



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, LAKHA & O'KUBASU, JJ.A.)
CRIMINAL APPEAL NO. 170 OF 2000
BETWEEN**

MASUO BAKARI TAJIRI

MOHAMED ABDULRAHMAN SAID APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court

**of Kenya at Mombasa (Waki, J. & Commissioner Mrs.
Khaminwa) dated 24th May, 2000**

in

H.C.C.R.A. NOS 160 & 162 OF 1998)

JUDGMENT OF THE COURT

The appellants in this case were convicted by the Mombasa Chief Magistrate of the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death being the only sentence provided for under the law.

Their appeal to the superior court against this conviction was dismissed and they have now appealed to this Court against that conviction. The ground of objection raised by the advocate for the appellants was that the evidence in the case was conflicting and if the evidence was properly assessed it was not credible. Upon a careful consideration of the evidence it is clear to us that there was competent evidence before the trial court and the first appellate court and accordingly the

main ground of objection of the appellants' advocate to the conviction must fail.

It is provided by section 361 of the Criminal Procedure Act:

"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.

(2)

(3)

(4)

(5)

(6)

(7)

(8)".

We are satisfied, on the interpretation of the said section, that once it is established that there is competent evidence it is not open to us on second appeal to go into the question of the sufficiency of such evidence as there is and to reverse the decision of the trial court, which has been upheld by the first appellate court, on the ground that the evidence is of an unsatisfactory nature or is insufficient to support the findings of fact, or that on it we ourselves would have come to a different decision.

This being a second appeal it cannot be entertained unless it is on some matter of law. As the Privy Council observed in Ramgopal v Shamskhaton 20 Cal 93 at p.99-

"It has now been conclusively settled that the third court cannot entertain any appeal upon any question as to the soundness of findings of fact by the second court; if there is evidence to be considered, the decision of the second court however unsatisfactory it might be if examined must stand final."

In this case the objections to the conviction of the appellants depend entirely on the facts and for the reasons we have given the appeal fails and is dismissed. Dated and delivered at Mombasa this 25th day of January, 2001.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR