



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO.98 OF 1998

REPUBLIC PROSECUTOR

VERSUS

- 1. SIYAD IBRAHIM ABASS)**
- 2. MOHAMED ABDI MAALIM)**
- 3. FARAH ALI DOLAL)**
- 4. MOHAMMED AHMED JELLE)..... ACCUSED**

J U D G M E N T

SIYAD IBRAHIM ABASS (The 1st accused), MOHAMMED ABDI MALIM (the 2nd accused), FARAH ALI DOLAL (the 3rd accused) and MOHAMMED AHMED JELLE (the 4th accused) are jointly charged with murder contrary to section 203 read with section 204 of the Penal Code. Particulars of this offence are that:-

On the 7th day of April, 1998 along Kismayu road at Garissa Township within Garissa District of the North Eastern Province jointly with others not before the Court murdered TIRUS KING’ORI CLEMENT (the deceased).

All these accused persons pleaded not guilty. Their trial commenced before me on the 7th March, 2000. The prosecution, led by the Learned Assistant Deputy Public Prosecutor Mr. Justus Momanyi Bwonongwa (ADPP), called a total of 22 witness. The accused were represented throughout by the law firm of M/S WTANGULA & COMPANY ADVOCATES. Miss D.W. Nyambu of that law firm appeared for the accused persons throughout the prosecution’s case. Mr. Tindi advocate of the same law firm then took over and represented the accused persons only during the defence of the 1st accused. He led him in his sworn evidence in-chief. Then Mr. Moses Wetangula advocate, the senior partner in the said firm, called one witness for the 1st accused and them led the defence of the rest of the accused to the conclusion of their respective defence cases

I also wish to record in this Judgment the fact that this trial proceeded with the aid of three assessors Mr. Moses Mwangi, Mr. Julius Mugambi and Mr. Joseph Wanjohi from the 7th March, 2000 until the 7th June, 2000 when Mr. Joseph Wanjohi failed to come to court. The then ordered the trial to proceed with the aid of two assessors, Mr. Moses Mwangi and Mr. Julius Mugambi, pursuant to the provisions of section 298(1) of the Criminal Procedure Code.

The accused had pleaded not guilty. In so doing each one of them in deemed to be innocent until proved guilty and convicted. In this connection, it is a cardinal principle of law that the burden of proof lies throughout on the prosecution to prove their guilt, the standard of proof is proof beyond reasonable doubt. The accused persons assume no burden of proof. Even in the particular circumstance of this case there

each of the accused has raised a defence of alibi, it is still the duty of the prosecution to displace the alibi defence beyond reasonable doubt by adducing credible and admissible evidence.

It is further a cardinal principle of our law that, where an accused, in answer to the charge, elects to give an explanation or to raise a defence, as each of them has done by raising a defence of alibi, the law places duty on the court to give due consideration to that explanation or defence and, if it is satisfied that it is possibly or probably true, then to give the benefit of doubt to the accused, by accepting it and acquitting the accused. The court will only reject that explanation or defence if, on the recorded evidence, it cannot be true.

I have recorded these principles of our law in this Judgment because I have applied and been guided by them in this Judgment.

Murder is defined in section 203 of the Penal code. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

There are three essential ingredients of murder, which the prosecution must prove beyond reasonable doubt so as to earn the conviction of the accused. With reference to this case the prosecution must prove that :-

(a) Titus Kingori Clement is dead

(b) That the four accused person jointly and with a common intention, acting in concert, unlawfully caused his death and

(c) That the four accused had malice aforethought.

It is necessary now to give, to some extent and detail, the background facts to this case because, it is the prosecution's case that the accused person planned and executed the deceased because they held him primarily responsible for the cancellation of the Kenya Certification of Secondary Examination 1997 Results in which they were candidates.

The deceased was a teacher at Garissa HIGH SCHOOL between 1996 and February, 1998. The other teacher at Garissa High School who have given evidence are CHARLES GATERE NJUGUNA (PW1) who taught there between 18th May 1997 and 7th April, 1998 when he left Garissa for Nairobi and is now teaching at Kijabe Boys High School, ROBERT NGILE MWANDO (P.W.2) who began teaching in Garissa High School in January, 1998 and left in April, 1998; ANTHONY MWAI THUMBI (P.W.6) who was posted to Garissa High School in 1995 and taught upto the 27th February, 1998; JAMES MUGENDI MUTEGI (P.W.11) who taught there from 1996 until February, 1998.

Each of these teachers has testified as to the massive cheating during the K.C.S.E. 1997 at Garissa High School by the Form IV students done in collaboration with the Headmaster of Garissa High School and certain examination invigilators. Despite earlier warnings against cheating at the examination issued by the District Education Officer. James Mugendi Mutegi (P.W.11) who was appointed an invigilator at county High School in fact testified of widespread cheating at County High School, and that when he complained about it to one of his supervisors of Somali origin he was told:

“Mwalimu, Kwetu Somali Tunasenyanga kula nyama chungu meno” Eat meat but take care of your teeth as well”

He said he understood this to be a veiled threat to him, that whereas he was a paid invigilator he should take care of his life. He said that he was being virtually told not to be concerned about the cheating at examination which was going on. He made a report of this incident to the District Education officer and then resigned.

The other teacher who was totally opposed to the ongoing cheating at the KCSE 1997 examination was

the deceased. He was so disgusted that he wrote a letter on 17th March, 1998 to the Secretary, Kenya National Examination Council which was received by Mr. FRANCIS KISINGA KYALO (P.W.9) and which he tendered into evidence as exhibit 7. This letter was written long after the KCSE 1997 Results were released on 26th February, 1998 and after the Results for certain candidates within Garissa District and North Eastern Province, including of Garissa High School and County High School, had been cancelled. The deceased's letter, however, gave a detailed extent and detail of that cheating which I wish to record in this judgment by reproducing the contents of exhibits 7. This is what the deceased wrote:-

Titus Kingori Clement

Garissa High School,

P.O. Box 94,

GARISSA.

17th March, 1998

The Secretary

Kenya National Examination Council

P.O. Box 73598

NAIROBI.

Dear Sir,

RE: CHEATING IN 997 KCSE EXAMINATION

I am a teacher at Garissa High School I personally witnessed this mal-practice stood against it and attempted to hinder it. Consequently my life is in danger. In most cases, cheating was effected through the following acts:-

(i) A teacher answering the examination questions and then passing the answered paper into the examination room.

(ii) Invigilators and Supervisors allowing candidates to exchange ideas, use written materials mainly textbook and move out to solicit answers.

(iii) Non-candidates, mainly form students, passing written information into the exam rooms with full knowledge of invigilators. When the mathematics papers I Exam was in progress, I Mr. Mwai, and other Garissa High School teachers saw Mr. Mohammed Aden tackling the same paper in the staff room. This paper was later passed to the Headmaster's office from where an invigilator picked it. It was taken into the exam room.

Through the examination period, it was evident that candidates were allowed to discuss, and use written materials mainly textbooks. Anybody walking along the examination room corridors could see.

During the same period it was obvious that Form 3 students were assisting the candidates by passing written information through openings. I and Mr. Mwai tried to sabotage this malpractice by giving the form 3 class a parallel exam to keep them occupied. For denying this most candidates felt that I had contributed in ruining their lives. After this paper (Mathematics Paper II_ a group of 8 candidates came to me and informed me that my act had jeopardized their lives and therefore I was to pay for it.

For all the cheating incidence and attempts that I witnessed, I always passed the information to other teachers. I openly castigated those individuals who were colluding in the practice.

It was for this reason that some teachers saw me a traitor, and informed those candidates about it. It was around this time that some of my colleagues, namely Mr. Kamau and Mr. Gatere, warned me that the candidates were planning sinister actions against me. Just before the examination was over, the Headmaster called me in his office and inquired whether I had any information regarding the author of the newspaper article that revealed massive cheating, and another anonymous letter on the same issue. I denied knowledge but informed him that personally I supported the views of authors.

Even before the exams were over, our students had information that their results might be cancelled because of the information passed to the examination council by some Garissa High School Teachers.

When the news of the cancellation finally came I was expecting a confrontation with the students. Therefore I kept away from school that Thursday.

On Friday I went to attend staff meeting scheduled to start at 8.30 a.m. As we were waiting, a rowdy mob comprised of Garissa High School and County High students descended on us with stones. We narrowly escaped death. If it were not for the police who arrived in time, things would have been more serious.

I spent that Friday night in friend's house with my family. Later that night, I was informed by a neighbour that the rowdy mob had broken into my room at around midnight. They only left when the Landlord pleaded with them not to set the room ablaze because it was not mine but his.

On Saturday (the following day) I sent for police and explained the predicament I was in. I was ferried by my landlord 10kms from Garissa town to avoid encountering the students whom I could see in groups as I passed by.

Sir, I sincerely hope you will see the danger in which my life is in Garissa so long as the result remain cancelled. The students are determined to ruin my life, just as we allegedly ruined their. They have the support of parents, local leaders and the community in general. However, I will be safe anywhere else.

TITUS KINGORI CLEMENT

TSC NO.363056

The deceased in this letter has documented his objections to the cheating in KCSE 1997 which was perpetrated by examination invigilators, supervisors and the Headmaster of Garissa High School; has documented the reason behind the subsequent cancellation of the said KCSE 1997 Results in respect of candidates at Garissa High School and County High School; has recorded the resentment he received and was subjected to by those students, teachers, parents, local leaders and the communities in general; and the threats to his life which he received and the protection he sought from the police, time and time again, and the transfer out of Garissa which he desired.

On 1st March, 1998 the deceased had left Garissa for Nairobi according to the evidence of his wife GRACE NJERI KINGORI (P.W5). In fact when the deceased wrote Exhibit 7 he was already in Nairobi and was pursuing his transfer out of Garissa. He left Nairobi on 5th April, 1998 for Garissa. He told his wife that he was going back to Garissa to collect his luggage and to process his payment. He arrived in Garissa on 6th April, 1998 where he went to stay in Robert Mwangi's house (P.W.2). Early in the morning of 7th April, 1998 when he was walking to the Bus stage in the company of P.W.1 and P.W.2, so as to catch a bus to Nairobi, he was attacked and stabbed outside Garissa High School. He died shortly after 11.00 a.m. on that 7th April, 1998 while undergoing treatment at the Provincial General Hospital, Garissa.

I have already stated that an essential ingredient of murder is the death of the deceased which the prosecution must prove beyond reasonable doubt. In this connection, it is not in dispute that, in that

morning of 7th April, 1998, while he was walking to the bus stage with PW1 and PW2, the deceased was attached, stabbed with a knife believed to have been prosecution exhibit No.1. He was rushed to Provincial General Hospital where he died while undergoing treatment. His body was immediately thereafter removed to Nairobi where it was taken to the City Mortuary. On 8th April, 1998 his father CLEMENT KARIUKI KAMAU (P.W.3) and brother MOSES KAMAU CLEMENT (P.W.4) identified his body to DR. SAMWEL ODERO YWAYA (P.W.7) who performed a postmortem examination. The findings of Dr. Ywaya (PW7) were that: the deceased, aged 27 years, had sustained an external deep wound on the lower part of the back, a fresh operated wound in the midabdomen and a cut wound on the left side of the head. Internally he had a tear of the large and small intestines, a tear of both Kidneys, which had been stitched, and profuse bleeding in the abdominal cavity. The cause of the deceased's death was bleeding in the abdominal cavity due to the tear of the bowels and kidneys by a sharp object. These details are contained in the postmortem examination form tendered into evidence as exhibit 6.

The second ingredient of murder to be proved, and with particulars reference to this case the most important thing to be proved beyond reasonable doubt, in that the four accused jointly and unlawfully caused the deceased's death. This the prosecution has set out to do by relying on evidence of www.kenyalawreports.or.ke 15 identification/recognition of the accused persons by P.W., P.W.2 and P.W.9 confessions recorded from 1st accused (inquiry statement exhibit 20) and inquiry statement exhibit 9 recorded from the 3rd accused. That evidence is vehemently denied by the accused persons, who have raised alibi as their defences.

It is important to deal with the issue of identification of the accused person first and I will first deal with the letter written by the deceased to the Secretary of Kenya National Examination Council (Exhibit7 reproduced herein above). There are two material observations, which I would like to make about the contents of this letter (Exhibit7). In as much as the deceased expressed deep fear for his life following receipt of threats he did not name any student of Garissa High School who actually had issued such death threats. He did not name the eight students who had confronted him soon after the KCSE 1997 Results were released. Neither did he name the teacher, parents, local leader, the members of the community in Garissa town who actually threatened him. The strict construction of the deceased's letter (Exhibit 7) yields the following results: The deceased received death threats from the general body of students, teachers, parents, local leaders and the community for supposedly ruining the lives of the Form IV students who sat the KCSE 1997 in Garissa District and whose results were cancelled. Secondly, in particular reference to this case, the deceased did not name any of the four accused persons as the students or persons who threatened to kill him

Directly following from there the deceased seemed to have made reports about these death threats to the police within Garissa Town, from time to time. It was necessary for the prosecution to have led evidence of those reports, particularly if indeed the deceased had named the accused persons or any person as having issued death threats. The deceased recorded in Exhibit 7 that he made reports to his landlord who successfully intervened and prevented the burning of the house occupied by the deceased. Though the deceased did not name his landlord in exhibit7, Grace Njeri Kingori (P.W.5) did in her evidence. The landlord was one Maina Githunguri.

It therefore came as a surprise when the prosecution failed to call and adduce evidence from the police officer and Mr. Maina Githunguri as to the nature of reports which the deceased had made in particular whether or not any of these accused persons had been implicated by the deceased. It is my holding that the prosecution had a duty to make available all witnesses necessary to establish the truth in this case, even if their evidence would have been inconsistent with its case. The Court is entitled to draw an adverse inference against the prosecution in the event of omission to do so. This same point was dealt with by the defunct Court of Appeal for East Africa in the judgment of LUTTA Ag. V.P. (as he then was) read on 18th October 1972 in **ERISA BUKENYA AND OTHERS v. UGANDA (1972) E.A. 549** when he said at page 551 Letter B:-

“Thirdly, while the Director (of Public Prosecutions) is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the

evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution." If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive inquiries had been made to trace them, but without success."

The prosecution called two witnesses described as eyewitnesses to the attack of the deceased. These are PW 1 and PW 2. There is no doubt that the deceased was attacked and eventually died. Evidence of PW 1 and PW 2 becomes crucial only in establishing whether or not these three accused persons attacked the deceased.

PW 1 stated how on that 7th April 1998 at 6.30 a.m. he and PW 2 were escorting the deceased to the Bus Station to catch a bus for Nairobi. The weather was hot and sunny. There was bright sun light like as if it was 8.00 a.m. or 9.00 a.m. when they reached a point between the gate to Provincial www.kenyalawreports.or.ke 19 General Hospital and Garissa High School, a boy emerged from a thicket as if he wanted to cross the road but did not. This boy was a stranger and unknown to him. The boy stopped and pointed at the deceased and asked him for his names. The deceased asked him why he wanted to know his names. The boy insisted to know the deceased's names. There followed some argument between them. He said the boy sounded threatening. While under cross-examination PW 1 said the boy was tall and wearing baggy clothes but has not seen him again. He said that two other boys then joined the first boy. He knew the two boys as the 4th accused and ABDINASSIR (not in Court). He said the moment he saw both 4th accused and ABDINASSIR he knew straight away that the life of the deceased was in danger.

PW 1 said ABDINASSIR slapped the deceased and then the first boy hit him with a metal bar on the head and the deceased fell down. Then other students came to the scene and attacked the deceased. He said he was able to see the faces of two other students among them. He pointed at the 1st accused and 2nd accused in Court, whose names he said he did not then know though he had seen them before the incident at Garissa High School where they were students. He said the 1st and 2nd accused were armed with metal bars each. They all surrounded the deceased and attacked him. PW 1 said the deceased fell down on his face and when he went to check on him, he found he had been stabbed five times with a knife, which was still stuck in his back. He identified the knife as Prosecution Exhibit I.

This knife was removed from the body of the deceased and he picked it up, wrapped it and took to the Garissa Police Station.

While under cross-examination, PW 1 said he came to know the 1st accused because he had taught him during the August Holiday in 1997. He said he knew the 2nd accused because he had seen him at Garissa High School. He knew the 4th accused as a student at Garissa High School and a member of the football team as a defendant.

PW 1 testified that, immediately after the attack, he managed to take the deceased with the Provincial General Hospital Garissa with assistance of one Mr. Gituma (another teacher) and a Mr. Otieno who was driving a Mercedes Benz lorry.

After the deceased's admission into the Hospital PW 1 said he drove to the house of the Deputy Headmaster of Garissa High School a Mr. Njoroge to whom he made this report. It is again to be noted that Mr. Njoroge was not called to testify. PW 1 said Mr. Njoroge and him drove to the Hospital from where he drove to the Headmaster's house so to make a report. The Headmaster was not present. He, in the company of PW 2, then went to the Garissa Police Station to make a report. He handed in the knife Ex. 9 and then his statement was recorded. It is again worth noting that details of that initial report by PW 1 at Garissa Police Station were not given in evidence, neither was the relevant Occurrence Book entry tendered into evidence nor was Mr. Njoroge called to give evidence.

From the Police station, PW 1 said they drove back to Provincial general Hospital Garissa where they learnt the deceased was still in theatre but soon thereafter it was announced that the deceased had died. He said he became disturbed and he sought the protection of the police as it was feared that teachers' responsible for the cancellation of KCSE 1997 results would be hunted down.

PW 1 concluded his evidence by saying that on 29.6.1998 he attended identification parades at Pangani Police Station in Nairobi where he identified 1st accused (identification parade form Exhibit 3) and 2nd accused (identification parade form exhibit 4). He also recalled that on the 5th October 1998, still at Pangani Police Station, he identified 4 the accused at an identification parade (identification parade Form Exhibit 5). PW 2 testified and told the Court that on 7th April 1998 he was escorting the deceased to bus stage at 6.30 a.m. in the company of PW 1. He has also confirmed that a young man emerged from a thicketthey had reached a point next to the Provincial General Hospital and the gate to Garissa High School.

That young man was unknown to h,. He asked the deceased to tell him his name but the deceased declined. Then he said two other young men joined the first young man. One of those young men slapped the deceased on his face and the first young man hit the deceased's head with a metal bar.

PW 2 said the attack took a short time, about two minutes , the area was bright as it was early in the morning (6.30 a.m.) but bright enough as day. He said he had not known or seen the first young man who has emerged from the thicket. He also did not identify him in court. He said the other

PW2 said the attack took a short time, about two minutes, the area was bright as it was early in the morning (6.30 a.m.) but bright enough as day. He said he had not known or seen the first young man who had emerged from the thicket. He also did not identify him in court. He said the other two young men who emerged were former students of Garissa High School. He identified the 1st accused, whom he said he knew before but not by names, and the 4th accused, whose names he said he also did not know. He conceded that he saw and was able to identify the 4th accused later from photographs shown to him by the investigators of this case. Those photographs were from Kenya National Examination Council. Later at Nairobi Pangani police station he said he attended an identification parade and identified the 1st accused (identification parade form Exhibit 3).

I have given due consideration to the evidence of PW1 and PW2 on the issue of identification and I have noted that there are some contradictions. Whereas both PW1 and PW2 agree that the first young man to emerge from the thicket was unknown to them and was not in court, there is some confusion and contradiction in the evidence as relating to the identity of the two young men who then emerged from the said thicket and joined the first young man. According to PW1, those two young men were 4th accused and ABDI NASSIR. It was only much later when other students joined the attack that he saw the 1st and 2nd accused. But according to PW2 the two young men who joined the first young man were the 1st and 4th accused. He does not mention about the 2nd accused. He also did not mention ABDI NASSIR at all in his evidence in chief but, while under cross examination he stated that he had known ABDI NASSIR MOHAMMED GARANE before, that he is the one who slapped the deceased and stabbed him in the back, thus confirming as correct what he had written in his police statement.

In further cross examination PW2 stated that the attack had lasted two minutes, that he was able to identify the 1st accused at the scene because he had come face to face with him as he is the person who struggled with him but that, at the identification parade which was conducted, he was able to identify the 1st accused and 4th accused with the aid of photographs he was given. These photographs were black and white and very clear, he said, which had been obtained, upon their request, by the police from Kenya National Examination Council for K.C.S.E 1997 candidates from Garissa High School. He stated that photographs of candidates of K.C.S.E. 1997 from County High School were not shown to him.

PW2, while under cross examination, had this to say:-

“I was able to identify the 1st accused at the ID parade from photographs given to us from Kenya National Examination Council. I was also able to identify the 4th accused with the aid of the said photographs. They were black and white photographs and were clear. We asked the police to get photographs from Kenya National Examination Council for 1997 K.C.S.E candidates from Garrisa High School”.

Evidence as to the procurement and use of photographs of candidates of Garissa High School in K.C.S.E

1997 during the investigations of this case is given by Chief Inspector William Indeke (PW20) and IP Joseph Ongera (PW21). PW20 was the Divisional C.I.D boss in Garissa from 1998-1999. Investigations into this case were transferred from the OCS Garissa to his office on 26th April, 1998. On the 30th April, 1998 he visited Garissa High School and collected photographs of all the Form IV students of 1997 who had sat for the K.C.S.E 1997 because some teachers had claimed that they had seen some of the students who had attacked the deceased. PW20 took possession of a total of 135 photographs which he tendered into evidence. These are black and white photographs with names typed next to each one of them. He said he handed these photographs to PW21 for investigation purposes. The idea was to show them to those teachers for identification purposes. He said PW21 travelled to Nairobi and later returned to Garissa and gave him a brief of what he had done. PW20 testified that PW21 had briefed that three suspects, all "former students of Garissa High School, had been identified and the said teachers had picked them, the three suspects, from the 135 photographs. PW20 named the three suspects as MOHAMMED AHMED JELLE, ABDI NASSIR MOHAMMED GARANE and OSMAN AHMED ABDI whom he pointed out as the 2nd, 3rd and 4th accused. PW20 was, of course, wrong in his identification because only MOHAMMED AHMED JELLE (4th accused) is in court. ABDI NASSIR MOHAMMED GARANE and OSMAN AHMED ABDI are not in court and are therefore not the 2nd and 3rd accused. Even when PW20 made this false identification, and repeating the same under cross examination, he was not re-examined by the learned ADPP to clarify or explain this error.

IP JOSEPH ONGERA (PW21) testified that he was handed photographs of the Form IV students of Garissa High School by PW20. Two teachers who had been attacked with the deceased had come to Nairobi by then. While in Nairobi this is what he did:-

"On 29.4.1998 I left Garissa and came to Nairobi where I met Mr. Robert Mwando (PW2). I asked him to look at the photographs which I had to enable him to tell me if he could identify the students who attacked him. I see 135 photographs (Exhibit 16). He identified photographs of ABDI NASSIR, OSMAN AHMED ABDI. I took the two photographs to the CID headquarters for enlargement so that we could circulate them. I went back to Garissa and informed the DCIO. We then started looking for Abdi Nassir and Osman Ahmed Abdi. These two students have not been arrested.

On 4.6.1998 I made arrangements with Charles Gatere Njuguna, a teacher, to meet him at CID headquarters Nairobi for him to see the photographs for purposes of identifying the students who were involved. Charles Gatere Njuguna identified two photographs of the former students who were involved. They are ABDI NASSIR and MOHAMMED AHMED JELLY. I took the same to CID for enlargement to see if they could be identified. I went back to Garissa and briefed the DCIO Garissa accordingly. Out of these, Mohammed Ahmed Jelle (4th accused) was arrested".

The procurement and use of these photographs (exhibit 16) by PW20 and PW21 has given me serious concern in this case, because it demonstrates that PW1 and PW2, who were present at the scene when the deceased was attacked by students whom they claimed to have previously known, may not after all, have been absolutely sure about the identity of the person who attacked the deceased. The photographs were used to see if the doubts which they may have had, could be cleared. The result of this exercise was devastating to the prosecution's case. Whereas PW1 had stated that he had known the 1st, 2nd and 4th accused before as students at Garissa High School and that he had recognised them during the attack of the deceased, when he was shown the 135 photographs which included of the 1st, 2nd and 4th accused, he could only pick out the 4th accused's photograph. PW2, on the other hand, could not pick up any photographs of the accused persons, despite his claim that he had at least been able to identify the 4th accused.

The learned ADPP has conceded that evidence of identification parades conducted in this case was worthless and should be ignored because the identifying witnesses PW1 and PW2 were previously known to the accused persons. Of course, where identifying witnesses are previously known to suspects, it would be futile to hold identification parades and, if the investigating officers insist to hold one, evidence of such identification parade is worthless.

In the present case, however, there is a possibility that identifying witnesses PW1, PW2 and PW5 were

shown photographs of the suspects (accused persons Nos. 1,2 and 4) before each parade, though the officers who conducted them have denied showing them any witnesses. The results is that the manner in which the identification parades were conducted in this case was contrary to the rules approved by the Court of Appeal for Eastern Africa in the case of R. vs MWANGO S/O MANAA (1936) 3 E.A.C.A 29 which were followed in SSENTALE vs UGANDA 1960 E.A. 365 at page 369. One such rule is that witnesses attending the identification parade do not see the accused/suspect before the parade, and this means either the natural physical features of the accused/suspect (the person himself or his images (photographs)). A breach of this rule is fatal to the conduct of the parade and renders evidence of that identification parade worthless.

I must also mention here that, when PW1 and PW2 made a report of this incident to Garissa police station in the early morning of 7th April, 1998, they did not name any of these accused, or anybody else, as having attacked and killed the deceased. This evidence is adduced by P.C Francis Mugambi Ibui (PW15) and Chief Inspector John Willis Okello (PW8) when PW1 and PW2 had the first opportunity to name the accused persons in their initial reports to the police, they failed to do so and only referred tot he attackers of the deceased as “former students of Garissa High School”.

For the above reasons I hold that there was a possibility of erro in the identification of the 1st, 2nd and 4th accused persons by both PW1 and PW2. Consequently I reject their evidence that they recognised or identified any of these accused persons during the attack of the deceased. I gave the benefit of doubt to them. There is no evidence, of course, that the 3rd accused was ever seen attacking the deceased. He was arrested in a police swoop or raid which was organized by PW8 in Garissa Town the night following the killing of the deceased.

This is not, however, the end of the matter. It is the prosecution’s case that the 1st and 3rd accused persons made extrajudicial statements in which they implicated themselves and their coaccused in the killing of the deceased. These statements are an inquiry statement recorded from the 1st accused by PW21 IP Joseph Ongera who tendered it into evidence as exhibit 20 (handwritten) and exhibit 20A (typed) and one recorded from the 3rd accused by IP John Mutua Imanene (PW17) who tendered it into evidence as exhibit 9.

Each of the accused persons has retracted his statement. A trial within trial was conducted and, in each case, it was ruled that the statements had each been recorded voluntarily from the 1st and 3rd accused persons.

The law on how to deal with retracted and repudiated confessions has been laid down in several cases by this court and the Court of Appeal, and it is this: A Court is entitled to convict an accused on a retracted or repudiated confession without corroboration if the Court believes that what an accused may have said in that confession is but the truth. It is, however, generally unsafe to convict an accused on uncorroborated confession. It is safe to look for corroboration before relying on such retracted or repudiated confessions. See TUWAMOI vs UGANDA 1967 E.A. 84. I will apply this principle of law in this case.

The 1st accused, in raising objection to the production of inquiry statement exhibit 20/20A, told the court that he had been arrested on 17th June, 1998 from IJARA town and was taken to Garissa police station where he remained in the cells until the 20th June, 1998 when he was shown 135 photographs and asked to pick from them the students who were involved in the murder of the deceased. He said he was handcuffed and beaten up. He said he declined to volunteer any information. He was then undressed, handcuffed, his hands and legs were tied with a rope, placed him on a table, tied his testicles with a rubber band which they tied to the roof. The policemen would then pull the rubber band and thereby pulling his testicles, while telling him that he killed the deceased. When the pain on his testacles became unbearable, he was given already prepared statement and directed to copy everyting down into other papers, which he did. He said that on 26.6.1998 he was taken to see a doctor, to whom he complained about the beatings. A P3 form was filled up and he relied on Exhibit 8 which was tendered into evidence by Dr. SAMWEL KAGIMA GATHERE (PW 18). In fact Dr. Gathere had told the court that the 1st accused was examined by him on 26.6.1998 and he had complained that his testes were squeezed by police but that when he

examined them the testes were normal, no swellings or tenderness. He confirmed, while under cross examination that the 1st accused did complain to him to be having pain in the testes.

It is true that I ruled, in the trial within trial, that the 1st accused had recorded this statement under inquiry (exhibit 20) voluntarily, thus rejecting his complaint. I am, however, entitled yet again to evaluate all the evidence adduced as relating to the recording of that statement in order to deciding whether I should act on it with or without corroboration.

One of the things attributed to the 1st accused in this statement to have said is that the deceased was stabbed by MOHAMMED JELLE (4th accused). But there is evidence from PW1 and PW2 that the deceased was stabbed by Abdi Nassir Garane (not in court). To this extent, at least, there is an inconsistency. For this reason, coupled with the holding which I have made to the effect that the evidence of identification by PW1 and PW2 is not free from a possibility of error, I have decided to look for corroboration of this statement before I rely on it.

In the said statement (exhibit 20) the 1st accused has implicated Mohammed Abdi Maalim (2nd accused) and Mohammed Jelle (4th accused). But it is trite law that evidence of an accused against his co-accused is the weakest evidence. It is accomplice evidence. It can only be used as lending assurance to other evidence against his co-accused. In such a case the court must look for corroboration for basing a conviction of his co-accused on that evidence.

The 3rd accused also retracted his statement (exhibit 9) recorded from him by IP John Mutua Imanene (PW17). It was admitted after holding a trial within trial. I am still entitled to evaluate all the evidence regarding the recording of this statement. I have done so. I am however satisfied that, before I can rely on this statement (exhibit 9) I must look for corroboration. In the case of this 3rd accused not a single witness identified him at the scene.

It is also debatable whether the contents of statement do amount to a confession as defined in Section 25 of the Evidence Act:-

In the statement under consideration all that the 3rd accused said is that on 6.4.98 he left home at about 9.30 a.m. (Garissa Ndogo). He used posta road, outside post office, a place where newspapers are sold (Nation) he found his school mates (whom he named but none of whom is the accused) plotting to kill one teacher by the name of Mr. Kingori. He left them there and he went to watch football. Later on he heard that indeed the deceased had been killed. I am not satisfied that this statement (exhibit 9) amounts to a confession. Indeed the learned ADPP conceded this point in his submissions during the trial within trial.

A statement was recorded by PW21 from the 2nd which I ruled was not confessions. On 20.6.1998 he recorded one from 2nd accused which he tendered into evidence as exhibit 21. In it he denied killing the deceased. His charge and cautionary statement (exhibit 10) recorded by C.I William Indeke (PW20) was also a denial.

A statement under inquiry recorded from the 4th accused and filed as exhibit CX II in the committal bundles was not tendered into evidence. IP Edward Kamande Mburu, who recorded it, was not called to give evidence. In that statement, the 4th accused had raised his defence of alibi, that on the day the deceased was killed he was bed ridden in his home. The fact that IP Mburu was not called to produce this statement entitles the court to make an adverse inference against the prosecution, which I hereby do.

As against that evidence adduced by the prosecution each of the accused has raised a defence of alibi and has called a witness to support it.

The law with regard to an alibi as a defence is that: an accused putting forward a defence of alibi does not assume any burden of proof. This was held in the case of ANISETH vs R. 1963 E.A. 206 followed in the case of RAPHAEL vs R. 1973 E.A. 473 and SSENTALE vs UGANDA 1968 E.A. 365. In such case, the burden of proving the guilt of an accused remains throughout on the prosecution.

The 1st accused, in his defence, testified that in the morning of 7th April, 1998 he was at IJAARA. He called his elder brother MOHAMMED IBRAHIM ABASS (DW2) who confirmed that the 1st accused slept in his house on 6th April, 1998 at Ijaara town. In the morning of 7th April, 1st accused remained with him at Ijaara, where they celebrated an Islamic public holiday called AL-HAJ MOUBARAK.

The 2nd accused, in his defence, gave unsworn statement and explained how he left Mbalambala Secondary School on 3rd April, 1998 and went to his parents home. He wanted to wear new clothes during the AL HAJ holiday. So he went to DABAR on 4.4.98 to see whether his brother could buy them. When he failed to get any, he travelled to SANKURI to another brother YUSUF ABDI on 5.4.98. On 6.4.98 they were joined by YUNIS ARALE GEDI. They slept together till the 7.4.98 when they went for prayers in the morning and celebrated the AL HAJ holiday together. He remained in Sankuri till the 5th May, 1998 when he returned to Garissa. He went back to Mbalambala school from where he was arrested on 19th June, 1998. He called YUNIS ALALE GEDI (DW4) and YUSUF ABDI MAALIM (DW5) who verified his explanation.

The 3rd accused said he left Liboi on 6th April, 1998 and went to Garissa so as to celebrate AL HAJ with his uncle KHALIF NUNDHE – a retired Colonel Chief – his grandfather. In the morning of 7th April, 1998 he went to attend prayers in an open ground upto 9.00 a.m. They returned home for lunch and then went back for prayers again. He came back home after 1.00 p.m., then went to town for a stroll. He was arrested in a police swoop in the evening. His defence was therefore an alibi. He called his grandfather KHALIF NUDHEN (DW7) to verify this defence.

The 4th accused, in his unsworn statement, he said that after the K.C.S.E 1997 results were cancelled, he re-registered for the K.C.S.E 1998 in the same Garissa High School. On 9.3.1998 he fell sick – cerebral malaria and the headmaster gave him permission to go to his parents in IJAALA town – some 200 kms from Garissa. He remained there under treatment until 10.5.98 when he went back to school where resumed studies for the whole of second term (August 98). Before schools opened he went to Ijaara to collect third term school fees. He was arrested there on 24.9.98. He called his witness HASSAN KOSAR ABDI (DW9) to verify that defence.

I have already stated hereinabove that the evidence of PW1 and PW2 as regards identification of 1st, 2nd and 4th accused was not free from possibility of error and I rejected it. The only evidence left against the 1st, 2nd and 4th accused was a retracted confession made by the 1st accused, implicating himself and the co-accused 2nd and 4th. This confession can be taken against its maker, the 1st accused, but I must look for corroboration before I can act on it. Corroboration would have come from the evidence of PW1 and PW2. Their evidence has been rejected. The retracted confession of the 1st accused can only be used without corroboration if I am satisfied that whatever is stated therein by the 1st accused is the truth. I am not so satisfied for the reasons contained in this judgement. Consequently the confession of the 1st accused in uncorroborated retracted confession. It is not safe for me to act upon it.

Evidence against 2nd and 3rd accused is the uncorroborated retracted confession of the 1st accused which is evidence of accomplice and is the weakest evidence against 2nd and 4th accused. It is also not safe for me to act upon it.

That leaves me with the explanations and defences of alibi which each of the accused has put forward, supported by sworn evidence of their respective witnesses. I find that the prosecution evidence on record has not displaced these alibi defences. Therefore they are possibly or probably true. The benefit of doubt is given to the accused persons.

For the above reasons I have to differ with the opinion of the assessors that the prosecution had proved its case against the 1st, 2nd and 4th accused. I agree with them that the prosecution has failed to prove its case against the 3rd accused.

I therefore find SIYAD IBRAHIM ABASS (1st accused), MOHAMMED ABDI MAALIM (2nd accused), FARAH ALI DOLAL (3rd accused) and MOHAMED AHMED JELLE (4th accused) not guilty of murder and do hereby acquit them.

I order that all and each of the accused persons be released from custody forthwith unless otherwise lawfully held. It is so ordered.

This 2nd day of October, 2001.

A.G.A ETYANG

JUDGE