticed that two appellants had pangas. The demanded from him money which he had received from a sale of potatoes. The complainant denied that he had money. The second appellant cut him on the face and nose. The 1st appellant cut him on the jaw. He removed for them Kshs.16,400/- because he was screaming during this ordeal his neighbours began to come to his homestead and at this point the appellants ran away. He was taken to Nanyuki hospital where he was admitted for two weeks. On being discharged he reported the matter to the police and recorded statement. He informed the police that he was able to identify both appellants.

PW 2 was a policeman who received information on 29th September 2004 that a person had been attacked by robbers at Karuri. That report was made by members of the public. On reaching the scene they found the complainant was unconscious. He noticed that he was bleeding profusely from the hands on his head and face. He was taken to Nanyuki hospital. Later he was issued with a P3 form. He confirmed that the complainant had been robbed off Kshs.16,400/-.

PW 3 was the Clinical Officer who attended the complainant on 29th September 2004. He noted that his clothes were blood stained and his jacket was torn. He had a cut wound to the forehead and a fracture of the skull. His right nostril had been cut off. He had tenderness on the chest and multiple swellings on both arms and legs. He was of the opinion that the injuries were caused by blunt and sharp objects. He assessed the injuries to be grievous harm. He filled the P3 Form which was exhibited in evidence.

The appellants on being put to their defence chose to give sworn evidence. The first appellant said that he is a resident of Karuri village. He described himself as a farmer. He said that he was arrested on 27th November 2004 for robbery with violence. He denied the charge and said that it was a frame up. He admitted in cross examination that he had known the complainant from 1986. That they had a dispute over a land. He denied having gone to the complainant's house at the night of the robbery and stated that he did not know that the complainant had sold potatoes.

The second appellant also said that he is a resident of Karuri village where he is a farmer. He said that he had been arrested for no reason and denied having robbed the complainant. He too said that the charge was a frame up.

In cross examination he admitted knowing the complainant and said that they had a land dispute from the year 2004. He stated that on the night of the robbery he was sleeping at the first appellant's home.

The evidence against the appellants is one of the identification by single witness. In the case where the evidence is of visual identification where the appellant denies having participated in the offence there is a case in point namely *Cleophas Otieno Wamunga vs Republic (1989) KLR 424,* this court stated:

"***Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The***

***way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of*** *R vs Turnbull (1976) 3 ALL ER 549 at page 552* ***where he said:***

***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 relatives and friends are sometimes made."***

In the case of *Kamau v Republic (1975) EA 139* the East African Court of Appeal had the following to say;-

"***The most honest of witnesses can be mistaken when it comes of identification."***

Having in mind the above caution, we find that the complainant was very clear on his recognition of the appellants. It should be noted that the appellants admitted having known the complainant for many years. On that fateful night the complainant had his hurricane lamp on in his house. He described the light that it emitted as bright.

He was able to see both the appellants at close range as they attacked him. They both cut him with a panga on his face. We therefore find that the reliance of the complainant's identification evidence to be

safe and reliable. The appellants in their cross examination did not deny or question the evidence in respect of the hurricane lamp. The appellants' defence is one of the alibi. Whilst the law does not assume a burden on the appellants to answer the charge we find that the alibi evidence on the appellants is not believable and is inconsistent. The second appellant said that on the night of the robbery he was sleeping at the first appellant's home. The first appellant did not give evidence in that regard. They both alleged that the case against them was a frame up. This they attributed to the fact that they had a land dispute with the complainant. Although one question was put to the complainant on whether he had leased their land and this question was put by second appellant there were no specific questions put to the complainant by the appellants on these alleged land dispute. We therefore find that the lower court was correct to have rejected the defence of the appellants. We are in agreement with the learned magistrate's assessment of the evidence of the complainant when he stated that his evidence was consistent, credible and there was no reason to doubt him. The evidence against the appellant was cogent and we find that there is no ground for interfering with the finding of the Lower court of the appellants' guilt. Having made that finding the sentence for the charge that the appellants were convicted for is one. That is death. The sentence therefore will remain.

***Dated and delivered at Nyeri this 29th day of May 2008.***

**MARY KASANGO**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**