REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 37 OF 2007.

LOSE TOMOO LEMKOU :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

J U D G M E N T.

1. The appellant **Lose Tomoo Lemkou** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal code. The particulars of the charge stated that on the 25th day of September, 2004, at Kanyarus reserved in West Pokot District within Rift Valley Province, being armed with a dangerous weapon namely an AK 47 rifle S/No. 1527 he robbed Emmanuel Chesokoria of cash Ksh. 80,000/= and at, or immediately before or immediately after the time of such robbery, killed the said Emmanuel Chesokoria. The appellant also faced a 2nd count of the same robbery with violence and the particulars of the charge stated that on the 25th day of September, 2004 at Kanyarus reserve in West Pokot district within rift Valley province, being armed with a dangerous weapon namely an AK Riffle S/No. 1527 robbed **DENNIS YEGO** of cash Ksh. 40,000/= and at or immediately after the time of such robbery killed the said **DENNIS YEGO**.

2. The appellant was tried, convicted and sentenced to death. He has now appealed against the conviction and sentenced. **Mr. Ngeiywa**, learned counsel for the appellant, faulted in the charge sheet which he submitted was defective because it was not dated or signed. He went on to submit that the conviction was based on the evidence of a single identifying witness, a child aged 15 years which was contradictory. The trial began before Mrs. Wambani (SRM) and after PW2 testified, The matter began denovo before Mrs. Chepseba (SRM) and the same witness contradicted himself in material particulars especially the names of the two deceased persons and on his own age. Thus according to counsel for the appellant the credibility of PW2 was further faulted because he testified that he was in the company of two other people, but he did not reveal their identity.

3. Moreover, PW2 alleged that after the appellant shot the two deceased persons, he hid the gun with his in laws who are not called to give evidence. The investigating officer did not call any evidence from the so called appellants in laws who could have shed light on how the gun was recovered from them. By failing to call those vital witnesses, Mr. Ngeiywa submitted that their evidence was adverse to the prosecution. Finally, there was no evidence to show that the deceased had Ksh. 40,000/= which was allegedly stolen by the appellant.

4. On the part of the State, Mr. Onderi, Learned Snr. Principal State counsel supported both the conviction and sentence. The charge sheet is properly drawn and names the two victims stated in the

charge sheet that were also mentioned in the evidence of PW2. Although PW2 was the sole identifying witness, his evidence was clear and cogent. He knew the appellant and the offence took place in broad day light when he was standing at a distance of 10 meters. There was no room for a mistaken identity. The trial magistrate also cautioned herself for convicting the appellant based on the evidence f PW2. However there was other circumstantial evidence especially by PW1 who was the area chief and visited the scene and found the bodies of the deceased persons. PW1 reported the matter to the police. The bodies were taken to the mortuary and PW1 and PW3 set out to look for the appellant who was arrested on 2nd October, 2004 at a place called Jamboreria which is far from the scene of crime. This was indicated that the appellant was fleeing from the scene which behavior is not consistent with that of an innocent person.

5. This being the 1st appeal, this court is supposed to re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction and sentence. The court must always be aware that it never saw or heard the witnesses and give due allowance for that. Briefly, the evidence that led to the conviction and sentence of the appellant was led by **Peter Lokokit, PW2**, a young lad aged 15 years. He testified that on 25th September, 2004, he was walking in the company of 4 people. He was ahead. The appellant was well known to him and he was walking behind him together with Kipyego and Chesikoke who are deceased persons in this case. The appellant was armed with a gun. Suddenly the appellant removed the gun and fired, PW2 managed to jump from the foot path but the deceased persons were shot. The appellant removed money from their pockets. PW2 testified that he was standing about 10 metres away; afterwards he ran using another route and reported the matter to the chief who testified as PW1.

6. The chief who received the report; **Luka Lotino Lokomol** (PWI) reported the matter to the OCS Kacheliba, PW3 they proceeded to the scene where they collected the two bodies of the deceased persons and kept the bodies at the Kapenguria hospital Mortuary. On 5th October, 2004 they recovered the appellant's gun which was at the home of his in laws'. They continued looking for the appellant; it was not until 2nd November, 2004 when the appellant was arrested from another area after a search was mounted for many days. The appellant charged with the offence of robbery with violence.

7. The other evidence was by chief Inspector Francis Chepkuri (PW3) who received the report from PW1 and visited the scene. They found the bodies of the two deceased persons which had gun shots. They collected the two dead bodies and took them to Kapenguria district Mortuary. PW1 and PW3 mobilized members of public to pursue the appellant and PW3 specifically instructed PW1 to look for the riffle that was used to commit the offence. PW1 was able to recover the gun from the house of the appellant's in laws. The appellant was also seen escaping to an area called Lilan. On 2nd November, 2004, the appellant was arrested by local APs from Chepareria D.O.'s office. The post mortem examination on the two bodies of the deceased persons was carried out by **Dr. Juma Kibe** who confirmed both bodies had gun shot wounds and the cause of death was due to acute hemorrhage due to an injury caused by a bullet.

8. The appellant was put on his defence; he gave unsworn statement of defence and alluded to a defence of alibi. He claimed that he was arrested while drinking an illicit brew because he refused to pay a bribe to the APs. The learned trial a magistrate after evaluating the above evidence was satisfied that the prosecution proved its case to the required standards. The court also warned itself that the prosecution relied on evidence of a single witness who was aged 15 years but the court was satisfied that his evidence was credible. This identification by a single minor witness has given us concerns more so because the prosecution did not adduce further evidence to corroborate it even from the obvious crucial witnesses like the so called in laws of the appellant from where PW1 said he recovered the gun that was used to commit the robbery.

9. In the case of **RORIA VS. REPUBLIC [1967] E.A. 583** the East Africa Court of Appeal held as follows regarding identification by a single witness:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness and as LORD GARDNER, LC said recently in the House of Lords in the course of a debate on section 4 of the

Criminal appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:

"There may be a case in which identity is in question, and if any innocent people are convicted today, I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity."

"That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification".

10. On our part we have re- examined the above evidence with an anxious mind for reasons that no investigations were carried out especially to link the gun that was produced in evidence with the appellant. PW1, the chief of the area testified that the AK rifle S/No. 1527 was recovered with the in laws of the appellant. However the in laws were not called to give evidence and the prosecution did not also give any evidence, such as a firearm certificate to show that the rifle that was used to commit the crime was issued to the appellant. No investigations were carried out to identify or verify the evidence of PW2 on whether he was traveling in the company of 4 or 5 people.

11. These are serious gaps that leave doubts in our minds on whether the appellant is the one who committed the crime or some other people who were walking with PW2 and the deceased persons. Since there was no evidence to show the appellant was part of the same enterprise with the other person(s) we find this appeal has merit. Accordingly we allow the appellant's appeal, quash the conviction and set aside the death sentence imposed on him. Unless the appellant is otherwise lawfully held, he is to be set at liberty.

Judgment read and signed this 8th day of April 2011.

M. KOOME.
JUDGE.

F. AZANGALALA.
JUDGE.