



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 148 OF 2008

BETWEEN

JAMES MUIRURI KIARIEAPPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated
28th July, 2008
in*

H.C.CR.APP. NO. 256 OF 2007)

JUDGMENT OF THE COURT

The appellant, **JAMES MUIRURI KIARIE**, was arraigned before the Senior Resident Magistrate's Court at Kigumo where he was charged with robbery contrary to **section 296 (1)** of the Penal Code. He denied the charge but after a full trial before the learned Senior Resident Magistrate (Ms. S.M. Mokuia) he was convicted and sentenced to six years imprisonment. He preferred an appeal to the superior court which came up for determination before Kasango J.

It would appear that during the hearing of the appeal before the superior court the appellant abandoned the appeal against conviction but asked for reduction of the sentence of six years imprisonment.

The learned judge considered the appellant's appeal for leniency and in her judgment delivered on 28th July, 2008 stated, *inter alia*:-

“I have considered the appeal against sentence. The maximum sentence provided by law for this offence is 14 years. The appellant was said to be a first offence (sic). Bearing that in mind I do hereby set aside the sentence passed by the lower court on 22nd August, 2007 and I do instead substitute it with a sentence of four years and that sentence shall begin to run from 22nd August, 2007.”

The appellant was still dissatisfied with the foregoing and hence this second appeal which came up for hearing on 11th May, 2010. In his address to this Court the appellant simply asked us to consider the sentence of four years imprisonment.

Mr. Kaigai the learned Principal State Counsel was of the view that as the appeal was against the sentence the appellant was not entitled to raise it here by virtue of **section 361** of the Criminal Procedure Code.

In our view, the appellant must consider himself a lucky man. He was tried and convicted of robbery contrary to **section 296 (1)** of the Penal Code and sentenced to six years imprisonment. On his appeal to the High Court, he abandoned the appeal against conviction and his appeal against sentence was partially successful in that the sentence was reduced to four years imprisonment.

Section 361 (1) of the Criminal Procedure Code provides:

“361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

In view of the foregoing, we agree with Mr. Kaigai that this appeal ought not to have been brought to this Court. Clearly this Court has no jurisdiction to entertain an appeal on severity of sentence unless, of course, the sentence is illegal. Accordingly, this appeal is struck out.

Dated and delivered at NYERI this 14th day of May, 2010.

E.O. O’KUBASU
.....
JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR