



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**  
**AT KISUMU**

**(CORAM: CHUNGA, C.J., TUNOI & LAKHA, JJ.A.)**

**CRIMINAL APPEAL NO. 148 OF 2000**

**BETWEEN**

**DICKSON SAMUEL ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, **DICKSON SAMUEL ODHIAMBO**, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code before the Chief Magistrate's Court at Kisumu but convicted of simple robbery contrary to section 296(1) of the Penal Code. He was, on 14 May 1998 sentenced to serve six years' imprisonment with six strokes of the cane. His appeal to the superior court was, on 23 June 2000 dismissed but pursuant to the notice of enhancement letter of 9 June 2000 given by the Republic the superior court (Wambilyangah, J.) substituted the sentence passed by the trial magistrate with one of ten years' imprisonment with six strokes of the cane.

The appellant now appeals to this Court against both conviction and sentence. We have no jurisdiction to entertain the appeal against sentence on a second appeal whilst the second appeal against conviction is limited to questions of law.

The prosecution case was that on 3 March 1997 at Nyangeta Village in Kisumu District within the Nyanza Province jointly with others not before the Court while armed with a home made gun, pangas and rungas robbed **HARNAN KAUR SIDHU** of one pair binoculars, 4 golden bangles and a bag with cash K.Shs.10,000/- all valued at K.Shs.82,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said **HARNAN KAUR SIDHU**. PW2 saw the appellant in broad daylight. PW3 arrested the appellant and recovered a somali sword and a handbag from the appellant. The evidence against the appellant was overwhelming and is inconsistent with the appellant's alleged innocence. The stolen items were recovered from him after a chase.

Before this Court, the appellant made two main submissions. The first was that whilst the charge referred to the date of 3 September, 1997 the prosecution evidence was that the date of the commission of the offence was 3 March 1997. That is so but we are satisfied that this has not caused any prejudice to the appellant. Nor did it occasion any miscarriage of justice. The appellant in his unsworn statement to the Court referred to the date as that of 3 September 1997. Secondly it was contended that the learned trial magistrate did not afford the appellant an opportunity to cross-examine PW1 and PW2. The record clearly shows that the appellant had no cross-examination for PW1 although no such record appears in respect of

PW2. We are, however, satisfied that this complaint cannot succeed. First, we remind ourselves that the question whether the appellant was allowed to cross-examine or not is a question of fact and not one with which this Court can concern itself. In any event, the point was not taken before the superior court. In all the circumstances, we reject this complaint.

We are thus left with evidence which clearly satisfies all the requirements to warrant a conviction of an offence under section 296(2) of the Penal Code. In our judgment, the appellant must be, as he hereby is, convicted of the capital robbery offence under section 296(2) of the Penal Code. The conviction of the appellant of an offence under section 296(1) of the Penal Code both by the trial court and the superior court is set aside and substituted by one above-mentioned. The only sentence that can be passed for his conviction under section 296(2) of the Penal Code is death and that is the one which is substituted for sentences of imprisonment and the strokes.

In the result, the appeal against conviction and sentence is dismissed. The appellant stands convicted under section 296(2) of the Penal Code and is sentenced to death.

Dated and delivered at Kisumu this 24th day of November, 2000.

**B. CHUNGA**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**A. A. LAKHA**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR