



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

Criminal Case 185 of 2003

REPUBLIC
PROSECUTOR

VERSUS

**1. COLLINS KATORE KILEL
2. RAMADHAN KARUME OTIENO
3. MOSES GITOGO MBUTHIACCUSED**

JUDGMENT

The deceased **Dr. Crispin Odhiambo Mbai** was at the time of his death, a known figure in our society. He was a University Professor and apart from that, he was chairing a committee on Devolution of Power in the Constitution of Kenya Review Commission popularly known as CKRC.

It has been amply proved that the deceased was shot on head and chest on 14th September, 2003 and he was rushed to hospital where, while undergoing treatment, he expired the same evening. Cause of death as per Dr. P.K. Maundu was gun shot wounds on head and chest and Brain contusion haemorrhage, lung collapse and Haemothorax.

The prosecution tried to give political motive to the death through testimonies of Margaret Awino Odhiambo (PW.1) widow of the deceased as well as his sister Beatrice Atieno Mbai (PW.2). PW.1 was not present when the incident occurred and apart from stating how she was received by Hon. Nyagah (PW.23) who broke the news to her and took her and her other relatives to Nairobi Hospital as well as gave her help with food and some money to look after the visitors who flocked in great numbers, told the court that the deceased had, later in the same week, complained to her that the Constitution Review process was not going on in its right direction and that some ministers like Hon. Murungaru were using threatening language and that they were going to ask for security on Monday (next day to the incident) during plenary session. She also testified that on reaching home from the hospital after the deceased died, she found the house cleaned and no signs of shooting were visible. As per her evidence, Hon. Nyagah explained to her that scene was cleaned under his instructions because she would be shocked if she saw it. She also stated that initially the Nyagahs were very supportive and helpful but from 17th September, 2003 they stopped coming to the house. This was because people had started pointing accusing fingers at him and he also asked her if what they were talking had not reached her. She further stated that maid of Hon. Nyagah and that of Mr. Kariuki, both next door neighbours to her, refused to go with the police without prior consent of Hon. Nyagah when she approached them. As far as the actual incident was concerned, she could only state that when she left the house at 2.15 p.m. the 1st Accused, who was a day watchman, was not at the gate. But during cross-examination she agreed that there was nothing peculiar about his absence at the gate as he was used to be sent for errands by the neighbours/Residents of the estate. She further stated that the same morning she herself had sent him to buy newspapers.

PW.2 had met the deceased on 13th September, 2003 and the deceased talked to her that some people were keen on scuttling the process of Constitutional Review and that death threats were issued against many including Hon. Raila Odinga. But she fell short of mentioning that such threat was actually issued against the deceased. As against these testimonies Senior Assistant Commissioner of Police Wakesa Nyaweri (PW.32) testified that he was one of the Senior officer involved in investigation of this case and was concentrating on investigating the political side of the offence. He recorded statements from several politicians and delegates of CKRC including that from Professor Ghai its chairman. He specifically stated that he did not receive any convincing evidence to link this case with political assassination.

Even the Learned prosecuting counsel, Mr. H. Okumu, in his submissions contended that this was a case of attempted robbery and I can safely state that, by so saying he had discarded the issue of political motive behind this case. Moreover, I do not have any further evidence to ponder on that issue and shall deal with this case accordingly.

The case against the 1st Accused as per evidence on record, is based on the fact that he was not on his duty, i.e. he was not at the main gate of the estate and that against the other two accused persons is on identification. They also have raised a defence of alibi in their respective testimonies.

I shall now dwell on the evidence of the prosecution led in order to prove the guilt of the Accused persons as charged. The Accused persons are jointly charged with others not before the court with murder of the deceased.

It is undoubtedly proved by the prosecution that the deceased, while in the sitting room of his home at Adams Arcade Estate, was shot by a group of persons at about 2.30 p.m. (between 2 p.m. to 3 p.m.) and after screams of help from his daughter Catherine Atieno Mbai (PW.6). Hon. Nyagah (PW.23) and Rosyline Naliaka (PW 5) a housemaid of one Mr. Kariuki the occupant of adjacent house went to her succor. They found the deceased in a pool of blood behind a chair and with help of others amongst people who had gathered (including Fredrick Okumu PW.9) put the deceased in Hon. Nyagah's vehicle and drove him to Nairobi Hospital. Several witnesses attached to the said hospital were called to testify how the deceased walked upto the waiting stretcher and how he was treated and how he succumbed to death while on operation table. They were Dr. Josiah Rutui (PW.8) looking after emergency cases, PW.14 Judith Gacheri Kinoti a nurse attached to Accidents and emergency Department of Nairobi Hospital and PW.19 Evelyn Katembo Sanda a nurse attached also to the said Department of Nairobi Hospital. Hon. Nyagah also described vividly his difficulties in getting the deceased admitted and treated in the hospital. The prosecution could not connect the mystery of missing shirt of the deceased from Nairobi Hospital to the present case despite the fact that witnesses related to the deceased had put stress on its unavailability. PW.6, PW.9 and PW.23 (Catherine, Fredrick and Hon.Nyagah) also testified that the deceased on the way to the hospital, as well as while he was carried to the vehicle which took him to the hospital, was uttering in dholuo language to the effect '**They killed me, why they are killing son of Mbai?**'. The prosecution has also failed to show its importance or any relevance to the present case.

Now I shall look at the evidence on what happened after the deceased was taken to the hospital.

PW.12, P.C. Patrick Oyalo on patrol with his co-officers received a radio call at 2.50 p.m. on 14th September, 2003 to proceed to Joseph Kangethe Road where gangsters were reported to have shot someone. On arrival there, nothing was found by them. On further checking and seeking instructions they were directed to the proper scene and found several senior officers and Administrative police officers already on scene. He was informed by Mrs. Nyagah (PW.27) that she saw three young men walking towards the house of the deceased but did not suspect anything. She then heard a loud bang and screams from that house.

The door of the deceased's house was opened and he entered. He saw the scene which was in disorder and full of blood. Three spent cartridges were recovered from the scene. He also confirmed that the house was cleaned by a relative before the investigation was carried out but he was not aware that 1st Accused actually helped in cleaning.

PW.20, APC Shaban Nzungu is one of many officers who went to the scene after alert and was the one who climbed to balcony of the deceased's house to open the main door so that other officers could enter the house and visit the scene.

PW.13, Supt. of Police Murenda Kathuri went to the hospital after the news reached him. He attended the post mortem on the body of the deceased on 19th September, 2003 and received a bullet head (Ex.9A) which he kept in safe custody. Similarly PW.10 Robert Omulama a security officer at Nairobi Hospital kept a bullet head recovered by the hospital in safe custody to be delivered to the police.

PW.18, Cpl. William Sayanga testified that on the material date he waited for 1st Accused at the scene upto 10 p.m. and that the next day when he arrived at 8.30 a.m. he escorted him to Kilimani Police Station. He in addition took blood samples of the deceased, his clothing (Ex.1 and 7) and three bullet heads recovered from body of the deceased to government chemist for analysis and also collected their reports (Ex.13, 14 and 20). He was asked in Cross-examination but denied that he was told that the 1st Accused helped in cleaning the scene the same afternoon.

PW.22 is Wilfred Kariba Marinda, retired Ag. Assistant Commissioner of Police. He visited the hospital and tried to calm the threatened unrest by University of Nairobi students who came in large numbers after the news of death was spread. He described the act of cleaning the scene before Scenes of Crime personnel visited the scene as unprofessional. However, he emphasized that the Police reservist who was said to have given an O.K to do the same denied having done so when contacted by him on phone.

It may be appropriate to deal with the incident of cleaning the scene at this juncture. It has become evident that the cleaning was done before the Scene of Crime Personnel visited the same. PW.1 Mrs. Mbai also testified that she found the home clean with no signs of shooting and was explained by Hon. Nyagah (PW.23) that he instructed the same because she would have been shocked to see the scene as it was. PW.4 Zakaria Okwaro Otieno a relative to the deceased testified that he saw the scene after the door was opened and that it was in disorder with pool of blood next to dining room. In the sitting room he found broken pair of eye glass (Ex.2) and a broken stool (Ex.3). He also saw blood stains on a chair (not produced). Any way he then testified that Mrs. Nyagah instructed him to clean the scene as Mrs. Mbai (PW.1) would be shocked to see it.

This she did after three spent cartridges were recovered by the officers who were on the scene. He further testified that 1st Accused arrived when he was talking with Mrs. Nyagah and informed them that he had gone home to change his clothes as someone poured water on his jacket. He however, stated that he agreed to clean the scene after Mr. Nyagah told that he had confirmation from the police to do so, and that he was helped by the 1st Accused in cleaning.

Hon. Nyagah (PW.23) so far as the cleaning of the scene is concerned stated that relatives of the deceased told him, on his arrival back from the hospital, that police had finished their work and he got that confirmation from the police on telephone. He denied any involvement with the cleaning.

Mrs. Nyagah denied that the late Police Reservist Mr. Nottingham instructed her to clean the house and also the averments that she instructed someone to clean the house. She only stated that she told the relatives of the deceased that it was alright for them to enter the house after the said Reservist informed her that they had received three spent cartridges from the scene. The proof of death of Police Reservist Nottingham is not before the court.

Continuing with evidence of police officers who visited the scene, PW.22 stated that he visited the scene the next day and Forensic experts were called who lifted blood stains from the floor of motor vehicle of Hon. Nyagah. He questioned 1st Accused that day who in response told him that at the material time he had gone to change his shirt which was soiled after he fell near stairs of servants' quarters. He arrested 1st Accused after his interrogation the next day and arrested 2nd and 3rd Accused after investigations were made. He specified that he was only instructed at 7.10 p.m. on the material date. During his investigation he confirmed the fact that Nyagah was in Mombasa the previous day of the incident and arrived at

Nairobi past noon the material date. PW.24 Morris Kavila from Kenya Airways also confirmed this fact.

PW.26 I.P. John Ndungu accompanied two Forensic experts to the scene the next day. He also recorded statements from witnesses from neighbourhood and was assisted by Nyagahs by way of permission to use their house while doing so. He was amongst officers when 2nd and 3rd Accused were arrested on the night of 18th and 19th September, 2003 at Kawangware. He also stated that the 1st Accused arrived at the estate at 2 p.m. on 15th September, 2003 while earlier testimonies are on record to the effect that he was there in the morning and was arrested then.

PW.28 ,Ag. IP George Ojoni was also amongst many officers to have arrived at the scene after information on a shooting incident was received. He got details of what happened from Mrs. Nyagah (PW.27). Up to the time he left the scene to go to Nairobi Hospital, according to him the scene was preserved. He prepared a sketch plan of the scene (Ex.25 A and Ex.25 B), the next day. According to him he saw Police Reservist Nottingham on the scene on the material date.

PW.16, PC Stephen Nyami is Scene of Crime personnel and took photographs of the rearranged scene but did not collect anything as the scene was already tampered with.

PW.29, former IP Daniel Kimathi took photographs of the deceased during post mortem and produced the same as exhibits (Ex.28). He also produced two photographs of a motor vehicle Reg. No. KAL 588Y kept at Pangani Police Station.

PW.36 Stephen Nyanjui Mbai agreed that he was the owner of the said motor vehicle which he used for his matatu business. Despite great efforts from the Learned State Counsel, he stood fast on his stand that the said motor vehicle was at his home in Thika and that the statement which was shown to him during his testimony was not his and also denied that it bore his signatures. Efforts by the prosecution to link his motor vehicle with the offence, in so much so that the accused persons boarded the same after escaping from the scene, did not bear any fruit at the end of testimony of PW.36.

I have indicated a part of testimony from PW.32 Snr. ACP Wekesa Nyamweri. I shall however note that he was heading investigations team upto October, 2003 and handed over the Investigation file when he went to attend a police course. He agreed that one suspect known as 'Gabow' was still at large who was suspected to be the owner of the murder weapon which, it appeared, was not recovered.

PW.33, IP Samuel Mukuri reiterated how on arrival at the scene on material date, Mrs. Nyagah gave them details of the incident and how the main door of the deceased's house was opened with help of a young relative and an AP Officer. He confirmed recovery of three spent cartridges from the scene (Ex. 12A, 12 B and 12 C). He also stated that the scene was not preserved and that he did not see any Forensic Officer on the scene when he left to go to hospital.

PW.34, A.C.P. Henry Ondiek and PW.35, Insp. Boaz Otieno visited the scene the next day. PW.35 reiterated that the 1st Accused was arrested after he finished cleaning the vehicle of Nyagahs and also confirmed that maids of Mr. Kariuki and Nyagahs refused to accompany him to the Police station to attend an Identification Parade unless they got prior permission from Hon. Nyagah. Out of these two maids only Rosyline Naliaka (PW.5) maid of one Mr. Kariuki was called to give evidence. PW.35 also confirmed that one suspect known as 'Gabow' was still at large and that during searches made in the houses of all the Accused persons no material or relevant evidence was recorded.

Government Analyst's report was produced by PW.31 Mrs. Rose Nyabona Gituku. After DNA tests were carried out, it was found that the blood stains on the deceased's clothes, those on stool and other items from his house, were generated from the deceased. It was further found after the required tests that the blood stains found from the clothes of 2nd and 3rd Accused persons were generated from their respective blood. There was no conclusive finding on the blood stains found on the bed sheet recovered from house of the 1st Accused person.

After elaborating on the said evidence I shall now deal with evidence of identification.

There are two witnesses who said that they saw the perpetrators of this heinous crime, and they are Roseline Naliaka (PW.5) and Fredrick Okumu (PW.9). Mrs. Nyagah (PW.27) has also stated that at about 2.30 p.m. on the material day she went up to dress her baby and she saw two young men passing through her window. After sometime she heard loud bangs which, according to her, were coming from the house of the deceased. Immediately thereafter she saw the same two young men walking towards the gate. She said she could not identify them as she was not wearing her glasses. At the most, her evidence would corroborate testimony of PW.5 that she also saw two young men around the same time rushing towards the gate.

According to testimony of PW.5 at around 3 p.m. on the material date, she went out to open the house gate for her employers to leave. She looked towards the main gate which was open and she did not see 1st Accused manning the gate, but was quick to say that she saw him there at 1 p.m. when she came back from the church. She stayed for a while outside and then she heard two gun shots coming from the deceased's house and immediately thereafter she heard screams of Catherine (PW.6) shouting "**come and help – my dad is dying!**". She went inside her own house and pressed security alarm. When she came out she saw Hon. Nyagah struggling to jump over the gate of the deceased's home. She then recalled that when she was opening the gate for her employer, she saw one young man unknown to her walking up and down twice from servant's quarters to main gate. She described his dressing and said he wore glasses, yellow jumper and blue jeans. However, she did not see him when she heard the gun shots and thought he must have gone out from the main road. Then when she heard screams of Catherine she saw two young men coming out from the deceased's house. One person of about 18 years of age was wearing a black V-shaped T-shirt and blue trousers and the other was wearing a **cream jacket**. She then testified that one of them, without specifying which one of the two, talked to her and said "**who is this mzee? Tell him to leave his stupidity**". This he said while he was at a distance of about 4 to 5 feet from her. She noticed a scar on his face which was swollen. She stated that she knew 1st Accused as Collins who was a day watchman of the estate. She also stated that she saw him on the compound after police had left. Contrary to what police witnesses stated, she told the court that she gave a hammer to a police who broke open the door of the deceased.

This witness identified 2nd Accused in an identification parade as a person with a scar and agreed that no one else in that parade had any scar on their faces.

This witness also had recorded three statements before the police. The first one was at about 8.15 p.m. on the fateful day i.e. on 14th September, 2003. In that statement she has not mentioned either the suspicious man walking up and down or the two young men running towards the gate and passing her. She talked about gun shots, screams of help from Catherine, Nyagah trying to enter the home, switching on of alarm by her, she herself entering the home, and seeing the deceased crawling in pain, blood all over the floor, a broken stool lying at the stairs, she helping the deceased being placed in Nyagah's car by holding his head which oozed blood and lastly locking the door of the deceased's home on instructions from Catherine.

Her second statement shows the date of 17th September 2003. On that statement she talked about a suspicious man and two young men running passing her. About the conversation between herself and one of them, she stated that he asked '**hii mzee nini?** And she asked him, "**nani?**" but he did not respond to her. She saw him zipping lower part of his cream jacket and that he had a swollen cheek. She did not mention having seen a scar in this statement.

The third statement of 19th September 2003 mentions that she identified 2nd Accused by his talks, scar on his face and facial appearances. I have detailed contents of these three statements because they all are produced as exhibits and thus are part of the record of this case. Both defence and state counsel have also made emphatic submissions on her identification.

Identification parade form (Ex.29) mentions that the suspect was identified after being asked to talk, walk and run. No mention of any scar is made in this form.

PW.30, Ag. IP Macharia Brian conducted the said Identification Parade. He agreed to the question from the defence counsel that the witness (PW.5) did not give him any description of the suspect before he identified him.

Fredrick Okumu (PW.9) at the time of the incident was working as a day watchman at Adams Arcade Secretarial College. At about 2.45 p.m. while he was talking on his mobile phone to his brother, he saw three young men coming from the deceased's house at a distance of about 300 meters. He did not have any reason to suspect them and did not look at them or their dressing. According to him, he saw them running to catch a matatu which stopped and they boarded it. At that time according to him he saw their dressing from a distance of about 100 meters. Two of them were wearing jackets and jeans and the third was wearing a black T-shirt with yellow sleeves. He had not heard any commotion and when his wife came to him and informed him that there was a problem he went and saw crowd of people gathered near Nyagah's home. His testimony as regards how he helped Hon. Nyagah to take the deceased to hospital need not be gone into in details except to corroborate the testimony of Hon. Nyagah (PW.23).

He testified that he told the police that it would be difficult for him to identify any of the three persons whom he saw on the material date. However, Police insisted that if he could not identify them by appearance then he could identify them from clothes they were wearing. He thus agreed during cross-examination that he did not see their faces and was going to identify the jackets they were wearing. He stated that he identified 3rd Accused because of brown jacket he saw that day and similarly identified 2nd Accused by a black jacket. As against this evidence, PW.5 had stated that she saw him wearing a cream jacket. He further conceded that on Identification Parade held at Pangani Police Station only 2nd Accused was wearing a jacket amongst all members of the parade.

PW.21, IP Thomas Chemweno was the officer who conducted Identification Parade at the request of Insp. Boaz Obetto. He insisted that the parade was conducted as per the Police Force Standing Orders. He however agreed that he did not remember how many members were wearing jackets but agreed that all should, if one is wearing a jacket. He also did not recall the identifying witness telling him that he identified 2nd Accused because of the jacket.

PW.25, Chief Inspector Peter Matu conducted Identification Parade wherein 3rd Accused was identified by Frederick Okumu (PW.9). He denied that he asked the witness to identify a jacket and that only the 3rd Accused was wearing the jacket amongst members of the parade. He denied a specific averment against him that he was one of the officers who assaulted all three Accused persons while in custody.

I may state here that PW.35 IP. Boaz Obetto is one of the police officers who is interdicted on allegations and subsequent charge of assault against these Accused persons. It has not come out clearly on record that C.I. Peter Matu (PW.25) is one of those officers.

Ho. Nyagah gave detailed and emotional story of how he helped to rush the deceased to Nairobi Hospital and also to get him admitted and treated. He also stated how he tried to help as a good neighbour and Christian to assist the bereaved family but had to abandon the same as a result of heightening criticism and suspicion as to his involvement in this crime. In my view, it is amply proved that he was in Mombasa the previous day and came back to Nairobi after noon of the material date. He and Mrs. Nyagah clearly denied averments made by some of the prosecution witnesses that they instructed PW.4 to clean the scene before police completed their investigations. I do not think their testimonies apart from aforesaid, help the prosecution in any way.

Lastly I shall state that the evidence of Ballistic Expert (PW.15) Mbogo Donald Mugo did not give any relevant fact as he was not given any .9 mm revolver which could match with .9 mm spent cartridges and fired bullets given to him for examination.

The Accused persons in rebuttal of what was the prosecution case, gave sworn testimonies.

1st Accused testified that on the material date while he was on duty as a day watchman, he was given

general errands as usual. Contrary to what all relevant testimonies of prosecution witnesses, he told that some minutes after 2 p.m. he was sent to Adams Arcade by one Chege from servants' quarters to buy eggs. He did so and on his way back he saw the vehicle of Hon. Nyagah speeding with hazard lights on. He saw a crowd gathered in the estate and was told by Rose Naliaka (PW.5) that the deceased was shot. He helped a young man to clean blood from the house of the deceased. He confirmed that he was arrested the next day when he was cleaning the soiled vehicle of Hon. Nyagah. Alibi given in his testimony is different from what prosecution witnesses had stated. According to PW.22 he also checked on this alibi from the Prosecution witnesses and found not to be true.

2nd Accused testified that from 10 a.m. to 2 p.m. of the material day he was at Kawangware sports ground. He then stated how on 19th September, 2003 at about 2 a.m. he was woken up and was placed with several others who had been rounded up by the police.

He also contested veracity of identification parades wherein he was identified by both PW.5 and PW.9 by stating that the lady (PW.5) had seen him in the police station and that he was asked to wear a jacket by the officer and he was the only one wearing a jacket. In respect of first parade he also stated that the members of parade were different in height, appearance and age.

He was closely cross-examined by Mr. H. Okumu as to his previous testimony in a case before Chief Magistrate's Court, and responded that he was asked to state what he testified by the prosecuting counsel himself. He agreed he lied before that court due to force exerted and that whatever he was stating in that court was what he was told in the video taped version shown before the court. In any event no light was shed as to the contents of that video tape, and thus I shall not presume or surmise anything in that respect.

Accused 3 testified that he worked as a tout with a matatu owned by his father. On the material date he was plying on route 46 from 5.00 a.m. to 11.00 p.m.

He also testified how on 18th September 2003 at around 11 p.m. while he was coming back home with driver of the said matatu they were arrested and rounded up with several other people.

On his identification by PW.9 he stated that he was pointed out by C.I. Matu of Pangani Police Station. He was joined in a line of people consisting of different height and status. He wore a black jacket and was identified because of that. He specified that around 2.30 p.m. on the material date, he was along Gitanga Road coming from Kawangware.

In short all of them raised the defence which in normal parlance is termed as Defence of Alibi meaning they told the court that they could not be at the scene of crime at the time when incident is said to have occurred as they all were somewhere else.

It is no doubt that none of the accused persons has called any witness to support their respective alibi. But in law, do they have the onus to prove the same?

Law as regards trial of murder cases after amendments made vide Act No.5 of 2003 has been drastically changed. The full trial procedure known as committal proceedings (trial for committal) has been deleted by the enactment of the said Act. Section 235 of CPC (now repealed) did cast an obligation on the magistrate to give alibi warning to the accused and that too in specified words.

In effect, thus the said obligation is not there. By necessary implication therefore the law of alibi as generally applied to the criminal trial has to take effect.

In the case of **Kiarie –V- R. (1984) KLR 739 at 745, the Court of Appeal** has stated that an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge prepared against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. In short, the alibi should be sufficient if the court thinks that it could be probable that it happened.

The defence of alibi obviously shall be distinguished from the statutory defences such as self-defence and diminished responsibility (see Section 111 of Evidence Act).

The case of **Leonard Aniseth –V- R. (1963) EACA. 206** also stipulates and confirms my aforesaid observations.

In view of the provisions of Section 309 of Criminal Procedure Code (especially when the provision for alibi warning has been repealed), the prosecution could have, if deemed fit, applied for permission to call for evidence to rebut, the said defence.

In any event, the accused persons testified under oath and were closely cross-examined.

1st Accused had testified that he was sent for errands. All the prosecution witnesses who were staying in the estate said with one voice that the watchman (1st Accused) was routinely sent by residents on personal errands. I have already noted the same in earlier part of this judgment. It is also on record that he was seen on the compound after the incident and that he helped PW.4 Zakaria Otieno a relative of the deceased, to clean the blood from the home of the deceased. This was definitely before Mrs. Mbai (PW.1) arrived home. With this evidence from the prosecution, and bearing in mind that the burden to prove the case against him beyond reasonable doubt is on the prosecution, I do find that his defence of alibi could be probable and raises a doubt as to his guilt. With this doubt I cannot but reach at the finding which I humbly do, that the benefit of the doubt shall be given to 1st Accused and I acquit him from the charge of murder as leveled against him.

As stated earlier the prosecution case against the 2nd Accused person is that of identification immediately after the incident. Two prosecution witnesses PW.5 Rosylina Naliaka and PW.9 Fredrick Okumu have stated that they saw him on the date of the crime. 2nd Accused has denied the validity of their evidence as well as identification during Identification parade.

Law as to identification in criminal jurisprudence is well settled and I do not have to add to or depart from those principles.

In the premises observed hereinbefore, simply put, I have to warn myself against any danger of errors in the identifications of these two witnesses specially when the prosecution substantially relies on these identification so as to prove the case against 2nd Accused person.

I have carefully detailed evidence of both these witnesses in the earlier parts of this judgment and do not think the same should be repeated.

PW.5 has described that he was wearing a cream jacket and had a scar on his face. I may only point out that she recorded three statements and she did not mention seeing any one in her very first statement. Moreover, although she had stated that she identified the 2nd Accused by a scar on his face and that no one else in the parade had such scar, the comment on the Identification parade form (Ex.29) does not mention the scar but contrary to that only states that the suspect was identified after being asked to talk, walk and run. This fact is not in her evidence. It is on record that PW.30 IP Makhokha had agreed that PW.5 did not describe to him the suspect so that he could select appropriate members of the parade.

While PW.5 specifically stated that she saw 2nd Accused wearing a cream jacket, PW.9 Fredrick Okumu described 2nd Accused as having worn a black jacket and identified him in the identification parade by the 2nd Accused by his dressing. He also readily agreed that he had not seen his face and only saw the dressings of three young men running and catching a matatu while he was talking on mobile phone to his brother. PW.5 had stated that she saw only two young men after she heard the shots from the deceased's house This was also the evidence from Mrs. Nyagah (PW.27).

This evidence on identification of 2nd Accused to say the least, does not take me out of the realm of

reasonable doubt. It is trite law that the witness should give details and circumstances of any identification to the authorities at the earliest opportunity. PW.5 did not do so while PW.9 was very hesitant to attend the identification parades as he had not seen the suspects by appearance. The details of the dressings vary as per testimonies of these two witnesses.

As has been laid down in the **case of Gabriel Kamau Njoroge –V- R. (1982-88) I KAR 1134**, it is trite law that before a parade is conducted and for it to be conducted properly, a witness should be asked to give the description of the suspect and the police would then arrange a fair identification parade. This has not been done in any of these parades. PW.21 IP Thomas Chemweno who conducted Identification Parade conceded that he did not remember how many members of the parade were wearing jackets having agreed all should have been wearing jackets, when the suspect was.

So far as 3rd Accused is concerned it was only PW.9 Okumu who identified him in identification parade conducted by PW.25 Chief Inspector of Police Peter Matu. PW.9 has stated that he was asked to identify the suspect by clothings and he identified 3rd Accused because of brown jacket he was wearing at the parade. It is also well worth noting that in his evidence he did not specify colours of jackets worn by the two young men when running on the material date.

PW.9 definitely cannot be placed in category of identifying witnesses who had sufficient and appropriate opportunity to properly identify the suspect to take the same out of possibility of mistaken identity. That is the reason he was rightly hesitant to attend identification parades but was forced into by the police with comments that he could identify the clothes, which he did by identifying the persons wearing jackets. It is also not on record that the descriptions of the suspects were given by this witness to the officers conducting Identification parades.

The evidence outlined by me on identification cannot, by any standard of proof, be termed as watertight so as to become basis for conviction of these two Accused persons.

In the **case of Raria –v- R. (1967) E.A. 583 at 584 Court of Appeal** stated and I quote:

“A conviction resting entirely on identity invariably causes a degree of uneasiness and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity”.

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification”.

Although 2nd Accused person is identified by two witnesses, neither their individual nor combined evidence met the standard of proof required to place reliance thereon.

The result of my observation will inevitably point to the fact that the prosecution has failed to prove the charge both against 2nd and 3rd Accused persons.

There is total absence of any proof of common intention of all or any of the accused persons in carrying out this heinous commission of crime.

I shall have no other alternative therefore, but to find, which I hereby do, that the prosecution has failed to prove the charge of murder as leveled against all the three Accused persons and thus I find

them not guilty of this charge.

I acquit them accordingly with the order that they be released forthwith, unless held otherwise as per law.

The Assessors also had similar opinion.

Dated and delivered at Nairobi this 28th day of April, 2005.

K.H. RAWAL

JUDGE

28.4.2005