



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Criminal Appeal 48 of 2007**

**MOHAMED HASSAN OSMAN.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Mombasa (Sergon & Njagi, JJ) dated 30<sup>th</sup> April, 2007**

**in**

**H.C.Cr. Appeal No. 109 of 2006)**

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**JUDGMENT OF THE COURT**

***Mohamed Hassan Osman***, the appellant herein comes to this court by way of a second appeal. The superior court had, by its judgment dated and delivered on 30<sup>th</sup> April 2007, dismissed the appellant’s appeal to that court from the conviction and sentence of death imposed on him by a Senior Resident Magistrate at Mombasa on 19<sup>th</sup> May 1999. It would appear that the appellant had appealed against the conviction to the superior court; that the first appeal was dismissed by that court and a second appeal to this court allowed his appeal but ordered a rehearing by the High Court. The present judgment of the High Court is, therefore, that court’s second biting at the cherry and the present appeal before us marks the second time the appellant is before this court.

Be that as it may, the appeal being a second one, the court can concern itself only with matters of law. Mr. Francis Kadima argued the appellant’s appeal before us. He appeared to argue the issue of identification of the appellant on the basis that Abdalla Hamisi (P.W8) who testified that he had known the appellant for some two or so years before the robbery at Housing Finance Company of Kenya Ltd’s premises at Mombasa on 7<sup>th</sup> March, 1998 and that he had seen the appellant among a group of three people he (P.W8) saw coming out of the bank immediately after the robbery was not a witness worthy of belief. P.W8 said the appellant was carrying a bag on his back and a pistol in his hand. Mr. Kadima’s contention before us really amounted to the proposition that P.W8 could not really be relied on as a credible witness because P.W8 did not inform the bank employees that he had seen the appellant coming out of the bank and it appears Mr. Kadima was also saying P.W8 did not give the police the name of the appellant when the witness first reported to the police. On the issue of whether or not P.W8’s evidence

was credible the trial Magistrate held as follows:-

**“As for accused 2 [appellant], none of the bank workers saw and identified him during the robbery. However, he was seen by P.W8, Abdalla Hamisi as he (Accused 2) left the bank. P.W8 said that he knew accused 2 very well for 2 years prior to that date as a neighbour. He said that accused 2, on seeing him (P.W8), accused 2 winked at him (P.W8) and said “*Kauka*” in Swahili, meaning that P.W2 (*sic*) should keep quiet. Another (*sic*) P.W8 said as accused 2 carried a bag appearing stuffed full with money on his right shoulder, while holding a pistol with his left hand. Accused 2 wore a black suit and a white shirt. He was in the middle (2<sup>nd</sup> position) of the line of escaping robbers as they left the bank. Identification of accused 2 by P.W8 is necessary (*sic*) one of recognition and there is no mistaken identity of accused 2 herein. Accused 2 in his defence said that he had been involved in a fight with P.W8, and therefore P.W8 had a grudge against him. P.W8 denied he had a grudge against accused 2. Further accused 2 never raised the issue of a fight with P.W8 when testified in court yet accused 2 had an opportunity to cross-examine P.W8 on the same. In my opinion, the accused 2’s defence is an afterthought, an attempt to save his skin. I am satisfied beyond all doubt that accused 2 was one of the robbers seen by P.W8 leaving the bank premises, carrying a bag and holding a pistol. His guilt has been proved beyond the reasonable doubt.”**

It is clear from this passage that the learned trial Magistrate accepted the evidence of P.W8 that the witness knew the appellant and that the witness had seen the appellant walking out of the robbed bank carrying a bag and a pistol. These are findings of fact. What did the superior court say on the same issue? We quote from the judgment of that court:-

**“..... P.W8 told the workers he had seen the robbers come out and board a waiting taxi outside the HFCK premises a few minutes earlier. P.W8 said he saw the appellant who was well known to him carry a bag on his left hand shoulders and a pistol on the right hand. He said the appellant winked at him and told him ‘*Kauka*’ meaning keep quiet. He said he saw the appellant in the middle of a file of three people who included Benard Kago Njuguna. P.W8 said the appellant was his neighbour in Magongo Estate where they both resided. This witness even led the police to the residence of the appellant where he was later arrested. The appellant confirmed P.W8’s assertion that he was a person well known to him though he claimed that P.W8 had a grudge against him which arose due to a fight the duo were involved after taking a drink. We have carefully reconsidered the appellant’s line of defence vis a vis the evidence tendered by P.W8. It is clear the appellant did not raise the issue of the fight between him and P.W8 during his intense cross examination of P.W8. We are unable to agree that there was a grudge by P.W8 against the appellant.**

**We are also satisfied that P.W8 was consistent in his testimony in chief and in cross-examination..... We are of the considered view that the appellant’s identification was that of recognition which was free from any possibility of error hence the appellant was properly identified.....”**

The robbery at the bank occurred after 7.30 a.m., in broad day-light. P.W8 was a taxi driver and had been in his taxi close to the bank premises. He swore he had known the appellant for some two years prior to the robbery and that they lived in the same estate in Mombasa. The two court’s below accepted this evidence and repelled the appellant’s contention that P.W8 had made up the story against him because of a grudge between the two of them. There was clearly evidence on record upon which the two courts could properly draw these conclusions of fact and on a second appeal such as the one we are dealing with in this Court, we can only properly interfere with concurrent findings of fact if it is shown that there was absolutely no evidence on record upon which the conclusions could be reached or if there was some evidence, such evidence was of such a nature that no reasonable court properly directing itself as to such evidence and the law applicable, could ever come to such conclusions. Mr. Kadima for the appellant did not make any such suggestion before us. Mr. Kadima’s submissions before us really boiled down to the proposition that the two courts below ought not to have believed P.W8 but should, instead, have believed the appellant. That is not the function of this court on a second appeal, and though Mr. Kadima urged his submissions with a lot of passion and conviction, we are unable to agree with them, of

course taking into account the recorded word.

The other point raised by Mr. Kadima and which we must shortly touch on is that P.W8 brought in issue the character of the appellant where the appellant had not put his character in issue. Cross-examined by the appellant, P.W8 stated:

**“I knew you for two years prior to this incident. You live ten blocks away from my house. You are a well known person in that area. You are a criminal and people fear you as such.....”**

Mr. Kadima told us that the Magistrate ought not to have admitted the evidence as it dealt with the bad character of the appellant. Mr. Kadima contended the Magistrate should either have stopped the appellant from asking P.W8 questions along these lines or stopped P.W8 from answering them.

We agree that evidence of an accused person’s previous bad character is inadmissible unless the accused himself has put his own character in issue. But it is obvious from the record that it was the appellant who asked P.W8 questions which led to the answers touching on his character. The Magistrate should have, but did not caution the appellant about asking such questions. P.W8 was bound to answer the questions and it is now unjust for Mr. Kadima to complain about the issue which the appellant, on his own volition and unprompted by anyone, brought upon himself. We cannot allow the appeal on that basis and we reject Mr. Kadima’s complaint on that aspect of the matter.

The appellant was convicted on sound evidence which proved the charge against him beyond any reasonable doubt and that being the view we take, the appellant’s appeal fails and we order that the appeal be and is hereby dismissed.

**Dated and delivered at Mombasa this 18<sup>th</sup> day of July 2008.**

**R. S. C OMOLO**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**