REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 11 OF 2008

CONSOLIDATED WITH

CRIMINAL APPEAL NO.14 OF 2008

(From original conviction and sentence in Criminal Case No. 138 of 2007 of the Senior Principal Magistrate's Court

at Isiolo – M..R. Gitonga – Ag. SPM)

ELIM ALIM JOSEPH.....1ST APPELLANT
YUSUF ABUBAKAR.....2ND APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellants were charged and convicted of the offence of robbery with violence contrary to Section 296 (2) Penal Code. Both were sentenced to death as prescribed by that Section of the Code. Both have appealed to this court on seven and eight respective grounds, which may be summarized as follows:-
(1) that the charge was defective
(2) that the appellants were not identified in the circumstance,
(3) there was insufficient evidence to convict the appellants as one eye witnesses was not called to corroborate the evidence of the complainant, PW1,

(4) that the trial magistrate failed to comply with requirements of Section 211of the Criminal Procedure Code.
We will deal with each of these grounds respectively.

1. Of a defective charge

Section 134 of the **Criminal Procedure Code (Cap.75, Laws of Kenya)** (the CPC), prescribes that every charge or information shall contain, and shall be sufficient if it contains-
: a statement of the specific offence or offences with which the accused person is charged.
: such particulars as may be necessary for giving reasonable information as to the nature of the

offence charged.

We have examined the charge sheet herein. It clearly states the charge,- robbery with violence contrary to Section 296(2) of the Penal Code. It also gives clearly, the particulars of the offence. It gives the names of the Appellants, the date, the place of the commission of the offence, that the appellants were armed with a dangerous weapon, and robbed the complainant of Kshs. 4,300/= and at or immediately before or immediately after the time of such robbery threatened the complainant (Ali Hassan), with the use of violence upon him.

Those are the classic ingredients of the offence of robbery with violence.

The Appellants were two in number, they were armed with a dangerous weapon, a kitchen knife as the evidence of PW1 would later show, following the immediate arrest of 2nd Appellant. They threatened to use violence upon the complainant. Judicial precedent suggest that the facts constituting an offence such as dangerous, or like in this case, robbery with violence, need not be stated otherwise than in terms of the law – See the case of **NZIOKA vs. REPUBLIC (1973) E.A. 91.**

The charge sheet is clear as to both the offence and the particulars thereof. We thereof find no merit on this ground and it therefore fails.

2. Of the Identification of the Appellants

PW1 testified that the time was 5.45 a.m. the crack of dawn. The Appellants were known to the complainant, who also each of them. The complainant knew the sisters of the 1st Appellant. He testified that he had no grudge against either of them. It is possible for a witness to mistake, the identify of even those he thinks he knows – **R.vs. TURNBULL (1976) 3 ALL E.R.** I do not however think that the complainant could have mistaken the identity of the Appellants. The complainant and the Appellants had social contracts. The 1st Appellant was free to ask the complainant for a few shillings to take tea, and the complainant would oblige. The complainant knew the 1st Appellant's family – and his sisters. A witness is not likely to mistake such a familiar face, at 5.45 a.m. particularly where, as in this case, they had exchanged greetings. *"They greeted me nicely"*

There was a security light at the time of the robbery. The robbers' faces were not covered or hidden. We are in the circumstances satisfied that the Appellants were conclusively and positively identified by the complainant and we must therefore reject this ground as well, and we so do.

3. Of the Evidence of one witness

Section 143 of the Evidence Act (Cap.80, Laws of Kenya) provides that no number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

Judicial opinion born of experience spanning many generations however suggests that the courts should be cautious of convicting an accused based upon the uncorroborated evidence of one witness. There was in this case an eye witness a watchman called "Adam". He was not called by the prosecution not deliberately though. The court went out of its way to issue witness summons but the witness could not be found, and could not therefore be served with the summons. In this case, the court was aware of this, and warned itself.

What was left was the evidence of PW2 and PW3, two police officers. PW2 was No. 79909 P.C. Kanampiu and PW3 was No. 84229 P.C. Patrick Yego. The time was 6.00a.m. They were about break – off duty when they received a report of robbery with violence from the complainant, PW1.PW2 testified that he together with PW3, accompanied PW1 to scene of the robbery at Transit Lodge. They questioned the watchman. He informed them of his efforts to rescue PW1 but was restrained by 2nd Appellant who was armed with a knife. In search for the Appellants, PW1 heard the voice of the 2nd Appellant, who was immediately arrested outside Safari Hotel.

PW2 testified that the 2nd Appellant was difficult, but admitted to them that he took the money and offered a refund. He confirmed that he was in the company of the 1st Appellant Elim Elim Yusuf who was later arrested at Bula Pesa (estate) who in turn informed them that he had received Shs 300/= from the 2nd Appellant.

In our considered opinion, the evidence of PW1 was adequately corroborated by the evidence of PW2, which was in turn confirmed by PW3.

It is therefore not correct to allege that the Appellants were convicted on the uncorroborated evidence of one witness.

In their defence, the 1st Appellants opted to keep silent.

The 2nd Appellant gave an unsworn statement, which was merely a denial.

In our view there was overwhelming evidence against the Appellants and they were properly convicted

and sentenced. We find no merit in their appeals. The same are dismissed. It is so ordered.
Dated, delivered and signed at Meru this 18th day of June, 2010

MARY KASANGO
JUDGE

M.J.ANYARA EMUKULE
JUDGE