



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 153 of 2004

STOJANANOVIC MILAN1ST ACCUSED
JACKSON NG'ANG'A WAWERU.....2ND ACCUSED
AHMED OMAR ABDULLAHI3RD ACCUSED

V E R S U S

REPUBLICPROSECUTOR

R U L I N G

The three accused persons Stojananovic Milan (hereinafter referred as A1), Jackson Ng'ang'a Waweru (hereinafter referred to as A2), and Mohammed Omar Abdullahi (hereinafter referred as A3) are all charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars are that on the 28th day of March 2002 at Sam Sam Petrol Station in Mombasa District within Coast Province, jointly with others not before the court, murdered Kamaldin Akasha. The prosecution called 26 witnesses in support of its case.

PW1, Amani Safari, Amani, was at SamSam petrol station belonging to Kamaldin Akasha [(hereinafter referred to as Kamaldin and the deceased interchangeably)] on 28th March 2002 about 8.00 p.m. That night, Amani was assisting in fueling vehicles belonging to customers in company of the deceased. A Land Rover Discovery belonging to the deceased was parked about 5metres from where they were seated. Amani was also about 5metres from the deceased. Alone gunman approached from behind the said Land Rover Discovery and shot the deceased three times at point blank range. Amani panicked and ran away after identifying the gun man whom he described as white and slim. On 8th of June 2002 Amani identified the 3rd accused at an identification parade as that gunman. The whole episode took 2-3 minutes, he opined.

PW2, Hassan Akasha Abdallah, Hassan, recalled that on 28th March 2002 the deceased discharged him from Makupa Hospital and took him to his house in Tudor at 10.00 a.m. in company of a driver by the name Amani (PW1).

On the same day about 9.00 p.m. he was rudely awakened by a heavy knock on his door by Amani who was a pillion passenger for Issa on his (Issa's) Vespa Scooter. Amani broke the sad news that deceased had been shot. Hassan left Amani at his Tudor house and got a lift from Issa up to SamSam petrol

station. Hassan was informed that the deceased had been rushed to Makupa Nursing Home. Hassan followed deceased to the said hospital where deceased was pronounced dead on arrival. He later escorted the body to Pandya Memorial Hospital for post-mortem. Later the body was released to the family for burial.

In cross-examination he was categorical that the deceased had been killed by Nuri who was their biggest enemy. That the deceased had also told him that Nuri had threatened him with death several times including the same week he died.

PW3, Salim Bajaber, Salim, landed at Mombasa Moi International Airport Mombasa on 28th March 2002. Baktash Akasha who was meant to collect him delayed. Instead he was given a lift by Mama Farida Hussein Baragha. On the way, at the airport toll station, he saw Baktash Akasha heading for the airport. Baktash did not see him though. Mama Farida Hussein aforesaid took him to his house at Ganjoni. In a space of 15-20 minutes, Baktash Akasha was at his door. He accompanied Baktash to Mama Ngina Drive. It was about 8.30 when Hassan Akasha (PW2) rang Baktash Akasha (PW 25) and disclosed that the deceased had been shot dead. They drove towards the disclosed scene of murder. They were told the deceased had been taken to Makupa Nursing Home. On reaching the said nursing home they confirmed that the deceased had succumbed to his injuries. They then took the body to Pandya Memorial Hospital for post-mortem and later for burial.

PW4, Mohamed Ali Abdurahman, Abdurahman, owns a video café. On 28th March 2002 on his way to work, one Abdullah disclosed to him that the deceased had been shot. He rushed to the scene and found the deceased still seated on a chair but bleeding profusely. He assisted in taking deceased to Makupa Nursing Home where he was pronounced dead on arrival.

PW5, Issa Ali Saad, Issa, went to deceased's petrol station. The bus left him there. He remained talking to petrol attendants and the deceased. He heard gun-shots and hid. When calm returned he came back to the Petrol station and found the deceased seated in the same position bleeding. A young man, he came to know as Amani, whom he found at the station asked him to take him to the house of Hassan (PW2). He left Amani at the said house and took Hassan (PW2) on a vespa scooter to SamSam Petrol Station, then to Makupa Nursing Home where the deceased had been rushed for medical attention.

PW6, Nurdin Akasha Abdallah, Nurdin's testimony is that Hassan (PW2) on reaching SamSam Petrol Station shouted that it was Nuri who killed the deceased. He wrote the statement on 15th November 2002 because of worries – two Europeans were looking for him. He feared for his life.

PW7, Dr. Nashon Chandaria, Chandaria carried out an autopsy on the body of the deceased at Pandya Memorial Hospital on 28th March 2002. He came to the conclusion that the cause of death was due to hemorrhagic shock due to massive internal hemorrhage due to gun shot wounds to the head and neck. He produced the post-mortem report as exhibit 1.

PW8, Nuri Akasha, Nuri, was in company of Milan a truck driver (since deceased) about 6.30 p.m. on 28th March 2002, they picked Milan's girl friend, an air-hostess from Moi International Airport and were en-route to the house when two police reserve, Yasir and Yazael, stopped them. They were chatting when a radio call came through to the police reserve one Yazael, to the effect that somebody had been shot at a petrol station. The two police reserve drove towards Makupa roundabout with Nuri on hot pursuit up to SamSam Petrol Station. They found that the deceased had been taken to hospital. The police officers present at the petrol station disarmed him on suspicion that it was his gun which had been used to shoot the deceased. He was locked up for 9 days. His other brothers – Baktash Akasha, Hassan Akasha, Yusin Akasha and others were also locked up. They were later released at different times. He was given back his firearm. Since then the Akasha family have had a problem with the 1st accused who was a friend and business associate of the late Ibrahim Akasha Abdallah and frequent visitor to their home.

On 12th November 2004, Nuri was informed of the presence of Milan (A1) at JKIA Nairobi. He

waylaid him en-route to the city centre. Milan (A1) warned him while in the car thus:

“let us go to the hotel and talk, or you will regret”.

That there was no need of calling the police as he would bribe his way out and thereafter would kill them “like fucking dogs”. That he would do to Nuri exactly what he did to Nuri’s father and brother. While the conversation was going on the party arrived at Grand Regency Hotel. Unknown to Nuri, Nuri’s friend Ali and Abed had phoned lawyer John Khaminwa who had arranged for the police. Inspector Ngatia Eregi (PW26) arrested Milan (A1) and Waweru (A2). He identified the two accused in court.

In cross-examination, Nuri admitted that Baktash (PW25) told him that Hassan (PW2) told the police that it is him (Nuri) who had killed the deceased. Yet when he met Hassan at the police station, he (Hassan) did not tell him (Nuri) so.

Nuri made a statement at the police station on 30th March 2002 but admitted that he did not mention Milan (A1) or Waweru (A2) as having any connection with the death of the deceased.

Nuri admitted having been detained for 9 days as a suspect in the murder of the deceased. That Nuri was the chairman of the committee dealing with the distribution of the estate of the late Ibrahim Akasha Abdallah. Before distribution was completed Nuri’s mother (Hayat) and Fatuma (3rd wife of Ibrahim Akasha Abdalla) withdrew money from a trust account without consent of the rest of the family. This fueled animosity within the Akasha family.

That at the time of the death of Ibrahim Akasha Abdallah the case of the haul-up of hashish was still on in a Mombasa court.

That he (Nuri) had been reported to the police for threatening Nurdin, Baktash, Hassan and deceased at various times.

Most significantly, Nuri’s evidence touched on the animosity within the Akasha family. The suspicion that Nuri had organized the killing of the deceased. That Milan (A1) was a suspect in the death of Ibrahim Akasha Abdallah in Netherlands in relation to the hashish case.

Confronted with the evidence tendered in High Court Criminal Case No.5/2003 REPUBLIC V AHMED OMAR ABDULLAH, Nuri confirmed that he was meant to testify in that case before the same was terminated by the Attorney General by way of a *Nolle - prosequi*.

PW9, P. C Joseph Kepuria, Kepuria, was at Police Provincial Headquarters Mombasa on 28th March 2003. At about 11.30 p.m. he was summoned by Chief Inspector Ndaiga of Makupa Police Station to attend a scene of crime. He visited Pandya Memorial Hospital and found Inspector Ndaiga guarding the body of the late Kamaldin Akasha whom he was informed had been shot at SamSam Petrol Station near Makupa roundabout. He took photographs and processed the film personally at CID Headquarters. The negatives were kept under his custody. He made a report accompanying the photographs which were received in evidence as exhibits 2 a – z, aa – bb.

PW10, Charles Ochieng Kaunga, Ochieng of Voda Taxi Sacco was approached by Emily Awuor who wanted a taxi registration No. KAK 063N Toyota station wagon for hire. The driver was instructed to collect a visitor at Moi International Airport Mombasa. Later the taxi driver informed Ochieng of the desire on the part of the visitor to have the vehicle for a further two weeks. Ochieng accompanied the taxi driver to the Selly Beach residence of Emilly Awuor. An agreement was reached between Milan (A1) and Ochieng on a sum of Shs.10,000/= per week by way of rental charges. Emily signed the agreement on behalf of Milan (A1). By the first week no payment had been received. He went to the house of Emily Awuor at Selly Beach but found that Emily and Milan (A1) had gone for holidays in South Africa. He arranged with police to tow away the vehicle. By that time Emily, as per the contract, owed the Sacco Shs.20,000/-. He identified Milan (A1) as the visitor on whose behalf Emily made a contract

for the hire of the vehicle aforesaid. Payment has not been made to date despite demand.

PW11, No.230436 Inspector Moses Mwangi, Mwangi attached to Divisional CID Headquarters Mombasa was at the station on 8th June 2002. He was requested by investigation officer Inspector Julius Maitethetira to conduct an investigation parade of Ahmed Omar Abdallahi (A3) at Central Police Station. The 1st – 4th witness did not identify the suspect. The 5th witness, Amani Safari (PW1), identified the suspect. The suspect signed the parade form and Mwangi counter-signed. The parade form was admitted as exhibit 3. The suspect commented on the form that the identifying witness was wrong.

PW12, Inspector Goeffrey Muriuki, Muriuki, was instructed by the DCIO Mombasa Urban SSP Ngatia Eregi (PW26) to proceed to Kisumu and collect a suspect at CID offices in Kisumu. On 2nd January 2003, he was handed over one Mohamed Omar Abdullahi alias Amado by CID Kisumu. He traveled with the suspect to Mombasa. The suspect was charged alone with murder of the deceased herein in Mombasa H.C Criminal Case NO.5/2003 and later in the present case jointly with two others.

PW13, Daniel Kiarie Mwangi, Kiarie, alighted from a matatu. He passed through Shell B.P Makupa. On reaching SamSam petrol station, he saw a car coming from the opposite direction moving at a zero speed. It was a Toyota AE 100 metallic green in colour. The car was being driven next to the pavement. Kiarie was on the pavement too about 1½ metres away. Only the driver was in the car. Kiarie shouted at the driver in Kikuyu thus “Korenda kunginyanga” which translated into English means “Do you want to step on me”. The Driver paid no attention. The driver was looking at the direction of Sam Sam petrol station. Three steps away from the car, Kiarie heard a loud sound from the direction of Sam Sam petrol station. At first he thought it was an electric fault. When he heard a second sound the car sped towards the filling station. In total he heard three such sounds. Time was about 8.30 – 9.00 p.m. Kiarie had a good look at the occupant of the gate’away car. The driver had a whitish T-shirt. The car accelerated from zero speed to high speed after the second shot. Fifty metres away, next to the junction, Kiarie realized that someone was running away from SamSam petrol station towards the gate’away car. The person was in a black T-shirt and had a marvin wool hat black in colour over his head. Immediately the car stopped the passenger door was opened. The man in black T-shirt and black marvin cap raised something like a gun. He had a polythene bag he was holding with the other hand. Immediately the man entered the car, the same was driven at high speed towards Makupa roundabout. He could not recall the type of trousers the assailant was wearing. At all material times Kiarie was about 30 metres away. He went up to the filling station. He found the person who had been sitting on the chair bleeding from the chest, neck and behind the head. He knew the person before this incident. He was not talking. An attendant from Shell B.P station came with a car which assisted in taking the injured person to Makupa Nursing Home. Three days later he was summoned to the police station to make a statement. On 4th April 2002, the police did not summon him to the identification parade. Kiarie was positive that he identified the assailant by use of electricity from Sam Sam petrol station and could identify him at the identification parade if he was summoned to do so. It is a pity that the police did not summon him to the identification parade and thus squandered the best evidence.

PW14, Mbogo Donald Mugo, Mugo, received three spent cartridges 7.65 mm. calibre exhibits A1, A2 and A3. He equally received a sub-machine gun 9 m.m caliber model CS P2009 bearing serial No.SP 31342. He also received 16 rounds of ammunition in caliber 9mm parabaram exhibit B. He examined the same and formed the opinion that exhibit B is a firearm as defined under the Firearms Act (Cap 114 Laws of Kenya).

Exhibit C1 – C16 comprised of 16 rounds of ammunition in caliber 9mm parabaram. He opined that such rounds of ammunition are suitable for use in firearm such as exhibit B, since 3 rounds picked at random from the lot were successfully test proved in exhibit C1 – C16 were alive and are ammunition within the meaning of the Firearms Act (Cap 114) Laws of Kenya.

Mugo compiled the report which he produced as exhibit 4. He confirmed that exhibits A1, A2, A3 on 7.65 machine gun could not have been fired from the 9 mm pistol presented for examination. He confirmed that the 3 spent cartridges must have been fired from model 61 sub-machine gun commonly referred to as Scorpion.

PW15, Tom Mwachiti Waweru, Mwachiti, a taxi driver with Voda Taxi Association drove Milan (A1) and Emily Awuor to Shelly Beach. Milan expressed the desire to have a self-drive car. Mwachiti made an agreement between Emily Awuor and Voda Taxi Association. Milan (A1) paid Shs.10,000/=. The subject motor vehicle was not returned as per the agreement and hence the Association, then involved the police and the subject motor vehicle was towed to Mombasa CID Headquarters pending investigations.

PW16, Hayat Akasha, Hayat, the second wife of the late Ibrahim Akasha Abdallah testified that her late husband and Waweru were dealers in hashish and bhang alongside Milan (A1) and the deceased. That her late husband and Milan (A1) were involved in Mafia like activities.

That the late Akasha Abdallah had diabetes and hypertension that triggered eye problem. It necessitated specialized treatment abroad. Hayat accompanied her husband to Holland. While in Amsterdam her husband received a phone call from Baktash Akasha(PW 25) that the deceased and Waweru (A2) had broken into the house of Milan (A1) and stolen a substantial tonnage of hashish. Her husband was shocked. Akasha called Magadi. Magadi called Milan (A1) and broke the sad news. Milan (A1) was in rage and threatened the late Ibrahim Akasha Abdallah on phone. That brought bad blood between deceased and Akasha Abdallah Ibrahim on the one hand and Milan (A1) on the other hand. Milan's view was that he had been short-changed by the two.

Milan (A1) rang Akasha Abdallah Ibrahim to arrange a meeting at the café shop of Magdi. Ibrahim Akasha Abdallah and Hayat left on foot for Magdi's coffee shop. A bicycle bell rang from behind. Hayat turned to look at the cyclist but Ibrahim Akasha Abdallah, kept on walking. Hayat saw the man on the bicycle pick a gun, aim at Akasha and shoot. The cyclist then rode ahead and pumped four more bullets into Akasha's body. The first bullet hit the back. Then the second in front of the left eye, the third, left front head and the fourth on the right of the head near the right eye. The last one hit the stomach.

The assailant was a heavily built man of about 5ft 7 inches and an adult. Time was about 9 a.m. Hayat ran to Magdi's shop and broke the sad news. She was hysterical. She ran back to the place where her husband had been shot and was informed by the police that he was dead. The police took Magdi and Hayat along. On the way to the police station Magdi told Hayat not to mention the name of Milan (A1). That if she did she would be endangering her life. After burying her husband she started receiving calls from Milan (A1). Milan (A1) told Hayat that he had killed Kamaldin. The remaining person was Nuri alias Tinta. That he would kill one more member of Akasha family. She reported the incident to Mombasa Police. She identified Milan (A1) in court. Last but not least she testified that Magdi was shot shortly after the death of Akasha Abdallah Ibrahim in Amsterdam. She thought Magdi's death was a drugs related issue and had a bearing on the death of Kamaldin Akasha.

PW17, Evans Kinyanjui, Kinyanjui an immigration officer was asked by SSP Ngatia Eregi (PW 26) to verify the endorsement on the passports of Milan (A1) which was required as evidence against the holder. He was asked to confirm the dates when the holder of the passports had either arrived or departed from Kenya. The passports in issue belonged to Stojananovic Milan. One in French, the other in Former Yugoslavia. The French passport was issued on 20th October 2004. According to this passport the holder was born in Belgrade in Yugoslavia on 18th February 1956.

Former Yugoslavia passport was issued on 7th July 1999 at Paris. According to this passport the date of birth is indicated as 18th December 1956. The place of birth is Cukaraca. It does not show whether that place is in Belgrade.

The names in the two passports are the same. The photograph appear to belong to one and the same person.

The expiry date in the French passport was 19th October, 2004. The expiry date in Former Yugoslavia passport is 2009.

He was commissioned to check the entry and exit of the passport holder from Kenya.

With regard to the French passport, he confirmed that the holder left the country on 12th May 2005 using a different French passport as opposed to the one before the court. That passport is No.99 X BII, 877. The passport in court is No. 045 C 72465 which is blank. It has never been used before.

That Milan (A1) had used the Former Yugoslavia passport to enter and leave Kenya between 8th November 2001 and 8th November 2004. Such entries are endorsed at the point of entry and departure confirming the various dates. He confirmed that Milan (A1) was in the habit of using Yugoslavia passport. In cross-examination he confirmed that Milan left Moi International Airport Mombasa on 27th March 2002, at 13.10 hours. That according to the charge sheet the murder, subject matter, took place on 28th March 2002. That was one day after Milan (A1) had left the country. Hence Milan left before the alleged murder took place.

PW18, NO.212421 Ag. SSP Benjamin Mwaliko recalled the events of 13th August 2003. He received a micro chip cassette recorder marked in the exhibit memo as Cr.342/141/2002. It allegedly contained a telephone conversation between two persons not know to him. He was instructed to get a clear transcript of the conversation contained therein.

He made a transcript not from the original cassette but from the second tape which he himself manufactured. The prosecution's attempt to have the said cassette admitted in evidence was strenuously resisted by the advocate for the defence. In my lengthy ruling of 8th August, 2006 I disallowed the admission of the second cassette as evidence in these proceedings on three grounds:

- (a) the date of the recording is contradictory. PW26 (SSP Ngatia) testimony is that it was 13th August 2003. Yet Inspector Obadiah Kuria's (PW21) testimony is that it was 12th August, 2003.
- (b) PW26 (S.S.P Ngatia) kept the tape from 13th August 2002 to November 2003 when he was transferred to Nairobi from Mombasa. The person to whom he handed over the tape had not been called to shed light on the circumstances of the fact of safe custody thereof even when the prosecution was given sufficient time to do so. Hence there was a missing link in the chain of possession of the tape to that extent. Without evidence of safe custody reception of the tape in evidence would be prejudicial to the accused.
- (c) Production of a second tape from the original tape because the original tape was not clear, makes the original tape inadmissible courtesy of Section 66 of the Evidence Act. Moreover the transcript intended to be produced in evidence was the transcript of the second tape as opposed to the original tape.

PW19, No.23088 Inspector Julius Maitethetira, was detailed by PW26 (SSP Ngatia) to investigate the murder of Kamaldin Akasha, the deceased. He proceeded to the scene at Sam Sam petrol station. He was handed over 3 spent cartridges collected at the scene and the firearm of one Nuri Akasha. He prepared the exhibit memo and forwarded the same to the ballistic experts for comparison. Eventually he established that Nuri's gun had not been used in the murder. He released Nuri and gave him back his gun. He arrested the third accused on the basis of the description given by eye witnesses.

He identified the 3rd accused in court. He was the investigating officer in Mombasa H.C.Cr. No 5/2003. He did not find anything to connect Waweru (A2) with the murder of the deceased. He had arrested another Yugoslavian other than accused one (A1) by the name Milan. This Milan was also released for lack of evidence linking him with the murder of the deceased. He investigated all the Akasha's sons. He did not find any evidence linking Milan (A1) with the murder of the deceased. The only person he had evidence against was the 3rd accused. That evidence was from the driver of the deceased, Amani Safari (PW1). On the basis of that evidence he caused the 3rd accused to be charged with murder in Mombasa. On termination of the Mombasa case he charged the three accused herein in Nairobi H. Cr. C. No.153/2004 - the present case.

PW20, Dr. Zephania Kamau, Kamau was requested to assess the age, examine for any injuries and

assess mental status of one Jackson Nganga Waweru (A2). He completed the report and produced it as Exhibit 7.

He was also requested to do the same for Stajananovic Milan (A1). He noticed that Milan (A1) had a pace-maker, a small swelling on the right knee which he did not attribute to injury. He completed the report and produced it as exhibit 8.

PW21, Inspector Obadiah Kuria, Kuria, was in the DCIO's office in Mombasa on 12th August 2003. At 1.00 p.m. SSP Ngatia (PW26) summoned him to his office. Ngatia was in the company of Baktash Akasha (PW25) who was making a follow up in respect of the murder of Kamaldin. Ngatia told Kuria that Milan, a suspect, in the murder of deceased had indicated to Baktash (PW25) that he would call him (Baktash) on phone at 1.00 p.m. Baktash (PW25) thought the phone call would be of a threatening nature, if the past experience was something to go by.

Ngatia instructed Kuria to record the conversation using a Sony Cassette recorder which contained a tape. A few minutes later Baktash mobile phone rang. Baktash confirmed it was Milan (A1) who was calling. Baktash answered the telephone and put it on a speaker mode. Kuria pressed the code button on the recorder and started recording the conversation. The recording took about 1 hour or so. At the end of it all, Kuria switched off the cassette. He caused to be marked the cassette VOR recorder as MR1 - 5. After recording, Kuria left the cassette and the tape with SSP Ngatia (PW26) for safe keeping. Kuria was asked by Ngatia (PW26) on 23rd November 2003 to do an exhibit memo and forward the same to CID headquarters for purposes of reducing the tape into a transcript. Kuria prepared the exhibit memo and forwarded the same to Mwaliko (PW18).

Last but not least Kuria took charge and cautionary statement of 1st and 2nd accused in Nairobi and the 3rd accused in Mombasa on 9th June 2002. In cross-examination he confirmed that the recording was done on 12th August 2003. He further confirmed that he prepared the statement on 12th August 2003 at 1.00 p.m. That by 12th August 2003 the 3rd accused was already undergoing trial at Mombasa. From 12th August 2003 he again saw the cassette on 23rd November 2004 after 1½ years. All this while the same was in the custody of SSP Ngatia (PW26).

PW22, Feisal Akasha, Feisal was at JKIA at Unit 3 on 12th November, 2004. en-route to Mombasa. Though he had a ticket for 6.00p.m. he wanted an earlier flight of 1.00 p.m. He approached the travel agency to effect the change. He met a rude shock when he found the Agency Manager with Milan (A1). When Feisal saw him, Milan started to move then came back and enquired if Feisal knew him. That Milan (A1) told Feisal that he was coming to take care of the family. Feisal understood that to mean that Milan was going to kill the rest of the family. Feisal called Nuri alias Tinta and informed him of the encounter with Milan (A1) and that Milan was from JKIA Nairobi heading for Nairobi City Centre. Feisal took the 1.00 p.m flight. Within one hour of arriving at Moi International Airport Mombasa Nuri alias Tinta called to say that Milan (A1) had already been arrested at Grand Regency Hotel in Nairobi.

PW23 Inspector Nathan Kiplagat, Kiplagat recalled the events of 12th November 2004. He was on patrol duties within Nairobi City. He was instructed to proceed to Grand Regency Hotel to assist in arresting some suspects. He was in company of some five officers. He met the suspects in the said hotel lobby. The complainants were Nuri alias Tinta, Nuri's mother (Hayat) and Nuri's brother, all part of the Akasha family. One of the suspects was Milan (A1). The other was Waweru (A2). From Milan (A1) they recovered Nokia mobile phone white and grey mixed, French and Former Yugoslavia passports. The phone was marked as MF1-9. From Waweru (A2) was recovered a Nokia mixed and blue and white model 3100 marked as MF-10. He escorted both suspects to Central Police Station. At the DCIO's office at Central Police Station, a further search was done on Milan (A1) and a sum of Shs.\$10,000 was recovered.

On 13th November 2004 in company of other police officers he took Milan (A1) to Grand Regency Hotel for a search of the safe in the room occupied by him. A further sum of Shs.\$50,000/= was recovered. No firearm was recovered from Milan (A1). Sometimes in the year he was sent by SSP

Ngatia (PW 26) to collect Ahmed Omar Abdullahi from Kisumu CID offices. He complied. He brought him to Mombasa where he was charged in Mombasa H.C. Cr. No.5/2003.

PW24, No.61898 P.C Patrick Simiyu, Simiyu, was detailed by Inspector Julius Maitethetira to escort the suspects Ahmed Omar Abdallahi (A3) to Dr. Mwangombe at Coast General Hospital for psychiatrist investigation. Examination of Omar was done in his presence. On 14th June 2002 he collected the result/report which was received in evidence as exhibit 9.

PW25 Baktash Akasha, Baktash, recalled that on 28th March 2002 at about 5.00 p.m. he passed by the deceased petrol station en-route to the airport to pick Mohamed Hamid and Salim Bajaber. He only managed to get Mohamed Hamid. Salim Bajaber had already left with a friend. At the airport he came across Nuri alias Tinta who had also gone to pick his guests. Baktash was headed for deceased petrol station. He was meant to pick the deceased about 8.30 p.m. – 9.00 p.m. He went to Ganjoni to pick up Salim Bajaber. On their way back Baktash received a telephone call from Hassan (PW2) at about 9.00p.m. to the effect that Kamaldin had been shot. He drove to the deceased petrol station and was told he had been rushed to Makupa Nursing Home. On reaching the hospital he was met with the sad news that Kamaldin had passed on. On the way back from Makupa Nursing Home, he met Nuri alias Tinta (PW 8) at Sam Sam petrol station. He told Nuri alias Tinta to his face that he (Nuri) had killed Kamaldin. Using Kamaldin Discovery Land Rover, he ferried the body to Pandya Memorial Hospital for an autopsy. The body was released to the family for burial at Chanzu on 29th March 2002. Nuri Akasha alias Tinta (PW8) did not attend as he was in police custody having been mentioned by Baktash (PW25) as the mastermind of the murder. That one week before Kamaldin's shooting Nuri alias Tinta had said that he would :

“show Kamaldin.”

To Baktash to show meant a threat. It was uttered at Engen Petrol Station along Nyali bridge. That Kamaldin and the late Ibrahim Akasha Abdallah used to travel overseas on business trips quite often. That Nuri alias Tinta was very close to Milan (A1). That the relationship between Kamaldin and the late Ibrahim Akasha Abdallah on the one hand and Milan (A1), Nuri alias Tinta, and Waweru (A2) was strained on account of hashish deal gone sour. The genesis of the bad blood was that the deceased and Waweru (A2) broke into the house of Milan (A1) at Nyali and stole substantial tonnage of hashish. Kamaldin sold the stolen hashish to one Magdi [since deceased through shooting in a gangland style execution at Amsterdam in 2000 January]. This was considered a betrayal by Milan and Nuri alias Tinta (PW8).

Baktash knew Milan (A1) through Nuri alias Tinta (PW8). It is Tinta that convinced the late Akasha Abdallah Ibrahim to do business with Milan (A1). Akasha Abdallah Ibrahim further got encouragement from Waweru (A2) to do hashish business with Milan (A1). That was in 1995 when the Akashas' got entangled with Milan (A1).

Baktash tried to calm down Nuri alias Tinta the week before Kamaldin's death but Nuri alias Tinta told Baktash that he was under pressure. That there was someone pushing him. The conversation took place at Engen Petrol Station along Nyali Bridge. When Baktash heard that Kamaldin had been shot the first suspect to him was Nuri. That the killing was “the show” Nuri alias Tinta had talked about. Arising from Baktash telling Nuri alias Tinta that you killed Kamaldin, Nuri was promptly arrested and put in the cells. That Kamaldin's death was not a one man show - several people were involved.

Cross examined by Dr. Muigai for 1st and 2nd accused, Baktash (PW8) confirmed that he made several statements to the police. One, on 3rd May, 2002. Second, in January 2003. Third, on 13th August 2003 at 14.00 hours. Significantly, Baktash failed to mention Milan (A1), Waweru (A2) and Omar (A3). Instead he mentioned Nuri Akasha alias Tinta as a possible suspect. By coincidence on the fateful day when Baktash went to Sam Sam petrol station shortly after deceased had been pronounced dead, he screamed thus:

“my brother has been killed by Tinta”.

Immediately the police swung into action and arrested Nuri Akasha alias Tinta (PW8) and the other Akasha sons.

Almost the same time the police arrested a citizen of Former Yugoslavia by the name Milan at South Coast Night Club. Coincidentally that Milan is not one and the same person as Milan (A1). That Milan, according to Nuri Akasha is now dead. No evidence has been led as to the circumstances of his death and whether he had any hand in the death of Kamaldin. Significantly that Milan arrested at the night club, according to Baktash Akasha, was more closer to Nuri Akasha alias Tinta than the Milan (A1).

Last but not least Baktash Akasha crowned his evidence thus:

“I confirm that the police lead was that the motive was a family feud...”

PW26 No.213586 SSP Boniface Ngatia, Ngatia, is the star witness in this case. He was the DCIO Mombasa Urban when deceased met his death. He over-saw the investigation which was being conducted by Inspector Julius Maitethetira, Inspector Joseph Muriuki and P.C Simiyu. He personally selected the afore –mentioned officers for the task.

From the brief given to him by the investigating team, he was of the persuasion that Baktash Akasha was pointing accusing finger at Nuri Akasha alias Tinta.

From a further brief given to him by the investigating team he came to learn that a white man said to be a close friend of Nuri Akasha by the name Milan was also arrested. Ngatia confirmed that, that Milan is not the one charged in court as accused No.1. That Milan’s whereabouts is not known.

Ngatia briefed the P.P.O Coast that there were three (3) possible suspects. Nuri Akasha alias Tinta, Baktash Akasha and a white man known by the name Milan. That there was no tangible evidence against the three suspects though. The P.P.O was in agreement and the main suspects were released. The mysterious Milan disappeared. Nuri Akasha (PW8) in his evidence claims that he is dead. The police has not ascertained this. The prosecution led no further evidence regarding him and his role in this whole saga.

Ngatia then started following another lead given to him by an informer. He summoned Nganga Waweru (A2) and questioned him about the death of Kamaldin. Waweru denied knowledge of the same and was released thereafter.

On 12th August 2003 Ngatia was in his office when Baktash Akasha (PW25) reported that he had received death threats from a person whom he identified as Stojananovic Milan vide his cellphone. Ngatia advised Baktash to have the conversation recorded. This was done on 13th August 2003 according to Ngatia and 12th August 2003 according to Inspector Obadiah Kuria (PW21).

The admissibility of the taped conversation was contested by the defence counsel for the 1st accused, Dr. Muigai.

In a ruling delivered on 8th August 2006 I held that the tape is not admissible in evidence, *inter-alia*, that in a criminal case the judge always have discretion to disallow evidence if strict rules of admissibility would operate unfairly against an accused (see KURUNGA SON OF KANIU V REPUBLIC [1955] I ALL E.R. 236

At that stage the prosecution closed its case. The two defence counsel submitted that the prosecution had failed to establish *prima-facie* case to warrant all the accused being put on their defences.

Dr. Muigai for the 1st and 2nd accused submitted forcefully that the charge was drawn on 26th

November 2004. Kamaldin Akasha was murdered on 28th March 2002. That was about 2 years and 6 months after Kamaldin's death.

A month after the incident, The Attorney General preferred charges of murder against the 3rd accused alone in Mombasa H.C Criminal Case No.5/2003. Plea was on 9th April 2003. The trial commenced on 5th May, 2003. The prosecution called 12 witnesses out of a list of 14. Out of the 12 witnesses called none mentioned Milan (A1) or Waweru (A2) adversely.

The Attorney General then entered a *Nolle-prosequi* on 21st February 2005 in respect of Mombasa H.C Cr. Case No.5/2003. The purpose, as made known to court, was to facilitate a joint trial of Ahmed Omar Abdallahi (A3), Milan (A1) and Waweru (A2).

That apart from the evidence of the 12 witnesses who gave evidence at the Mombasa trial, the only additional testimony in the present trial is that of the tape recorded evidence relating to the alleged threat and/or utterances by Milan (A1) to Baktash Akasha (PW25), Hayat Akasha (PW8), evidence of Julius Maitethetira (PW19), evidence of Inspector Kuria (PW21), Feisel Akasha (PW22), and evidence of Baktash Akasha (PW25).

That to the extent that the prosecution has taken an old case it had mounted against the 3rd accused and re-hearsed it with no credible witnesses or evidence against the 1st and 2nd accused, to that extent is the prosecution's case doomed,.

That it is common ground:

- 1) That the deceased, Kamaldin Akasha was the son to Ibrahim Akasha Abdallah, since deceased.
- 2) That the deceased Kamaldin was half – brother of Nuri Akasha alias 'Tinta'
- 3) That Nuri Akasha alias Tinta (PW8) is the son of Hayat Akasha (PW16), the 2nd wife of the late Ibrahim Akasha.
- 4) That the late Kamaldin Akasha and his brother Hassan (PW2) are the sons of one Karim Akasha the first wife of Ibrahim Akasha whom he had divorced.
- 5) Baktash Akasha (PW 25) is the son of Ibrahim Akasha Abdallah by his third wife – Fatuma Akasha
- 6) Ibrahim Akasha Abdallah was killed by a gun'man in Amsterdam Holland in a mafia style execution. He was in the company of Hayat (PW16) and Nuri Akasha (PW8) was in Germany which borders Holland and was the first to arrive at the scene.
- 7) The killer of Ibrahim Akasha Abdulla have never been discovered todate. No investigation was undertaken by the police to this end.
- 8) No sooner had Ibrahim Akasha died than a severe family feud emerged, particularly with regard to a foreign account and distribution of the assets of the estate generally.
- 9) As soon as Kamaldin was shot two of the Akasha sons came to the scene of crime – Hassan (PW 2) and Baktash (PW25).

Hassan said in front of everybody at the scene that "that has been done by Tinta" (PW8). Hassan later reduced the same in form of a statement to the police made on 31st March 2002 (see exhibit D1). Baktash Akasha(PW25) and Hassan (PW2) are all agreed that the chief suspect is Nuri Akasha alias Tinta. All the Akasha sons were arrested and released after sometime. Nuri took nine (9) days in the cells.

The Sunday Nation of 31st March, 2002 under the Heading “YUGOSLAV HELD OVER THE DEATH OF AKASHA” run a story about a Yugoslav described as a hitman from Marcedonia. He was arrested at a Night Club in South Coast. The Yugoslav is not brought to court. No statement was ever taken from him. That Yugoslav was in the company of Nuri Akasha alias Tinta on the night of the murder. His name is Milan. He is not charged in the Mombasa High Court alongside Omar (A3). That Milan is not charged before this court either.

The Sunday Nation afore-quoted reported that there was an account in Netherlands to which the deceased was a signatory. The police failed to look for this lead. The police equally failed to investigate the death of Ibrahim Akasha Abdallah in Netherlands.

The deceased was shot on 28th March 2002. Milan (A1) had left the country on 27th March 2002. The Milan in court could not therefore have been the killer of Kamaldin.

The following week Sunday Nation had a story under the heading “AKASHA’S SON IS KILLED IN DRUG SHOOTING”. Attack mirrors his father’s death in Amsterdam. The Sunday Nation further reported said that the death of Magdi a drug Baron in Netherlands also mirrored that of Ibrahim Akasha. That the Akasha family members are taking revenge. That it is an inside job.

Against that background, Dr. Muigai submitted that the charging of Omar (A3) in Mombasa High Court Cr. C.No. 5/2003 was a massive cover up. The Akasha family was involved in internal feud. The killing of Kamaldin was a family affair. There was, so to speak, a “civil war” in the Akasha family.

Mr. Opolo for the 3rd accused associated himself with submissions of Dr. Muigai for the 1st and 2nd accused. He submitted that it was a case of single identifying witness. That the test to be used is the one in R V TURNBULL (1967)3 ALL ER.549. That the 3rd accused contemporaneously with the holding of the parade commented that he was not satisfied with the parade. The identification parade form was admitted as Exhibit 3.

That the evidence of Amani Safari that the gun’man was slim and white should be looked at against the backdrop of other statements for example, Zakaria Charo (CD2) whose statement to the police, so far as relevant, reads:

“ This man was tall, very brown and had a cap. He looked like an Arab”.

In his evidence, on oath, in court Zakaria Charo testified that the 3rd accused is not the man he saw fleeing from the scene. The cap which the assailant had was base ball type which concealed the assailant’s face.

David Kiarie Mwangi (PW13) was walking on the pavement adjacent to Sam Sam petrol station. He was nearly knocked down by the gate’away car. He talked to the driver. Immediately he heard gun shots. The person he saw had a Marvin cap. That as much as David Kiarie Mwangi’s evidence was candid and first hand yet the prosecution did not use him in the identification parade and thereby squandered the best opportunity as relates to identification.

Mrs. Ogoma, for the State on the other hand, maintained that a prima facie case had been established:

- (a) that the post-mortem report confirmed death of Kamaldin Akasha.
- (b) That the said death was as a result of gun-shot wounds by assailant hence unlawful.
- (c) That motive was established in that through the prosecution witnesses, it has been shown that accused No.1 and the Akasha’s had bad blood. The deceased and the 2nd accused had broken into the house of Milan (A1) in which house was a substantial tonnage of hashish at Nyali in Mombasa.

(d) Hayat Akasha (PW16) testified that her husband Ibrahim Akasha Abdallah had gone to Amsterdam inter-alia to meet Magdi (since deceased – through gun shot wounds) and Milan (A1). The agenda was with regard to the proceeds of hashish stolen from Milan's (A1) house at Nyali in Mombasa.

Akasha Ibrahim died without Milan (A1) getting payment.

(e) That the first accused, after Ibrahim Akasha's death, reverted to threatening the Akasha's with death. That Nurdin Akasha (PW8), Feisal Akasha (PW22) and Hayat (PW16) all talk of death threats.

(f) That with regard to Feisal (PW22) the accused said "I took care of your father and Kamaldin. That I am coming to take care". According to Feisal (PW22) taking care means killing.

That from the threats aforesaid the court should infer that Millan (A1) was the killer of Ibrahim Akasha and Kamaldin Akasha.

(g) That Millan (A1) left Mombasa on 27th March 2002 by flight. That was one day before Kamaldin was shot. That the court should infer that Milan (A1) left the country after organizing Kamaldin's death.

(h) That Milan (A1) had two passports; French and Former Yugoslavian. That there was also another passport which was not produced in court. The court should therefore infer that Milan (A1) is a suspicious character.

(i) Insp. Maitethetira (PW19) arrested one Milan whom the Sunday Nation of 31st March 2002 describes as a Yugoslavian hitman. This Milan was picked by Nuri Akasha alias Tinta (PW8) at Moi International Airport Mombasa on the night Kamaldin was shot at. By coincidence this was between 7.00 p.m. – 9.30 p.m. of the fateful night.

(j) Milan (A1) was spotted at the airport- JKIA – where he threatened Feisal (PW22). Later the same day he was spotted in a vehicle headed for Nairobi city in company of Waweru (A2). That the court should infer evidence of conspiracy between Milan (A1) and Waweru (A2) to murder the deceased.

(k) That the bad blood in the Akasha family is as a result of differences in a polygamous family. They usually differ and patch-up. The court should not infer more than domestic differences.

As against Omar (A3), Mrs. Ogoma submitted that there is evidence of identification by Amani Safari (PW1) in a parade.

The prosecution set out to prove that it was Milan (A1), Waweru (A2) and Ahmed Omar Abdullahi (A3) with malice aforethought who killed Kamaldin Akasha, the deceased herein.

In that mission the prosecution set out to piece together certain events which they placed before me as circumstantial evidence and direct evidence connecting the three accused persons with the death of the deceased herein.

These events, on the evidence, as they relate to the Milan (A1) and Waweru (A2), 1st and 2nd accused respectively are as follows:

(a) That Nuri Akasha alias Tinta introduced the late Ibrahim Akasha Abdallah, to Milan (A1) to do drug business. Waweru (A2) encouraged the late Ibrahim Akasha to relate to Milan (A1) business-wise.

(b) That Milan's (A1) house at Nyali in Mombasa was burgled into and a substantial tonnage of hashish stolen therefrom.

(c) That hashish was apparently sold to Magdi a drug baron-cum-café owner in Amsterdam.

- (d) It created bad blood between Milan (A1) and Nuri alias Tinta on the one hand and Waweru (A2), Kamaldin (deceased), the late Ibrahim Akasha Abdallah, on the other hand.
- (e) In the year 2000 Senior Akasha was taken ill. He traveled to Amsterdam for treatment and also to resolve the dispute between his family and Milan (A1) and by strange coincidence he was shot dead in Amsterdam on 3rd May 2000 in company of his wife Hayat (PW16) when going to meet Magdi and Milan (A1) at Magdi's coffee shop.
- (f) Magdi cautioned, Hayat Akasha (PW16) while on the way to Amsterdam Police Station, not to mention Milan (A1) as a possible suspect in the murder of her husband. That doing so would land her in trouble.
- (g) Magdi himself is later shot dead in the year 2000 in circumstances which mirror the death of Ibrahim Akasha Abdallah.
- (h) Milan (A1), according to Baktash Akasha (PW25) threatened the family that he would eliminate them one by one. The tape where the alleged threats are contained is ruled inadmissible in evidence by the court. That leaves oral evidence of Nuri Akasha (PW8), Hayat Akasha (PW16) and Feisal Akasha (PW 22).
- (i) Kamaldin Akasha is shot dead on 28th March 2003.
- (j) Hayat Akasha, (PW16) Feisal Akasha (PW22) and Nuri Akasha alias Tinta (PW8) blame it all on Milan (A1). They argue that Milan (A1) always threatened members of their family.
- (k) That Milan (A1) is a suspicious character because he has dual citizenship and consequently two passports – Former Yugoslavian and French.
- (l) That though there was bad blood in Akasha family characterized by in-fighting this was as a result of differences in a polygamous family. It could not have resulted in one of them resorting to killing their own.
- (m) That it must be Milan (A1) – Waweru axis responsible for the murder of Kamaldin therefore.

These events, on the evidence, as they relate to Ahmed Omar Abdullahi alias Amado (A3) are as follows:

- (a) that he was identified by Amani Safari (PW1) at an identification parade as the gun' man (see exhibits 3).

Thus the prosecution's case as it relates to Milan (A1) and Waweru (A2) is purely circumstantial evidence. While the prosecution's case as it relates to Ahmed Omar Abdullahi (A3) is based on direct evidence.

The defence case, so far as is discernible from the cross-examination and submissions on no case to answer, as relates to the Milan (A1) and Waweru (A2) is as follows:

- (a) Kamaldin was murdered by Nuri Akasha alias Tinta, (PW8) the son of Hayat Akasha, (PW16) the 2nd wife, of the late Ibrahim Akasha Abdallah. [(see evidence of Baktash Akasha (PW25) and Hassan Akasha (PW2)].
- (b) That Nuri Akasha (PW8) and her mother Hayat (PW16) are shifting the blame on Milan (A1) and Waweru (A2) and portraying them as having been the hidden hand behind the murder of Kamaldin.
- (c) That there emerged, so to speak a, "civil war" in the late Ibrahim Akasha Abdallah's "empire"

immediately following his death by reason, inter-alia, of a foreign account in Netherlands. Ibrahim Akasha Abdallah and Kamaldin, the deceased, used to travel together quite often to service this foreign account among other things.

- (d) When the senior Akasha is shot dead in Amsterdam, he was in the company of Hayat Akasha (PW16) the mother to Nuri Akasha alias Tinta (PW8). That even Tinta was by coincidence in Germany, which neighbours Netherlands, and Tinta was the first member of the Akasha family to have reached Netherlands, immediately Ibrahim Akasha Abdallah was shot.
- (e) That the hidden hand behind Kamaldin's death was Nuri Akasha alias Tinta who swore to "show" Kamaldin the same week Kamaldin was shot. See evidence of Baktash Akasha (PW25) and Hassan Akasha (PW2).
- (f) That Nuri Akasha alias Tinta murdered Kamaldin together with Milan, a truck driver - cum- hitman from Macedonia who was a close friend to Tinta. This Milan was arrested at a nightclub in south coast., Mombasa. This Milan was in the company of Tinta between 7.00 p.m. and 9.30 p.m. on 28th March 2002. By coincidence that was the period within which Kamaldin was shot.
- (g) That the arrest of Milan (A1) and Waweru (A2) two and a half years after the death of Kamaldin was a massive cover-up by the police who let the real murderers go scot-free.
- (h) That the alleged threats to Hayat Akasha, (PW16), Feisal Akasha (PW22), and Nuri Akasha (PW8) are really a red herring.
- (i) That in any event, Milan (A1) left the country through Moi International Airport Mombasa on 27th March 2003 at 13.10 hours, a day before the murder of Kamaldin, and could not be the assailant who pumped five bullets into the body of Kamaldin. Milan's alibi has not been displaced by the prosecution.
- (j) That Waweru is merely a victim of circumstances. He is guilty by association. Association with the late Ibrahim Akasha Abdallah, Milan (A1), Akasha's sons and the Mombasa – cum – international drug trafficking curtail.
- (k) That the prosecution's case is full of material contradictions. The same is discredited and hence worthless.

The defence, case as it relates to Mohammed Omar Abdullahi (A3), so far as is discernible from the cross -examination and counsel's submission is as follows:-

- (a) You are wrong: This man does not fit the description given by Amani Safari (PW1) - white and slim. Zacharia Charo's testimony is that the gun'man was "tall, very brown and had a cap. He looked like an Arab". This is material contradiction.
- (b) In any case the identification parade was challenged by the accused contemporaneously with the event.
- (c) This is a case of a single identifying witness. The evidence must be tested with the greatest care and circumspection. It does not meet the test laid in R V TURNBULL (1967) 3 ALL E.R 549.
- (d) Some witnesses summoned in the Mombasa trial like Zacharia Charo (CD 2), were conveniently excluded from this trial. The court should infer that their evidence, if received, would have been adverse to the prosecution's case.

Section 306(1) of the Criminal Procedure Code provides:

"(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence

shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

Section 306 (1) (Supra) is the equivalent of Section 210 of the Criminal Procedure Code which relates to Criminal trials before the subordinate courts in our jurisdiction.

Section 210 of the Criminal Procedure Code provides:

“ If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

What amounts to a prima facie case under the equivalent of the Tanzanian provision was considered by the court of Appeal for Eastern Africa in RAMANLAL BHATT V R (1957) EA 332 at page 334 thus:

“ Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of prosecution, the case is merely one:

“ which on full consideration might possibly be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed, it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

Applying those principles to the current case it is clear to me that the prosecution set out to prove by way of circumstantial and direct evidence that it was Milan (A1), Waweru (A2) and Ahmed Omar Abdallah alias Amado (A3) who killed Kamaldin on the night of 28th March 2003 at Sam Sam petrol station.

The first fact which the prosecution set to prove was that there was drug business relationship between Milan (A1) and Waweru (A2) on the one hand and Ibrahim Akasha Abdallah (senior Akasha) and Kamaldin Akasha, the deceased herein, on the other hand.

That Milan’s (A1) house at Nyali in Mombasa was burgled into and substantial amount of hashish stolen therefrom. That hashish was sold to one Magdi an Egyptian drug merchant with a coffee shop in Amsterdam, Holland. The proceeds were then pocketed by Ibrahim Akasha Abdallah’s family.

The episode created bad blood between Milan (A1) on the one hand and Waweru, (A2), Kamaldin (deceased), Ibrahim Akasha Abdallah (deceased) and Magdi (deceased) on the other hand.

In an attempt to settle the dispute Ibrahim Akasha Abdallah flew to Amsterdam. He was shot dead on the 3rd of May 2000 in the Red-Light District in company of his wife Hayat (PW16) while en route to meet Magdi and Milan (A1). It disturbed business in the Red-Light District with the “girls” chasing the

gunman on foot.

Magdi cautioned Hayat not to mention Milan's (A1) name contemporaneously with the shooting of Ibrahim Akasha Abdallah. Magdi thought that it would endanger her life. In which event Magdi thought that it was Milan (A1) behind the murder. The Netherlands police and the Kenya police have to date not established who was behind this heinous crime.

Shortly thereafter Hayat, Akasha (PW16), Feisal Akasha (PW22) and Nuri Akasha alias Tinta all claim to have received death threats from Milan (A1). The death threats as they relate to Hayat Akasha (PW16) and Feisal Akasha (PW22) were given in direct evidence in court. The one relating to Baktash Akasha was embodied in a tape which was not admitted in evidence and hence the court did not benefit from the same.

Magdi himself was shot in Amsterdam in the year 2000 in circumstances which mirror the death of Ibrahim Akasha Abdallah.

Kamaldin himself was shot in the year 2003 in circumstances that mirror the death of Ibrahim Akasha Abdallah, and Magdi.

Against this backdrop, I am of the persuasion that the evidence in this case as relates to Milan (A1) and Waweru (A2) was entirely circumstantial. In R -Vs- KIPKERING ARAP KOSKE & ANOTHER [1919], 16 EACA 135, 136, the Court of Appeal quoted from WILLS ON CIRCUMSTANTIAL EVIDENCE (6TH EDITION, P311) thus:

“..... In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation on any other reasonable hypothesis other than that of his guilt.”

There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the other party, accused.

From the evidence on record it is clear to me that there are other co-existing circumstances weakening the chain of circumstances relied upon.

(a) There is evidence that Nuri alias Tinta (PW8) told Baktash Akasha (PW25) that he would “show” Kamaldin. This was one week before Kamaldin was shot. Nuri told Baktash that he was under pressure. That someone was pushing him.

(b) When Baktash heard the news that Kamaldin was shot, he immediately said at the scene thus :

“ This has been done by Tinta”.

(c) Hassan Akasha (PW2) on receiving news of Kamaldin's death also said instantly that the deceased had been killed by Nuri Akasha alias Tinta who was their biggest enemy,

(d) As a result Nuri Akasha (PW8) was duly arrested and detained for 9 days together with his other brothers and half brothers. His gun was also confiscated but later returned.

(e) On the night of Kamaldin's murder, Nuri Akasha alias Tinta was in the company of a Yugoslavian from Marcedonia by the name Milan whom the Daily Nation of 31st March 2003 described as a hitman. This Milan was a suspect. He was arrested at a South Coast Night Club in Mombasa. This Milan was interrogated but left off the hook by the police on the basis that there was no evidence to link him the murder. This Milan also dies mysteriously soon after his release (see evidence of Nuri Akasha (PW8)

(f) There is evidence that after the death of Ibrahim Akasha Abdallah a “civil war”, so to speak, engulfed his business “empire”. Nuri was the chairman of the assets distribution committee. Kamaldin knew about the foreign account with substantial loot. Kamaldin used to travel outside the country with the late Ibrahim Akasha Abdallah to service the account among other things.

(g) Milan (A1) left Kenya by a flight from Moi International Airport on 27th March 2003 at 13.10 hours one day before Kamaldin was shot. Hence could not be the gun-man described by eye-witnesses. (see evidence of Evan’s Kinyanjui PW17).

Against this backdrop it is my judgment that the other co-existing circumstances weakened the chain of circumstances relied upon by the prosecution. The prosecution witnesses testimony contradicted each other in material particulars. In sum, the prosecution’s evidence is worthless discredited evidence.

The evidence adduced by the prosecution to that extent does not satisfy the legal requirements of circumstantial evidence to put Milan (A1) and Waweru (A2) on their defence.

As against Ahmed Omar Abdullahi (A3) there is the evidence of Amani Safari (PW1). No doubt Amani Safari (PW1) is a single identifying witness whose evidence has to be tested with the greatest care and circumspection, (See RORIA V R (1957) E.A 583. That cannot be done unless the identifying witness had made a report as to whether he/she could identify the assailants and given the description of the assailants to the authorities.

His ability to identify the accused is then to be tested on an identification parade (see R V MOHAMMED BIN ALLUI (1942) EACA 72, AND SHABAN BIN BONRDI [1940] EACA 60.

This principle of testing with greatest care and circumspection was laid down in R V TURNBULL [1967] 3 ALL EL 549 thus:-

“ The judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under his/her observation? At what distance? In what light? Had the witness ever seen the accused before? How often? If only occasionally, had he or she any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused’s actual appearance.”

Having these principles in mind, I am of the persuasion that identification of Ahmed Omar Abdallah (A3) was faulty. There is nowhere to pick any material discrepancy between the description of the third accused given to the police by the witness when first seen by him and the accused actual appearance. As a matter of law, I am of the persuasion that identification by Amani Safari (PW1) is almost worthless. It is trite law that a single identifying witness evidence must be tested with the greatest care and circumspection (see PETER MWANGI MUNGAI V REPUBLIC CRIMINAL APPEAL NO.140/2000 (C.A.):

The police omitted to summon Daniel Kiarie Mwangi (PW12) to the identification parade yet he was at the scene and gave evidence in court. Equally the police omitted to call Zakaria Charo (CD2) a witness who gave evidence in Mombasa H.C.Cr. No.5/2003: – R V AHMED OMAR ABDULLAHI (A3) and absolved accused 3. It is trite law that when the prosecution fails to call a witness whose evidence is material, then the court ought to infer that his evidence would have been adverse to the prosecution’s case (see BUKENYA V UGANDA (1967) E.A. Those omissions are so material and begs so many questions. To my mind it lends credence to the defence assertion that there was a massive cover up by the police. That the three accused persons are merely scape-goats. In my judgment the real killers of the deceased are out there. In coming to that conclusion I have particularly in mind the evidence of Baktash Akasha (PW25) who said that Kamaldin’s death was not a one man show - several people were involved. It could have been a family feud as much as it could have been international drug trafficking curtail war. The modus operandi mirrors the Chicago drug cartel “wars” during the “reign” of Al Capone as captured

in the book "CHICAGO GANG WARS OF THE 1940s". No wonder Hayat Akasha testified that her husband was involved in mafia like activities.

For those reasons I find as a matter of law that the prosecution has failed in its duty to establish a prima facie case against any of the three accused person.

If there was any evidence against them, the same has not been brought to the attention of the court with the consequence that the court has not benefited from the same.

Accordingly, I enter a verdict of NOT GUILTY under Section 306(1) of the Criminal Procedure Code. I acquit all the three accused persons of the charge of murder. They are set free unless lawfully held for some other lawful reasons.

DATED and delivered at NAIROBI this 2nd day of February, 2007

N. R. O. OMBIJA

J U D G E