IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO. 53 OF 1987

BETWEEN

KARUKENYA & 4 OTHERS ……APPELLANT

AND

REPUBLIC…….....…RESPONDENT

JUDGMENT OF THE COURT

In the early hours of March 30, 1981, a gang of some four persons descended on the homestead of Laban Kiura Kathangana, at Gichiche village in the Embu District, broke open the door of the house with a heavy stone and murdered him and injured his wife Sarah Njoka w/o Kiura. The deceased was formerly a councillor in the area and had been a director and manager of a local firm known as the Embu Produce Traders and Farmers Company. He also started to operate a concern called Embu Foodstuffs before his death in 1981. He was shot in the right side of the chest with a firearm which was in the possession of one of the raiders and his wife was cut several times with a *panga*. Kshs 50,000 representing part of the "takings" from the deceased's business for the previous two days was stolen. The deceased's death was caused by extensive damage to the heart and left lung, and the rupture of his spleen and liver.

The firearm in question was a 7.62 calibre G3 rifle which had been missing from Langata Army Barracks since January 31, 1981, when private Nyangai Congo reported its disappearance from the guardroom where he had been on duty the previous night. An empty cartridge found by the police in the corridor leading to the main bedroom of the house where the deceased had been sleeping was matched with the stolen rifle by the ballistics expert attached to CID Headquarters, Mr Nduguga and found to have been fired from that rifle.

The five appellants were arrested and eventually charged with the murder of the deceased, their arrests taking place respectively according to the evidence, on March 30, August 29, and September 5, 9, 1981. They were each convicted after a full trial before V V Patel, J sitting at Nyeri on the April 14, 1983, who agreed with the opinions of his two remaining assessors, and sentenced to death. Each appellant now appeals to this court from his conviction and sentence. Each was separately represented by counsel at his trial and each, save the fifth appellant, is represented by different counsel in this appeal.

The prosecution case against the second, third, fourth and fifth appellants was that they were all present at and took part in the break-in and the murder, and that they were thus principals in the first or second degree in the perpetration of the crime. That against the first appellant was that he had hired the other

appellants to carry out the crime, and there were differing accounts suggesting that he had paid them Kshs 12,500, with a promise of a further Kshs 50,000 to do it. There were also differing accounts as to whether Laban Kiura was to be taken to the first appellant before being killed or whether the object of the mission was simply to kill Laban Kiura. He was thus said to be an aider and abettor to the others in the commission of the murder under section 20 (not section 21) of the Penal Code. The reason, and the motive, behind this was said to be that the deceased had been both a political and business rival of the first appellant and that he had *inter alia*, instigated the other partners in the Embu Produce Traders and Farmers Co to bring a High Court Civil Action, number 95 of 1977, claiming Kshs 65,255.50 against the first appellant.

Mr Rebello, who appeared as junior counsel to Mr Swaraj Singh for the first appellant, when arguing grounds 1 and 2 of this appeal criticized the learned judge's reference to the alleged motive behind the first appellant's design when he said, towards the end of his judgments:

> "The motive need not always be proved, here there exist some good reasons to support why accused 1 "(the first appellant)" would be willing to get rid of the deceased."

followed by a reference to the High Court case I have just mentioned. We agree that the prosecution does not have to prove motive: neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possesses the motive. Sub-section (3) of section 9 of the Penal Code provides:

> "Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

That sub-section appears in the section of the Penal Code dealing with intention; and says that the existence of a motive of itself does not, unless otherwise provided, enhance or lessen an individual's responsibility in

law for the commission of a crime. The sub-section has no application to the admission of such evidence as part of the prosecution case. We think the law in this respect was correctly stated in *R v Keisheimeiza w/o Tankikawa* (1940), 7 EACA 67 where the then Court of Appeal for Eastern Africa said:

> "Whilst motive and opportunity are important matters to be considered when weighing the prosecution case they cannot in themselves be regarded as corroboration."

This was reiterated, but in a slightly different form, in *R v Wanjerwa* (1944), 11 EACA 93 at p 96 follows:

> "We appreciate of course that evidence of motive and opportunity is not of itself corroboration, but such evidence, in conjunction with other circumstances, may constitute such circumstantial evidence as to furnish some slight corroboration in a case where the degree of criminal complicity to be attributed to the alleged accomplice is very slight indeed."

All the learned judge was saying in the passage which we have quoted, was that evidence of motive was admissible and a matter to be considered together with all the other evidence. Accordingly, in the form in which itwas put, we detect no misdirection in this particular portion of the learned judge's judgment.

The evidence being admissible, Mr Metho, on behalf of the respondent contended that he was entitled to rely on the antecedent civil case, and the fact that the first appellant's land had been attached, allegedly at the instance of the deceased, not only as providing a motive for the first appellant to compass his death but as part of the background to the circumstances leading up to, and as part of the circumstantial evidence of, the deceased's death.

We propose to consider first the case against the first appellant, in which there were two elements, namely the fact that three of the other appellants implicated him in their respective charge and caution statements, and the identification of him by the third and fourth appellants at a parade conducted by Chief Inspector

Ogeta at Central Police Station, Nairobi, on the September 8, 1981. There was no other evidence, direct or circumstantial, against the first appellant, his reply to the charge and caution on the September 10, being exculpatory. He put forward an alibi,

not in that statement but at the trial, which was that he spent the whole of the night of the March 29/30, 1981, with his second wife Jane Mbiro Karukenya in Kianjokoma sub-location and the Ezakaya Njagi Karangi taken supper with them that evening. He had stayed until 1.00 am. This alibi was supported by both the witnesses concerned.

As to the first element in the case against the first appellant, Karukenya, the second appellant, Kiong'o said in his statement of the September 12 that after collecting the rifle, which had been previously acquired he and the remaining appellants went to the first appellant's house at Kevote where they were given tea. In a corner of one of the rooms the first appellant showed him some bundles of Kshs 100 notes, of which he gave them Kshs 12,500 and promised that after the mission to kill Kiura, that is the deceased, was accomplished he would produce a further Kshs 50,000. Kiura was, however, to be taken to the first appellant alive before being killed. Kiong'o also said that he and his companions shared out the Kshs 12,500 in the presence of the first appellant. After this the four of them drove in the Fiat KVD 743 (which they had hijacked earlier that evening) towards the deceased's house and, after that ran out of petrol, they continued on foot. Then there followed an account by the second appellant of what happened at the scene of the crime.

The third appellant's charge and caution statement was recorded on the September 5, 1981. He said he was informed there was "a piece of work we would go and do at Embu" and recited certain events relating to the acquisition of the rifle which took place in February and on the March 13, 14, and 15 of that year. On the day in question he, Kiong'o travelled to Embu in a vehicle which ran out of petrol. Accordingly they managed to acquire the Fiat by stopping it at a makeshift road block, and then drove to the fifth appellant's house. From there all these four appellants went to the first appellant's house, where they met a watchman at the gate. The watchman was also mentioned by the second appellant. After entering the house they were met by the first appellant who went out of the room with the second appellant. After their return, and as they were all leaving, the first appellant told them "to work hard and bring Kiura the Councillor to him." On the way to the deceased's home the second appellant said the first appellant had promised to pay them Kshs 50,000 if they were successful; but he did not refer to an amount of Kshs 12,500, nor the plan to kill Kiura. The third appellant then gave a similar account to that of the second appellant as to what had happened at the scene of the crime.

The fourth appellant's statement was taken on September 8. He gave a lengthy account of an indeterminate association with the second and third appellants and an acquaintance of his called Gikonyo during February and March of 1981. He maintained that he did not know that the item which the other appellants had was a firearm until a later stage in this association. On the night in question the second and third appellants sought him out and he agreed to accompany them. They drove to Sagana where the vehicle either ran out of petrol or broke down. This appellant then gave a similar account of the hijacking of the Fiat, collecting the fifth appellant and being met at the gate of the first appellant's house by a watchman. He also said that they met the first appellant and that he and the second appellant disappeared into the house together for about twenty minutes. After they had emerged the first appellant told them to bring 'that man' (he did not then know whom the first appellant was referring) to him dead. They then all left in the Fiat which also broke down (or ran out of petrol). The fourth appellant then related the events which took place at the house, where the murder occurred. He remained at the gate. He did not mention receiving or being promised any money except that Kinyua (meaning presumably the third appellant) gave him Kshs 300 "afterwards". The fifth appellant did not implicate the first appellant at all. His charge and caution statement, made on April 4, 1981, was exculpatory.

These statements, which we have summarized, insofar as they implicate the first appellant, the case against whom we are presently considering, together with identification parade, formed the basis of the Republic's case against him. Three identification parades were held on the September 8, 1981 (the last two at Pangani Police Station Nairobi) at which the first appellant, the first appellant's brother Victor (PW 38) and the alleged watchman, Kiringa Njega (PW 38) were respectively the suspects. In each case

the identifying witnesses were the second and third appellants. They each identified the first appellant and Kiringa Njega, but not Victor. We have ventured to use the expression "the alleged watchman" because, of course, he denied in his evidence and in his statement to the police that he had ever worked as a watchman for the first appellant at his house. Neither had he opened the gate for the other appellants on the fateful night. He had, however, been re-engaged by the first appellant as a watchman at his shop, some three hundred yards from the house, in 1981. As was pointed out during the course of the submission in this appeal Kiringa Njega was not in any sense a hostile witness because he had not departed from his statement to the police, and rightly, no application was made to treat him as such. Had Kiringa Njega said he was guarding the first appellant's house that night and had he identified any of the other appellants as having gone there, there would then have existed evidence capable of corroborating their respective statements, and, possibly, substantive evidence against the first appellant, but this was not the case.

It will be observed that the identification parade was held three days after the third and fourth appellants were charged on the September 5, (according to exhibit 24) at 1.30 pm on the September 8, the "suspect", the first appellant, had been arrested on the 4th September. In our experience this extraordinary procedure, whereby two persons who have actually been charged with a crime are used as witnesses on a parade for the purpose of identifying another person who is very shortly afterwards charged with jointly committing the same crime, is quite unprecedented. The statement made at the parade by these two "identifying witnesses" were, of course, highly prejudicial to the first appellant and we observe that the third appellant when pointing out the first appellant, said that the first appellant had told him and the second and fourth appellants "to kill councilor Kiura", a matter which was absent from his charge and caution statement in which he said:

> "We never heard whatever they (meaning the first and second appellants when they went out of the room) were talking about at all."

We echo the remarks of Mr Georgiadis, who then represented the first appellant, that such evidence (taken, moreover, without further caution) should not have been admitted, if for no other reason than that it would cause grave prejudice to the first appellant without (as the authorities in relation to unsworn and unlisted statements made by accused persons implicating their co-accused show), being of anything more than evidence of the weakest kind against them (*Anyama s/o Omolo and another v R*) (1953) 20 EACA 218 at p 221) even assuming those statements amounted to confessions and were thus admissible under sub-sections (1) and (2) of section 32 of the Evidence Act, (cap 80). The prejudicial effect of this evidence therefore grossly outweighed its probative value and should have been rejected by the learned judge on that ground alone. The content of his ruling on this issue, however, shows that he was troubled by no such considerations when overruling Mr Georgiadis' objection.

The same objections to which we have referred in regard to the statements made at the identification parade apply to the charge and caution statements of the second, third and fourth appellants insofar as they implicate the first appellant. However, Mr Swaraj Singh in his submissions went further than this. He contended that he was entitled to attack the voluntariness of those statements, because, if they were not each proved to be voluntary, and, even more important, true, then they would not have been admissible anyway, let alone the fact that they provided no more than evidence of the weakest kind against the first appellant. Accordingly, when dealing with grounds 2 and 8 of his memorandum of appeal, Mr Swaraj Singh took us in detail through the medical evidence as it affected each of the three appellants concerned. He also analysed the evidence, given in and the rulings on, each trial within a trial, which, we note were held separately to determine the admissibility of each statement, a practice which (as we have had occasion to say in the past) is clearly more consonant with the ends of justice than consideration of all the disputed statements, where there are several accused persons, in one omnibus trial within a trial.

Unfortunately, however, having adopted the correct approach to the separate assessment of the voluntariness or otherwise of the respective statements of the second, third and fourth appellants, the learned judge then, at the instance of counsel then appearing for the first appellant decided to hear the evidence of the medical witness for the defence, Dr Abukuse, who was being called in the first trial within a trial to determine the admissibility in law of the fourth appellant's statement of his examination

of the other two appellants who disputed their statements also. It is perfectly true that this was done with the agreement of Mr Metho who was prosecuting for the Republic; and that there was no dissent at the time (or at least no recorded dissent) from the other counsel concerned. Indeed Mr Ndirangu, on behalf of the fourth appellant, said that he wished Mr Georgiadis to complete the re-examination for his client as well (meaning as well as that for the first appellant). No opportunity was given to counsel for the second and third appellants either to examine Dr Abukuse in chief or re-examine him. Neither does it appear that Dr Abukuse gave his evidence afresh in the presence of the assessors. This is directly contrary to the decision of this court's predecessor in *Kinyori s/o Karuditu v Regina* (1956), 23 EACA 480, where at p 482, the court set out the correct procedure to be adopted during and after a trial within a trial. They said, *inter alia*.

> "The accused will also be entitled to recall and again to examine any witness of his who spoke to the issue in the assessors absence, and to examine any other defence witness thereon."

The reason for this direction is contained in the following paragraph in the same judgment (at p 483):

> "The broad principle underlying that procedure is that the accused is entitled to present, not merely to the judge but also to the assessors, the whole of his case relating to the alleged extra-judicial statement; for the judge's ruling that it is admissible in evidence is not the end of the matter; it still remains for both judge and assessors individually (or, where there is a jury, for the jurors) to assess the value or weight of any admission or confession thereby disclosed and also the accused is still at liberty to try to persuade them that he has good reason to retract or to repudiate the statement concerned or any part of it".

It is obvious that unless all the evidence relating to the disputed confession is given before the assessors, the accused person is deprived of his basic right to have all the admissible evidence weighed and considered by the assessors, who are there to assist, and in many cases greatly assist, the judge in his decision. The reason given for calling Doctor Abukuse's evidence all at once was to save the doctors's time. That may be very laudable in itself, but not if it leads to grave defects in procedure in a capital trial, so as to deprive an accused person of his right to have the evidence considered by the assessors. As a substitute for this the learned judge committed that which in our opinion was another grave error to which Mr Rebello when he was presenting this appeal on behalf of the fifth appellant, drew our attention, in that the judge read over to the assessors that which had occurred in the trials within a trial, instead of letting them hear the evidence for themselves. It may be that the evidence given would have been repeated, in substance, before them, but this material, which was before the judge alone, is precisely not that which should have been read over to the assessors, for the whole purpose of the trial within a trial procedure is then frustrated. Moreover the assessors could not consider the allegations of torture and beatings, as to their truth or otherwise, as the judge directed them to do in his summing-up, unless they had themselves heard all the evidence pertaining thereto. Returning to the evidence of Dr Abukuse, the procedure adopted gave rise to the justifiable comment by Mr Rebello, and by Mrs. Njenga Njau on behalf of the second appellant, that the learned judge, by making a detailed finding regarding the credibility of Dr Abukuse in his ruling on the admissibility of the fourth appellant's confession (which necessarily included, in its context, a finding) not only in relation to Dr Abukuse's evidence as to that which he found when he examined the fourth appellant, but also in relation to that which the doctor had found on his examination of the second and third appellants thereby precluded himself from approaching the issue of admissibility of their respective confessions with an open mind. Indeed he did not even refer to the Doctor's evidence in his rulings on the admissibility of the second and fifth appellant's respective confessions.

Though we consider Mar Swaraj Singh's proposition in regard to grounds 2 and 8 of his client's appeal that he was entitled to attack the voluntariness of the other confessions, inasmuch as they affect the first appellant, to bea valid one, we will nevertheless confine ourselves, so far as this appellant is concerned to the quality of that evidence as against him, leaving the issue of the admissibility of these confessions as such, until we come to consider the cases of the other appellants individually.

We will first turn to the submissions on behalf of the republic regarding the case against the first appellant. Mr Metho sought to persuade us that the pattern of the respective narratives in the confessional

statements made by the second, third and fourth appellants, all of which implicated that first appellant as the instigator of the crime, was such that they fitted in with known circumstances which were proved facts. To take one example, it was an undoubted fact that Stephen Murari Kinya was stopped on the road on the evening just before the murder by an electric post across it, near Sagana, and his Fiat car stolen from him. This fact was referred to in each of these appellants' statements and was thus a guarantee of the truth of those respective portions of their statements.

Mr Metho drew our attention to the several other respects in which these three statements covered the same ground, though made to different police officers, and in particular that they tallied as to the respective roles played by each at the time of the attack on the deceased's house. In this respect, he said, the case was stronger than *R v Gae s/o Maimba and another* (1945) 12 EACA 82, where the conviction of both accused persons was upheld on appeal notwithstanding that in their retracted confessions they sought to blame each other for the actual strangulation of the deceased. Mr Metho posed the questions as to whether it could have been by mere coincidence that each of the second, third and fourth appellants implicated the first appellant as the mastermind behind the murder, and what self interest they could possibly have had in doing so. There was consistency in those parts of their statement which implicated the first appellant, with common denominators of the watchman at the gate of his house, the provision of tea and the private discussion between the first and second appellants inside the first appellant's house. Mr Metho argued that the sum total of all these matters showed not merely corroboration but a strong circumstantial case as against the first appellant.

There is more support for Mr Metho's submissions in two decisions of the High court, *Republic v Samuel Kamau and another*, Eldoret Criminal Case 300 of 1965, a murder charge in which Trevelyan J said:

> "A confession (as defined) is not admissible in evidence if it was induced: Evidence Act (No 46) 1968, section 26. Where an accused makes a retraction which the court rejects there should nonetheless be corroboration subject as aforesaid. It is a very favourable rule to an accused. An invitation to retract. But is a court limited to acting on a statement only if it is true? I believe not. The criterion must be whether the statement represents what its maker has said. It may or may not be true but is entitled to go in as part of the evidence in the case generally without corroboration unless there are circumstances making such corroboration desirable."
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> The second decision was in *Republic v Mwaniki Wanjau and Stephen Ngunji*, Nyeri Criminal Case No 7 of 1974, where the two accused had set out to rape the deceased, had killed her in the course thereof or shortly after, and had made statements admitting their complicity in the crime, but each stating that the other had inflicted the fatal blow on the deceased's head. Hancox J (as he then was) said:
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> "However, neither accused has admitted inflicting the blow on the head and neither statement can in my view, be used as evidence against the other. Again the doctor's evidence clearly shows that the wounds were cut wounds, and Mr Macharia has submitted, with some force, that his client's statement cannot be true because it does not indicate a sharp weapon. As I emphasized to the assessors this is not suggested in either statement.
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> In my view, however, the correct approach to this case is to regard it wholly as one of circumstantial evidence. If the facts are explainable upon no reasonable hypotheses other than that either or both accused persons murdered or actively participated in the murder of the deceased then their denials can safely be rejected. Short of this, if there is any doubt, an acquittal must follow."

However in neither of these cases, nor in *R v Gae s/o Maimba* (*supra*), did the confession in question implicate another accused who had not himself admitted participating in the crime or otherwise shown to have been connected with it. None of them is an authority for the conviction of one accused, in effect, solely upon the extra-judicial confession of another.

While we have listened with great respect to Mr Metho's very competent submissions on this part of the

case, the proposition involved in them cannot, in our judgment, prevail against that which has been settled law for many years. Neither was Mr Metho able to point to any fact which provided independent corroboration that the three appellants concerned congregated in the first appellant's house that night. In our judgment the true position is as stated in *Anyuma s/o Omolo and Ocharo Nyakang v R* (1953), 20 EACA, 218 upon which Mr Swaraj Singh laid great emphasis. In that case a shopkeeper had been robbed at Kisii and the only evidence against Ocharo was contained in the confession of the accused, and the statement of another, implicating him in the raid, plus two pieces of other evidence which the Court of Appeal for Eastern Africa held were either inadmissible or of little weight. At page 221 the Court said:

> "But section 30 "(of the Indian Evidence Act which corresponds now to section 32(1) of the Evidence Act, (Cap 80)" merely says that a confession by a co-accused may be "taken into consideration" as against the accused and the substantive question in each case is what weight can properly be given to it. As was said in the case cited above – "A confession by a prisoner A which involves the guilt of prisoner B is of itself, unsupported by other testimony, evidence of the weakest possible kind against B". It is of course accomplice evidence which needs corroboration and this need is the greater when the maker of the statement has sought to retract it, for as the court said in *Yasin v King Emperor* [1901] ALR 28 Cal 689:
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> It is obvious that a retracted confession should carry practically no weight as against a person other than the maker: it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who had thus lied on one or more occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath."
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> It is perhaps scarcely necessary to point out that an extrajudicial confession by one co-accused cannot be corroborated by the similar confession of another accused."

Even more appropriate to the circumstances of this case is another decision of the same court in the same year, *Karaya s/o Njonji and others v Regina* (1953) 20 EACA 324, an emergency case, where the only evidence against the third appellant, who was said to be the instigator of the strangulation of the deceased, was that of extra –judicial statements by the other two appellants. At pages 325 and 326 occur the following passages:

> "As regard the statements, the mistake the learned judge made was in the use he made of section 30 of the Indian Evidence Act. Every commentary which has ever been written on this much discussed section has emphasized the need for care and restraint in the application of the section. The reason is obvious for the section does reflect a deviation from the English law of evidence, in that it allows, under certain circumstances, a statement by one accused not taken in the presence of the other accused, or tested by cross-examination to be taken into consideration against that other accused person.
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> The section has presented much difficulty in India over the years, and we are well aware that there are conflicting decisions. We are quite satisfied, however, from our study of the Indian cases that it is incorrect to regard a confession made by one accused in an extrajudicial statement as a basis for a case against a coaccused, and to hold that with some corroboration it is safe to convict. On the contrary, what is needed is independent evidence from a trustworthy source, which when linked and supported by the confession of the coaccused, removes beyond any reasonable doubt the question of innocence."

(see also the case of *R v Ndaria & Others* (1945), 12 EACA p 84 at page 86.

That the learned judge did precisely that which the authorities say cannot be done is indicated by the following passages from his judgment:

> "Unlike their evidence in this court each of the 2nd, 3rd and 4th accused implicated Karukenya as well as Kinyua with this murder. They confessed their parts in this crime as well and each one said

what they did. I have set out their said statements earlier. The said statements are in great detail and are consistent with each other."

And he continued:

> Kiringa Njega denied being at accused 1's house on the night of the 29/30 March. In my view the somewhat uncertainty of this part of the evidence would not dent the case for the prosecution in the light of the evidence as a whole which shows that there was a plot, a well planned one to murder the deceased, Kiura, and Karukenya (accused 1) was the master-mind behind it. He arranged for Kiura's death."

Finally, near the end of the judgment he said:

> "The cautionary statements of accused 2, 3 and 4 one of them separately connected Karukenya with this murder. They led the police to his house and identified him. Why would so many police officers be interested in making up a most wicked type of evidence against him as suggested by him?"

We would observe in relation to this last passage, which is touched on in ground 4 of this appellant's appeal, that the other appellant's actions in leading the police to the first appellant's house, and in identifying him on the parade, are just as much extra-judicial statements against him as the incriminating passages in their respective charge and caution statements. We therefore consider that grounds 1, 4 and 5 of the first appellant's memorandum of appeal must succeed.

The principles stated in the cases to which we have just referred with regard to confessions implicating co-accused persons have been followed again in these courts, and it seems to us extraordinary that the learned judge not only acted on this confessional evidence as against the first appellant, but administering no direction either to himself or to assessors in accordance with these authorities.

The only other evidence said to incriminate the first appellant was that of motive. Such evidence, as we have said, can amount in law to corroboration but could not in itself be substantive against the first appellant, particularly as he said that though there was an attachment order against his property:

> " ... Since there was no danger of the sale of my land I did not ask the deceased to do anything."

Whether this was so or not, according to the Court Clerk, PW 43, who produced the civil case file, the sale was in fact stopped on January 19, 1981.

In response to this very weak evidence the first appellant set up an alibi, which we have already summarized. Mr Metho argued with considerable force that the learned judge gave an adequate direction to the assessors on this aspect of the case. At the beginning of the judgment he gave a full direction that the burden of proof rests throughout on the prosecution and that the proof must be up to the standard of the assessors being satisfied that the case against the appellants was proved beyond reasonable doubt: if a reasonable doubt existed then they were entitled to an acquittal. Moreover the judge then directed the assessors to consider the case of each appellant separately, and told them that a finding of guilty against, or an acquittal of, one would not necessarily mean that the others were guilty or not guilty. Coupled with the direction at the end of the judgment.

> "Defence of accused 1, 2, 3 and 4 also summarized including the evidence of all the defence witnesses."

Mr Metho submitted that the judge, notwithstanding the brevity of the notes on certain aspects of the summing-up, must be understood to have analysed the respective defences of the appellants individually. Even if, contrary to his submissions, the judge in his summing-up did not give to this aspect of the case the requisite attention, Mr Metho said that all was corrected and dealt with in the judgment, where the alibi of the first appellant and the evidence of Karangi and of his second wife Jane in support of it were

set out. Furthermore he asked, how was it possible for the prosecution to provide adequate material for the rebuttal of an alibi, so as in turn to enable the judge to consider that material in relation to the alibi and to give a detailed analysis thereof, if the alibi crops up for the first time during the trial? It was this situation, Mr Metho said, which was intended to be rectified by the 1982 amendments to the Criminal Procedure Code requiring prior notice to be given of the intention to put forward an alibi. But even before those amendments (which of course came into force after this case began) the fact that it was set up in advance was a very material factor to be considered in testing the veracity of an alibi, as was illustrated by the judgment of Sir Udo Udoma CJ in *Ssentale v Uganda* [1968] EA 365 at p 368 as follows:

> "That apart, the answer of alibi was raised at the first available opportunity, which was immediately the appellant was arrested. It was therefore the bounden duty of the prosecution or the police, who had investigated the case, to have checked and tested it. But this the police not only refused but failed to do even at the request of the appellant. The learned trial magistrate never directed his mind to this aspect of the case. If the alibi had been raised for the first time at the trial then different considerations might have arisen."

The judge did, it is true, set out the alibi of the first appellant in his judgment, and referred to the witness' evidence in support of it. But there is justification for the complaint in ground 10 of his appeal that he made no attempt to analyse the alibi, for he dismissed it in this perfunctory phrase:

> "Accused 1 (Karukenya) and accused 2 (Wakiongo) pleaded alibi in their defences. The accused does not have to prove alibi. The court has to consider if the "alibi' is even a possibility. Having done so I decide against it. I reject the evidence of accused 1 as well as his witnesses as full of lies and fabrications."

In our judgment this simply will not do. There was no analysis of the alibi, which, *inter alia*, means that it must be weighted and tested intrinsically and as against the prosecution evidence, to see if it might reasonably be true or if it can safely be rejected as false.

Even more brief was the judge's summing-up to the assessors on this point, to which we have already referred. In our opinion there was no indication that the assessors were directed to consider the appellant's defence as an alibi, to be disproved by the prosecution beyond reasonable doubt. There are many decisions of this court on the point, a recent one being *Charles Lamambia v Republic*, Criminal Appeal 8 of 1984. Accordingly we consider that this appellant's appeal must succeed on ground 10 also. We therefore do not need to deal specifically with his other grounds of his appeal and, as we said, grounds 2 and 8 will in effect be considered when we come to the appeals of the other four appellants. As regards the first appellant we are of the opinion that to describe the case against him, and his conviction, as unsafe and unsatisfactory would be a masterpiece of understatement, and that there can be no other conclusion on this appeal than that it must be allowed.

We now turn individually to the appeals of appellants 2, 3, 4 and 5. The second appellant, Peter Gatanyu Kiong'o (Kiong'o) sometimes called Mundu wa Kiong'o or wa Kiomo, of Banana Hill village, Kiambu aged 24 at the relevant time, is the son of a minister of religion who owns a saw mill at Nakuru. Kiong'o was a Kenya Air Force private towards the end of 1981.

He was arrested on September 9, 1981 by Sergeant Mburu Chege of Nairobi CID Headquarters who was with CIP Jared Abok of the Nairobi Special Unit. This was about 6 months after Kiura was murdered. Kiong'o was implicated in this by Tirus Ireri Kinya (Ireri), the third appellant, who was arrested on August 29, 1981. Kiong'o was said to be in perfect physical condition when he was arrested. He then took the Sergeant to his home in Kiambu where a jacket [Exhibit 21] was found but nothing more was made of this.

On September 12, 1981 he was charged with this offence by I P Ngugi at Nairobi CID Headquarters and cautioned in the usual form of words and, according to the officer, Kiong'o elected to make a reply and wrote out his statement [Exhibit 33] in English and it is decidedly inculpatory.

He recounts in it how he joined the Kenya Air Force in 1978 and in January 1981 he was posted to Langata barracks for a month where he met Ireri, the third appellant, of the regimental police, who boasted that he had been issued with a G3 rifle. Two months later, in March 1981, Ireri told him and Cheru, the fourth appellant, he had since stolen it and hidden it in the Langata cemetery opposite the barracks. So Kiong'o and Ireri went and collected it at night and took it to Cheru, the fourth appellant, a civilian who lived at Kangemi. Cheru was to keep it until they took it off with them to Embu to kill Kiura.

Then he describes their journey by bus from Nairobi to Sagana where they alighted and then set up their road block using an electric light pole across the road to halt vehicles. They were going to commandeer one for their mission.

The first vehicle from Embu went straight over the pole, so did the second, a Peugeot 504, but the third a red Fiat KVD 743 hit it and stalled.

Kiong'o opened the driver's door and hauled him out while Ireri and Cheru opened the passenger's door at the front and removed the passenger. Cheru turned the car round while Kiong'o and Ireri robbed the victims of their coats and watches. Kiong'o took the wheel and drove off with Ireri and Cheru.

They were directed by Ireri because he knew the area and they first of all collected the rifle from 'very fertile valley' of Kianda Kianduma and then joined up with Ngoroi, the fifth appellant, and off they went to the house of Karukenya, the first appellant.

When they reached it they found a watchman who seemed to expect them. They left the Fiat outside the entrance gate and passed a Land Rover outside the house. The front door was opened to them by a middle aged woman who gave them tea in the dining-room. Karukenya called Kiong'o aside and in a corner showed him a bundle of Kshs 100 notes. He peeled off 125 of these and handed them to Kiong'o and promised him another 500 of them when their task was accomplished. He asked them to be sure to bring Kiura to him before they killed him. They shared out this Kshs 12,500 between the four of them before they departed.

They went back to the Fiat and left for Kiura's place but they were forced to walk the last part of the way because the Fiat ran out of petrol.

Kiura's house was near that of Ngoroi who suggested they should march into Kiura's garden behind some of his neighbours. The others agreed to his ruse so they woke up an old woman and a middle-aged one, as Kiong'o is said to have described them in his alleged confession, told them they were government officials who were authorized to search Kiura's house from 2.00 am to 3.00 am. At the entrance they left the woman behind with Cheru to guard them.

Kiong'o loosed off two rounds in the air to disperse Kiura's dogs. They called out to Kiura to open the door to them but he refused so Kiong'o heaved a large rock against the door which broke open before them and in they went.

Kiong'o led the way into the house and on meeting Kiura shot him dead. Ngoroi had to hare off after after Mrs Kiura who had escaped into the garden. Ngoroi took the *panga* with him for this. Kiong'o went into Kiura's bedroom where he collected an envelope containing Ksh 50,000 in cash. Ngoroi returned into the house and then with Ireri picked up a cassette player. They went back to Cheru and then all four left the scene. Ngoroi went one way and Kiong'o, Ireri and Cheru another until Cheru could walk no more so he lay down where he was and fell asleep. This left Kiong'o with Ireri and when daylight came they hid the rifle (and cassette) and they went to a hotel for tea.

At 9.00 pm Kiong'o and Ireri reached Kangemi and found Cheru back in his house. Ireri said he would return to Embu to collect the balance of their payment from Karukenya and the cassette and sell the latter. Some days later he returned without the balance or the cassette (which he said had rusted where they hid it).

Kiong'o went to Nakuru at the end of April 1981 and remained there until he was arrested on September 9, 1981.

He concluded this alleged confession by saying he spent some of Kiura's Kshs 50,000 (in the envelope) on 'machines' and the rest he 'misused'.

Kiong'o repudiated this confession. He declared it was not written by him nor signed by him and he produced a page [Exhibit D 18] of a passage from the book of Daniel from one of the new translations of the Old Testament.

Furthermore, he continued, the material in it is not true because in the early hours of March 30, 1981 he was not at Gachihe village in Embu District in the Eastern Province but on his way to Kisumu by bus as his diary [Exhibit D 17] and his used bus tickets [Exhibit D 16] confirmed. He had gone there to buy machinery for his father's saw mill. He had handed the diary and the tickets to Sergeant Chege when he was arrested at Nakuru and they had been returned to him before the trial began. He claimed that after he had been arrested he was tortured by the police from time to time. After his arrest he had been taken to an office in the Nairobi CID headquarters where CIP Abok interviewed him two days later and asked him where his pistol was but Kiong'o denied he ever had one.

So IP Muli and two other policemen took him to Karura Forest and flogged him with ropes and that night, back in the CID headquarters he was treated by a doctor who said he worked at the GSU dispensary and gave him a signed note with details of his examination and treatment which a policeman tore up later.

The next day, September 12, the same officers were joined by CIP Olando and off they went with Kiong'o to the same forest. This time IP Muli produced an election campaign poster of Karukenya's with his portrait on it and asked Kiong'o to attend a parade and select Karukenya as the one who organised Kiura's murder which Kiong'o refused to do so IP Muli burnt Kiong'o's foot with a smouldering iron bar. Kiong'o still would not co-operate so they took him back to CID headquarters where he remained for another 6 days.

On September 24, 1981 he was at Muthaiga Police Station and in the evening CIP Malala saw his injured foot and supplied him with shoes. The CIP Malala took him in a patrol car with its driver, CIP Ngugi, and a photographer, Cpl Chesire, to outside Sagana town where he refused to point to a stationery bus so he was handcuffed. Then he was photographed at the bus stop and outside and inside a hotel. He was locked in the boot of the patrol car and taken to Sagana Technical School where he was removed from it and at gun point photographed near an electric light pole chosen by Eliud Mwai. Back into the boot he went and at Embu CID offices he emerged to meet Nyongesa who took them to Karukenya's house where he was photographed pointing to the Land Rover outside it and in two rooms in the house.

The same procedure was followed in three other houses one of which was that of Kiura. They missed out Ngoroi's home because CIP Malala said he could not remember where it was. He was then left at Embu Police Station.

He had been handcuffed from Sagana onwards and never cautioned before being photographed at various places and he never answered any question put to him. He had never been to any of these places before.

On September 29, 1981 he told the police at Embu he was unwell and he was informed he would be taken to Embu Court, charged and remanded to Embu prison where the doctor would treat him.

When he was charged with the other four appellants he met them for the first time and he was distressed by the false charge levelled against him. The magistrate noticed his foot injury and ordered treatment for it in the remand prison.

The next day he was examined at Embu District Hospital and he had a note [Exhibit D 2] written by whoever examined him there that day. Most of it is indecipherable but there are three lines which are clear and they read as follows:

Peter Kiong'o

30/9/81

Wounds at the back

Having been whipped – 1 month ago

Pus cells

He was examined in the prison on October 21, 1981 by Dr Abukuse at the request of his advocate and the doctor's report (Exhibit D 1) and evidence later revealed that on October 21, 1981 Kiong'o had month old:

> Multiple stripe haematoma on his back, buttocks, thighs and arms thick skin peeling off scars in the center of the sole each foot which could have been caused by hot object a scar on his penis.

Dr Quaraishy examined him on January 7, 1982 and asked him what his age was and when he told her he was 24 she wrote that down on the form (exhibit 4) handed to her by Sergeant Ngio. He also told her all about his rough treatment by the police but she just wrote that his general appearance was good and, finally, she wrote that his mental health was 'okay'.

She examined him again because the defence advocate asked her to do so. This was on March 26, 1982 during the period when the magistrate was conducting the preliminary inquiry and this time she found he had

> 5 headed 1/2" long scars on his back
>
> 2 more on his buttocks
>
> a small abcess on his buttocks
>
> 1 scar on each thigh
>
> 2 on his left arm
>
> a black spot on each sole
>
> an unblemished penis

Kiong'o maintains that it was because he had these scars that he was not taken before the magistrate until 29 September 1981 or 20 days after he was arrested.

Karukenya the first appellant, and Ngoroi, the fifth, did not mention Kiong'o in their exculpatory statements.

Ireri, the third appellant, did, however, in his alleged inculpatory one (Exhibit 38) made on September 5, 1981. He recalled meeting Kiong'o of the Kenya Air Force at the Langata Barracks sometime in February 1981 at about 1.00 am when he arrived at his house in his white Peogeot 404 saloon KPZ 923 and woke him up and asked him where Maingi Kariuki (Kariuki) was and he told him where he lived. Later, Kiong'o returned with Kariuki and they sat on his bed where Kariuki told him to get up and put on his uniform, which he did.

They all met again at Kiong'o's vehicle and Kariuki had a G3 rifle and one empty magazine which was handed to Kiong'o who put it on the back seat and then on the instructions of Kariuki, they took it to Cheru, the fourth appellant, at Kangemi, woke him up and handed it to him and then returned to their

separate barracks.

Ireri said he met Kiong'o again on March 13, 1981 at Cheru's house at Kangemi where the other two told him two men called Kamau and Muhindi from Ireri's unit at Langata barracks had brought to Cheru 14 rounds of ammunition and a magazine for the rifle and there was some work for all three to do with them at Embu.

Kiong'o told them they would travel in his vehicle the next day at 6.30 pm to Ngoroi, the fifth appellant, at Embu and hand him the rifle and this they did at 9.00 pm when Kiong'o handed Ngoroi the rifle and 14 rounds of ammunition with a magazine. They returned in Kiong'o's vehicle to Nairobi by 4.00 am.

Off they went on March 30, 1981 to Embu in KPZ 923 which ran out of petrol near Sagana. Then Ireri has roughly the same account of the holdup save that the Fiat they hijacked is not a red but a blue one. He confirms Kiong'o drove it to Embu and to Ngoroi's house by 10.00 pm where Ngoroi produced the rifle wrapped in a green cloth and off they went with him and it to Karukenya, the first appellant, at Kevute. He has the same account of what happened there save that Kiong'o is said to have been taken by Karukenya into his bedroom and not a corner of his dining-room and the Kshs 500,000 is to be paid if they took Kiura to Karukenya later. He then implicates Kiong'o further with these details. It is Kiong'o who picks up the G3 rifle when the Fiat runs out of Petrol. Kiong'o silences Kiura's dogs by firing off above them. Kiong'o kills Kiura by pumping several bullets into him. Kiong'o walks out with the rifle and the cassette which are hidden under a sisal plant near Kiandundu Trading Centre. He includes the small detail that it is Kiong'o who pays for their breakfasts at the center.

Cheru, on the other hand, collapses outside Kiandundu but Kiong'o and Ireri continue, according to Ireri in his alleged confession, to Itabwa where they board a *matatu* to Embu and then a bus to Sagana where they buy some petrol for Kiong'o's vehicle and drive in it to an hotel in Sagana where they sleep until 4.00 pm.

They then trail back to where they left Cheru but they abandon the search at 7.00 pm, collect the rifle and cassette and take them back to Kiong'o's house at Kangemi which they reach at 9.30 pm where Cheru arrives later and they hand the rifle to him.

Kiong'o and Ireri depart in Kiong'o's vehicle and Ireri leaves him at the gates of his barracks. Kiong'o promises to pay him his full share later.

How did Kiong'o deal with what the other appellants said about him? When he made his statutory defence statement he said that they lied and the one matter he specifically contradicted was that he owned KPZ 923.

Cheru the fourth appellant, implicated Kiong'o in his alleged confession (Exhibit 31) of September 5, 1981 recorded by IP Mwaura. They were known to one another because another KAF private called Gikonyo introduced them to one another in February 1981 and they re-met 3 weeks later at an open air cinema and again in Cheru's house on a Saturday in the same month just before Kiong'o began his leave.

They all met again at Private Gikonyo's house and this time Private Ireri was also present. Kiong'o then tried to sell them some Kenya Air Force bed sheets.

Kiong'o and Ireri returned to him in March that year with the news that they had a gun which they asked him to look after but he refused to do so. Instead he lent them an old sheet and they left him. Some time later they returned and told him they had a successful trip to Embu.

Later still he accompanied them on their journey to Sagana and Embu and the houses of Karukenya and Kiura and his account of all that is much the same as that of Kiong'o and Ireri so he also ties up Kiong'o with the trip to the house of Ngoroi, the fifth appellant, and where they collect the rifle, a *panga* and some clubs. It is Kiong'o, according to Cheru, who leads them next to Karukenya's house and then on to Kiura's place. Here Cheru says he was told to wait at the gate while Kiong'o with the gun and the others

proceed to the house and after some shooting Kiong'o comes out with the gun and a cassette followed by Ireri and Ngoroi.

Kiong'o also maintained that none of this was true.

The judge's notes on his summing-up to the assessors deal with the case against and for Kiong'o, the second appellant, in particular, in this way. Kiong'o was named on September 8, 1981 at an identification parade as one of the group that murdered Kiura and he was arrested on September 9, 1981 at Nakuru. He had, according to the Republic, written out and signed his reply when he was charged with this offence and cautioned but he denied replying to it or writing or signing anything despite being improperly treated by the police. There was a trial within a trial, continued the judge, and he read out the evidence he recorded in it, when, of course, the assessors were absent and, he told them, he admitted this one as having been written out and signed voluntarily by Kiong'o.

He warned the assessors that a repudiated confession may form the basis of a conviction if after careful warning the court is satisfied it is the truth of what happened and of Kiong'o's part in it but it is usual to search for other true evidence connecting Kiong'o with this crime. He reminded them Kiong'o took the police to Sagana, Embu, Karukenya's house, Kiura's house and Kangemi and showed them just where everything happened.

He also summarized Kiong'o's defence and reminded them of the submissions of Kiong'o's advocate.

Both assessors were satisfied Kiong'o (with others) murdered Kiura that morning.

So was the learned judge who in his judgment dealt with Kiong'o's case in the same way as he did in his summing up. He found the witnesses for the republic spoke the truth and Kiong'o did not do so. He was satisfied Kiong'o voluntarily wrote and signed his confession which the judge set out almost word for word and he did the same for his defence statement. He disbelieved his allegations of police savagery or that the doctor's evidence supported them. Kiong'o's alibi was proved, he added, to have been 'not even a possibility' and he rejected it. The diary and bus tickets were spurious. He was satisfied Kiong'o's confession was the truth of what Kiong'o did in this matter and he would act on it without corroboration. The fact that Kiong'o pointed out the exact points of the group's actions during that operation was corroboration of what he confessed he had done. The confession of Ireri and Cheru implicated him and lent some support to the evidence against Kiong'o. He found, in agreement with the assessors' opinions, that the Republic proved Kiong'o guilty with others of this murder.

Kiong'o's appeal was based on these grounds (summarized in our words)

1. The conviction was against the weight of evidence.

2. It was an error of law to find that Kiong'o made any confession or any voluntary one.

3. If Kiong'o did make a voluntary confession it was not corroborated.

4. The judge erred in law in rejecting Kiong'o's alibi.

So far as Kiong'o is concerned it is true that there was no evidence led in the trial that he was recognized or identified by anyone as a member of the group that murdered Kiura and nothing incriminating was found in his possession. The evidence against him was his alleged confession, the allegations made by Ireri and Cheru in their alleged confessions, his reconstruction of the events for the police and the alleged falseness of his alibi.

A reading of all the evidence in the trial and of his alleged confession leaves this court with no reasonable doubt that it could be a true account of what took place that night. But, we recall, Kiong'o claimed he made no reply to the charge and caution despite what he endured at the hands of various policemen. He never wrote or signed that confession and the assessors (by their opinion) and the learned judge found he

did. On an issue of whether or not an accused wrote and signed a document a judge is entitled, in the absence of expert evidence, to examine and compare what is said to be his writing and his signature on it with those the accused admits were his on another and to draw his own conclusion. *Hassan Salim v R,* [1964] EA 126 , 127 D (T) Spry, J; *Onyango v R,* [1969] EA 362 H (K) Mwendwa, CJ and Farrell, J and *Wainaina v R,* [1978] KLR 11, 13a (CA). So can an appeal court. *Pope v R* [1960] EA 132, 145 (CA-K).

The portion Kiong'o alleged he wrote was not made in the presence of the judge and the assessors so the conclusion the judge drew is not, with respect, based on satisfactory evidence. Moreover, this was a capital charge and the evidence of an expert, was, in our view, required before the assessors could reach an opinion and the judge make a finding on the issue. The trial was, it is true, a long one but expert evidence could have been called for by the Republic or the defence or ordered by the judge before the summing-up and it should have been.

Kiong'o objected to its admissibility on the grounds that he never made any reply, written or oral, to the charge and caution. IP Stephen Muriithi Ngugi charged and cautioned Kiong'o and alleged Kiong'o wrote out this confession and after a trial within a trial during which only this was put to him so it was not alleged he ill-treated Kiong'o. After this trial within a trial he was not cross-examined by Kiong'o's advocate or anyone else.

Kiong'o alleged in the trial within a trial he was manhandled by the police. The fact that all the evidence recorded by the judge in that exercise was later read out by him to the assessors in his summing up, though they were rightly excluded from hearing a word of it, and the evidence of the doctors was not called in the trial within a trial or taken into account at any subsequent stage did not prejudice Kiong'o because he maintained he made no statement and signed nothing despite what his captors did to him. The issue of voluntariness was not raised by Kiong'o or his advocate.

Had it been, then the errors in the trial within a trial and after it would have vitiated it.

Having found, however, that Kiong'o wrote this reply and it amounted to a confession which truly revealed his part in it the judge sought corroboration (though he was prepared to act on it without it). He then fell into error, with respect, by finding it in the journey Kiong'o made with the police back along the way the death squad took. Kiong'o was handcuffed, in police custody, had allegedly confessed to this crime and had yet to be taken before any court so if he told the police anything on that tour he told them nothing they did not know.

The allegations made by the other appellants against him at the identity parades were hearsay and those in their alleged confessions could not lend assurance to anything else which counted for nought.

Kiong'o's alibi was not put to Sgt Mburu Chege or CIP Jarad Abok at the trial who arrested him. It was announced by Kiong'o in his statutory defence statement and he produced his diary and his bus tickets.

Again there was no request or order for Kiong'o's written entries in the diary to be compared with a fresh sample of his writing. There was no attempt by the Republic to check on the authenticity or otherwise of the tickets.

The republic had to prove beyond any reasonable doubt that this alibi was false. The learned judge may or may not have made that clear to the assessors but he did so in his judgment. He has roundly declared the diary and the tickets to be part of a plot to support the alibi but he has given no reasons for doing so. We have been unable to support that finding on our evaluation of all the evidence on the issue.

The consequence is that this court agrees that the conviction of Kiong'o was against the weight of the evidence so his appeal must succeed. The case against Tirus Kinyua Ireri 3rd appellant, was based on his charge and caution statement, the evidence of Nyaga Kimani (PW 14) and the circumstantial evidence that led to the discovery of the weapon of the murder.

The charge and caution statement was alleged to have been recorded by Chief Inspector Gideon Muli,

who died during the preliminary inquiry after testifying at the Embu P I as witness No 32 on April 7, 1982. He was therefore, not available at the High Court trial. His deposition was, despite Mr Njiru's objection, admitted in evidence during the trial and after it had been read out by Joseph Naragwi (PW 44). The appellant repudiated the alleged statement and during the trial within a trial the prosecution's evidence consisted of only C I Muli's deposition (EX 37). The appellant gave unsworn evidence and denied signing any paper or statement. The learned judge ruled that the deposition of Chief Inspector Muli showed that the appellant voluntarily made and signed the statement which was admitted as Ex 38. An unusual procedure was adopted whereby the prosecuting Senior State Counsel read out the alleged statement (a role played by a prosecution witness) and produced it.

It is clear from what transpired at the trial that the appellant had no opportunity of cross-examining the police officer alleged to have recorded his (appellant's) charge and caution statement, and the prosecution tendered no evidence to prove that the statement, if any was voluntary. The circumstances surrounding the alleged recording of the statement and the lack of any evidence to prove the voluntary nature of the statement made it imprudent and improper to admit the alleged statement in evidence at the trial. The trial judge's notes and ruling do not show that before he allowed the deposition to be read out he satisfied himself that its reading would not unduly prejudice the appellant (section 303(2) (a)(ii) of the Criminal Procedure Code). We should point out that again in the case of this appellant who had complained of beating and had been medically examined by Dr Abukuse and Dr Qureshi the judge should have considered the medical evidence and properly accepted or rejected it, but he did not even refer to it in his ruling. We agree with Mr Njiru that this statement should not have been admitted, and, hence, we shall ignore it.

In February 1981 Nyaga Kimani was living with Kinyua Ngoroi, the 5th appellant, when two persons whom Nyaga later identified as Tirus Ireri and Peter Githenji, 4th appellant, went to Nyaga's home looking for Ngoroi. That was at about 7.00 pm. The two men went away but came back the same night at 9.30 pm and the 3rd appellant, who was in military uniform went to Nyaga's bedroom.The 4th appellant had a gun, which Nyaga identified as Ex 13, later identified as the murder weapon; Nyaga's identification of Ex 13 was not challenged in cross-examination. The 3rd appellant demonstrated to Nyaga how the gun (Exh 13) worked, when Nyaga was escorting the two to a bus stage. They had been with Nyaga from 9.30 pm to 11.00 pm. At one stage they were in the lounge (referred to as table room) where there was a lamp burning. They stayed with Nyaga until the moon was high before he escorted them. The circumstances for positive identification were favourable: *R v Turnbull* [1976] 63 CAR, 132. The two appellants asked Nyaga if he knew the deceased Kiura and they also asked whether he (Nyaga) knew where Kiura kept his money, an allegation that was not disputed through the cross-examination of this witness.

At the preliminary inquiry at Embu, Nyaga spoke of Njeru Ndogo and at the trial in the High Court he spoke of Kinyua Ndogo. He told counsel for the 3rd appellant that at the CID the 3rd appellant was referred to as Njeru Ndogo Ireri. We do not think the different names used in any way affected the image of the 3rd appellant in the mind of Nyaga.

On the day following the two appellants' visit to Nyaga's home the latter went to see the deceased at his home but missed him.

Although Nyaga was initially arrested and detained by the police for two days after which he was released this did not make him an accomplice and there was no ground of appeal against his evidence as an accomplice. Nevertheless, his evidence was sufficiently corroborated as we shall hereafter show.

After Chief Inspector Jared Abok had received information from some suspects held at Parklands Police Station that the 3rd appellant had a G3 rifle he went to Langata and took the appellant to CID Headquarters for interrogation. The appellant led the police to the home of the 4th appellant at Kangemi, where Ex 13, the weapon of murder, was recovered and so was some live ammunition. These items were handed over to Benson Gichuki Ndugua (PW 5), firearm examiner, together with nine empty catridges found at the scene of crime. The uncontroverted evidence of Benson was that the nine empty cartridges found at the scene were fired from the G3 rifle, Ex 13. In his defence the appellant put forward an alibi and told the court that he had gone to Nyahururu on 3rd March 1981 for sports and when the sports were

over in April he asked for permission to pass through his home. Whereas at the beginning of his unworn statement at the trial he implied that he did not leave Nyahururu till April, at the end of his statement he says that on March 29, 30, 1981, the night of the murder he was at the military camp in Nairobi. Major Gabrain Baratai (PW 4), who said that the 3rd appellant's name was on the roll for army officers who were at the barracks when the roll call was taken in the morning of March 30, could not testify that he personally saw the appellant there since he did not personally take the roll call. He also said that the athletes who had gone to Nyahururu returned in early May 1981 although the 3rd appellant not having done well was returned earlier, but the major did not know the exact date of the appellant's return. The major did not support the appellant's allegation that he asked for permission to pass through his (appellant's) home when the sports were over. As Mr Metho correctly stated an alibi may be rebuted through cross-examination of the witnesses supporting it, or by self-contradiction in the evidence of the person setting up that defence. The evidence of the appellant relating to his alleged alibi placed him at two different places so great distance apart, namely, at Nyahururu and at Nairobi's Langata Barracks. These contradictions showed the falsity of the alibi.

The evidence of Nyaga supported by the independent circumstantial evidence of February 1981 and his leading the police to the home of the 4th appellant where the murder weapon was established the guilt of the 3rd appellant, again the circumstantial evidence we have set out above is incompatible with the 3rd appellant's innocence and incapable of explanation on any other hypothesis than that of his guilt. On our own assessment and evaluation of the evidence we are satisfied that this appellant participated in the crime was established by the prosecution beyond reasonable doubt. The 3rd appellant's appeal fails and should be dismissed.

The 4th appellant, Peter Cheru Githinji, was arrested on August 29, 1981 and on September 5, 1981 he made a charge and caution statement to Inspector Charles Mwaura in which he narrated how he met the 2nd, 3rd and 5th appellants. He admitted taking a part, with the 2nd and 3rd appellants in laying the electric post across the road at Sagana in order to obstruct passing traffic so that they could rob any motorist of a motor vehicle to be used in the murder. The vehicle used to transport the appellants to the deceased's home on the fatal night was robbed in this exercise and it was a Fiat car. The 4th appellant had this to say in his statement:

> "When it reached where the post was, the vehicle stopped. It was a Fiat colour green. We rushed at the vehicle. Kiong'o stood at the side of the driver. Kinyua stood at the passenger's side while I stood at the rear of the vehicle. The vehicle had two people. Mundu wa Kiong'o removed the driver, Kinyua removed the passenger while I rushed inside the vehicle and drove the vehicle towards the direction it came from, Embu. Wa Kiong'o and Kinyua robbed those two people their coats. Mundu wa Kiong'o and Kinyua came into the car and wa Kiong'o drove the vehicle as we headed towards Embu side. Myself I was at the rear seat. From there we drove straight to a certain man's place called Kinyua Ngoroi ... Kinyua Ngoroi and the other Kinyua went somewhere in the garden and returned with a gun. The gun was dismantled and they started assembling it. The gun was completely assembled ... We went and entered into the vehicle with the gun."

He was left to guard the gate of the deceased's homestead as the others invaded the house and fatally attacked the deceased. He witnesses all that took place playing his part as narrated in the statement. He was present and participated up to the end because he said in the statement that when the other attackers came out from the deceased's home he called them to draw their attention to where he was stationed and then left the home with them.

The 4th appellant repudiated and retracted the confession and during the trial within a trial he narrated to the trial court how he was tortured in Karura Forest and at the CID headquarters by Chief Inspector Abok, Kivyatu, Inspector Mwaura and Sergeant Mburu. He referred to injuries to his neck where a rope was tied and his legs and said he was whipped and was pricked with a sharp instrument and he bled profusely. On October 21, 1981, the appellant was examined by Doctor Shadrack Abukuse (DW 1) who found haematoma on the appellant's neck, caused by rope tied round his neck. There were multiple stripes of haematoma on the back part of the thorax a cut on the right ear lobe and bruises on the lower third of both legs which appeared to have been inflicted by a rope tied around them. The doctor testified as to many

other physical injuries on the body of the appellant including his penis, tibia bone area and the tip of the first toe of the left leg which had a wound 2 centimeters in diameter. The doctor said that these injuries were about a month old.

The trial judge ruled that the appellant voluntarily made the statement. On the allegation of torture and the evidence of Dr Abukuse the judge said:

> "The doctor described the injuries he found on the 4th accused as listed down in Ex D 4. The doctor stated that the injuries he found on accused 4 were about a month, month and a half or two months old ... I have considered all the evidence before me in this trial within a trial including the accused's unsworn statement and his doctors's evidence... .I am not sure as to the extent to which this privately engaged and paid doctor was influenced by the prior information that he had about the murder charge and the tortures."

With respect the judge had not carefully considered the evidence in the trial within a trial, as he purported to do for had he done so he would not have made the unwarranted disparaging statement attacking the integrity of another professional man with no cause as he did. Equally, he could not have failed to bear in mind what is stated in the case of *Njuguna Kimani & 3 Others v Reginam* (1954) 21 EACA 316 where the predecessor of this court correctly stated that it was the duty of every judge and magistrate to examine, with the closest care and attention, all the circumstances in which a confession has been obtained from an accused person. The onus upon the prosecution to prove affirmatively that a confession has been voluntarily made and not obtained by improper or unlawful questioning or other improper methods is all the heavier when actual violence appears to have been or is used*: Mataka v Republic*, [1971] EA 495 at pa 505 [1971] EA 495 at p 505. In the circumstances of this case the judge's ruling was unfair, for besides the allegation of violence having been used and the medical evidence thereof, there was the long detention in police custody (for 8 days) before the statement was recorded. We are inclined to agree with Mr Hayanga that the prosecution did not discharge the onus upon it affirmatively to prove the voluntary nature of the appellant's confession and in those circumstances the statements attributed to the appellant should not have been admitted and must be discarded. It is not, therefore, necessary for us to deal with grounds of appeal 8 and 9 which relates to the question of corroboration of the alleged confession and the weight and credence the evidence of Leah Muthoni Njeri added to he appellant's objection to the statement. In February 1981 the 4th appellant was with 3rd appellant when they visited the home of the 5th appellant, they were seen, and had a discussion with Nyaga Kimani. We have already set out what transpired on the night in question when considering the case against the 3rd appellant. However

we must point out again that it was the 4th appellant who had or carried the gun (Ex 13) and the 3rd appellant demonstrated how it worked. The unmistaken identification of the 4th appellant by Nyaga as the person who remained in the table room where there was a lamp light and Nyaga's evidence that he escorted the two appellants to the Runyenje's bus stop when there was moonlight was not challenged in cross-examination. The appellant and the 3rd appellant that night wanted to know whether Nyaga knew the deceased and where the deceased kept his money.

When the 3rd appellant led chief Inspector Jared Abok to the home of the 4th appellant at Kangemi and after Abok had taken the two appellants to the CID Headquarters and interrogated Cheru on whose request he and Abok went back to Kangemi where the appellant led Abok to a stationary car (registration Number KCX 357) outside his (the appellant's) house. The appellant opened the bonnet of the car and produced therefrom the G3 rifle (EX 13) which was wrapped in manila bag. The appellant then led Abok to a place in the compound where he dug and produced therefrom a magazine loaded with eleven rounds of ammunition which were all live and which the firearm examiner, Ndugua, said that were for use in Ex 13.

The conduct of the 4th appellant and that of the 3rd appellant in taking the police to places where they pointed to objects ie the G3 rifle (Ex 13) and the live ammunition in 4th appellant's compound was admissible evidence: *Woodrooffe's Law of Evidence* 9th Edn p 295.

At his trial the appellant gave an unsworn evidence in which he repeated his account of being tortured in

the Karura Forest and at the CID Headquarters. He also spoke of the Malala exercise whereby he and the 3rd appellant were taken to various places at which their photographs were

taken by the police. He denied killing anyone since his childhood. He said that he knew nothing about the gun and he had never kept such dangerous weapon.

In our opinion the circumstantial evidence we have already set out and which we have reached after our own assessment and re-evaluation of the recorded word, justified the inference of the 4th appellant's guilt on the principle set out in *R v Kipkering Arap Koskei and Another* (1949), 16 EACA 135. That evidence also shows the presence of a common intention which connects the 4th appellant with the 3rd appellant, and places the two appellants squarely at the scene of the murder and, therefore, firmly linking the 4th appellant, as it did the 3rd, with the other appellant who was proved to have participated in the murder of Kiura.

Being satisfied that Cheru's guilt was proved beyond reasonable doubt we must dismiss his appeal.

Now we turn to the fifth and the last appellant, Kinyua Ngoroi (Ngoroi).

The republic's case against him was that sometime in February 1981 Ireri, the third appellant, and Cheru, the fourth appellant, met Peter Nyaga Kimani (Nyaga) when they were looking for Ngoroi. Nyaga took him to a house in which he lived with Ngoroi and his brother Kariuki. Each occupied a separate room. They had something with them which Nyaga put in Ngoroi's room and then they went out to look for Ngoroi who returned without them and in turn, went out to look for them. Back came Ireri and Cheru saying Ngoroi was drunk and Nyaga accompanied them to the bus stop and on the way they showed him in the moonlight the gun (Exhibit 13) and how it worked. Ngoroi told Nyaga later he knew Ireri and that he was a soldier but he did not know Cheru.

On March 12, the same year Ngoroi saw 3 people but at what time is not clear from the evidence. One was Samuel Kabiruchi Kathanga, the brother of Kiura, whom he asked to persuade Kiura to give him Kshs 10,000 because he had been given that sum by some men to kill Kiura. The second was Mrs Sarah Njoka Kiura (Mrs Kiura), the wife of the deceased, who was in her shop at 1.00 pm and he asked her to telephone the District Commissioner, whom Kiura was meeting, and tell Kiura that Ngoroi wanted to see him. The third was Mrs Dorothy Wanjira Njagi (Mrs Njagi) the wife of an Embu advocate. She owns the Provincial Bar and Restaurant in Embu but she was visiting the Pemboni Hotel that evening. There Ngoroi said he had signed a contract with others to kill her and it was out at Runyenjes so she sent him out in her orange Toyota KVJ 192, driven by her father-in-law, Ngarumo, to look for it at 7.00 pm. They went to Kevuta where Ngoroi went to a house and returned saying the letter was missing but he had seen some men with a gun. Then they went to Gitiyo Runyenjes were they roused Mrs Kiura, her daughter Margaret Thaara Kiura (Miss Kiura) and one of her brothers but they could not bring Kiura out to see Ngoroi. They returned to Mrs Njagi who was in her own bar with the Embu DCIO, IP Naragwi. It was after midnight but Naragwi took Ngoroi to his own home and showed him where the gun had been kept but it was missing and so were the men who had brought it there.

Came March 29, a Sunday and Nyaga saw Ngoroi at their house in the morning but he was not there at the time Nyaga went to bed which was 9.30 pm in his testimony at the trial and 11.00 pm in the preliminary inquiry.

At 3.00 am on March 30, some neighbours of the Kiuras were woken up by four men and made to show them where the Kiuras live. They were Naomi Njoka and her daughter-in-law, Esther Wambui, and they could not identify or recognize any of the men. They swore they did not know Ngoroi.

Then there was the attack on the Kiuras and gunning down of Kiura. Ngoroi was recognized by Mrs Kiura by the light of the moon and by his voice, and she had known him since he was a young boy. Miss Kiura saw him by the light from a torch one of his group shone on Ngoroi's face and she had been at the same school with Ngoroi. They were adults. One of Mrs Kiura's three sons, Joseph Kariuki, who was 16 when he gave evidence, swore he saw and recognized Ngoroi, whom he had known since 1979, among

the four bandits attacking their homestead.

Between them they saw Ngoroi facing them and picking up a large stone which the Kiura's used for grinding food-stuffs before it was used to break down a door to the house where the elder Kiuras were. Then they saw Ngoroi with Kiong'o in the corridor leading to Kiura's bedroom where Kiong'o shot Kiura when he emerged from it and then Ngoroi chasing after Mrs Kiura who fled from the main house into the garden where he felled her with a blow from a *panga*, clutched and tore her dress when she rose up after he had delivered three more blows about her head and shoulders with same weapon. She yelled at him and asked why he was attacking her when she knew him and he replied that he did not know her at that time.

The three members of the family did not all see and hear all of that so they did not give the same account of the episode. The daughter and son were asleep in a house that was separate from the one where their parents were. Kiura flashed his torch at Kiong'o and Ngoroi when they were about to kill him. One of the gang shone his at Ngoroi when the attack on the house began. There was moonlight. Mrs Kiura was as close to Ngoroi as anyone can be when they were being attacked by the other with a *panga*. Miss Kiura was about 5 paces away when he slashed at her mother. Kariuki Kiura was only 3 paces off when he saw Ngoroi lifting the grinding stone.

The three sons, Joseph Kariuki, Joel and Salesio slipped away from the houses and told Constable Katana at Runyenjes police station of the attack on their parents. Their report was made at 3.50 am. Mrs Kiura who had to find something to wear first, followed and made her report to Constable Katana and the acting OCS, Corporal Nancy Waithira. She named Ngoroi as one of them and said he had cut her and spoken to her.

Mrs Kiura was taken to Kongori, a clinical officer at Runyenjes and he found she had two cut wounds, one on each shoulder, measuring 2" x 1" x " 1/2", a few small cuts on her chest and one on her right ear 1" x "1/2" which were consistent with cuts by a sharp instrument such as a sharp *panga*.

At 6.00 am AP Sergeant Njue Simba arrested Ngoroi and Nyaga in their different rooms and took them to the Kenya Police at Embu. Nyaga was released on April 4 and Ngoroi was charged with this offence and cautioned by CIP Kivyatu, the PC10 from Isiolo, who was on a routine visit to Embu and knew nothing of all that had gone before.

Ngoroi told him he was suffering from asthma and then elected to reply in English with an exculpatory statement which CIP Kivyatu faithfully recorded in full.

Ngoroi claimed Kiura as a lifelong helpful friend. He had been to find him on March 13, 1981 at his shop but found only Mrs Kiura present. He went to their house at 10.30 pm and found Mrs Kiura, her daughter and her son. He returned to their shop at 8.00 am on March 14, where he saw Mrs Kiura and then Kiura who told him to collect Kshs 10,000 and in exchange Kiura would give him stock for a business he wanted to begin.

He had been on a drinking spree from 7.00 to 10.30 pm around Runyenjes and Embu with Kiura Kiboko in his Peugeot 404 saloon KKU 188 together with Muriuki Nyaga and Njagi going from bar to bar until he met Nyaga in the night club at Runyenjes from where they trailed back to their rooms and went to their rooms at 11.00 pm.

He named the bars as the Blue Valley Estate canteen, the Silent Selected Bar and the Pemboni, the Kabukuba and the State Bar and he remembered just who had had what drink and who paid for it.

The next morning March 30, when he was arrested he was told Kiura had been killed but he was not involved in that deed.

Dr Obong'o examined him on April 3, 1981 at Kerugoya hospital because the doctor at Embu was not available. He found he was about 26 years old, fit, alert, sane and with no visible injury on his face.

Ngoroi did not tell him he was unwell or had been ill-treated by anyone.

Ngoroi was taken before the Runyenjes District Magistrate who read out the charge to him and remanded him in police custody.

Ngoroi was implicated up to the hilt in this alleged murder by Kiong'o, Ireri and Cheru, his co-accused and appellants, when they were arrested and charged and cautioned and made statements between September 4, and 13 that year.

So much for the case against Ngoroi. His defence at the trial was made on oath and he claimed the police had refused to let him expose a plot by Dorothy Wanjira Njagi and others to murder Kiura because some politicians were involved in it, the police had forged the statement he was alleged to have made in answer to the charge and caution and then made him sign it at gun point and he had an alibi for the event. Again he said Kiura was his good friend and a man of his area.

Nyaga had told him on March 7 Mrs Njagi and others wanted Kiura erased and the next day he warned Kiura who told him to find out more about this. Mrs Njagi admitted she and others wanted Kiura and her husband, the advocate, wiped out when he saw her that evening. They were 'dictators' bent on grabbing other people's property by force. Back he went to Kiura with this news and he told the Runyenjes police.

Nyaga told him to report to Mrs Njagi on March 13. He went to find Kiura but Mrs Kiura said he was with the DC at Runyenjes. He saw Mrs Njagi and the DCIO, Naragwi, that evening and she sent them off to meet two men who were with Nyaga and would recruit him in Runyenjes and

he set off with Ngarumo in her vehicle. There he found Nyaga and Ireri and the gun and he was shocked to see the gun. He and Ngarumo went to warn Kiura but his family kept them away from him.

On the way back he met Naragwi at the police station with Mrs Njagi and they told him to forget about what he had just seen. He threatened to tell the OCPD so Naragwi took Ngoroi in a police vehicle with Sergeant Ngio and Mrs Ngigi back to Ngoroi's house. Leaving Mrs Njagi in the Land Rover, Naragwi took Ngoroi into his house and told him he was betraying the others having agreed to be part of the assassination gang. There was no-one else in Ngoroi's house. Naragwi searched his house and found nothing in it. Ngoroi was left behind and sent to sleep. The others went away.

The next day Nyaga said he and the others had narrowly escaped being caught by the police. Ngoroi told Kiura who reported this to the police at Runyenjes. He found no help there and he was due to see his MP. That MP saw Ngoroi three days later and told him to forget what he had seen and heard because there were other politicians at work in all this.

He repeated the details of his drinking bout on March 29 which were in the statement produced by CIP Kivyatu.

He then swore that he was home by 11.00 pm, woke up his mother, took some pills with water and found his brother Kariuki at home where he lay down and slept.

Next came the events which led to his signing the statement CIP Kivyatu composed.

On March 30 Kivyatu struck him in the cells when he was telling him his life story. Naragwi saw him and told him not to mention Mrs Njagi's plot. Ngoroi vomited blood and was taken to hospital where he was treated for chest trouble and given a card with some details of this on it which Naragwi tore up.

March 31 was the day he was taken by Naragwi to Ngigere where he had his penis and testicles roped to a tree but he refused to promise not to talk about the plan to kill Kiura and Njagi. Back in the prison an alarm sounded in the night and Naragwi came and told him someone called Musa, who knew about the plot, was on his way to die in Kenyatta Hospital. He would be the next to do so.

He survived and on April 1 he was beaten up in he CID offices and then taken to Embu hospital where the doctor complained of police brutality. Naragwi tore up the doctor's report.

On April 4, he was ferried to Kerugoya hospital and on the way Naragwi beat him up on a bridge. All the time Nargwi was anxious that Ngoroi should not reveal there was this scheme to kill Kiura and Njagi. He was examined at Kerugoya and returned to Embu. He wrote out a statement for Naragwi in an office who tore it up. Back they went to Ngigere where they beat him again.

He was taken to Kivyatu who asked him questions and lashed him with a whip when he did not give the answers Kivyatu wanted and when he did Kivyatu wrote them down and thus the reply to the charge and caution came to be composed. He was then made to sign it while Kivyatu covered him with a gun.

He was not taken before any magistrate until April 21, 3 weeks after his arrest and about 17 days after he had signed the statement CIP Kivyatu had written. The magistrate made an order that he should be examined in gaol and an X Ray revealed he had dislocated shoulder so he went into hospital for 8 days.

The accused who implicated him told lies about him and so did the Kiura family, one and all. The latter said they saw him because they had seen him on March 13, at their gate and because Naragwi stirred them up to do so to keep Ngoroi from ratting on Mrs Njagi and the others and, presumably, Naragwi and the politicians.

Ngoroi's mother, Concepta Igandu, remembered that the evening before Kiura was killed, Ngoroi, and Nyaga returned to their house 30 feet away from hers at about 10.00 pm. Ngoroi had a cough and she gave some medicine with water which he swallowed. They returned to their rooms and she did not wake up again. Her dog would have barked had anyone tried to leave or return during the dark hours and she did not hear the dog bark.

Dr Muriithi confirmed that Ngoroi was treated by him at Embu Hospital for chest pains and vomiting on March 30 and admitted for dislocated shoulder between April 24 and 30 in Embu hospital in 1981. Thereafter he was an outpatient for chest pains and coughing until May 21. He was persuaded to say that a twist, pull or fall could lead to a dislocated shoulder and chest pains. Coughing and vomiting were common ailments and when he examined Ngoroi he did not complain of being roughly handled by the police and his body was not marked with haematoma or bruises.

The learned judge's summing up and judgment embraced all the appellants, of course, and so did the opinion of the assessors and the findings of the judge.

The assessors and the judge, by implication and specifically, respectively, believed the witnesses for the republic and Doctor Muriithi but not Ngoroi's mother and Ngoroi. Our independent review and consideration of the record leads us to find that their assessment of their credibility was correct.

Ngoroi was not examined by Dr Abukuse, he did not call Dr Muriithi until he embarked on his defence, and his statement was exculpatory so any mistakes that occurred in the trial within a trial for that statement cannot be said to have occasioned him any prejudice.

The discrepancies in the evidence of Mrs Kiura, Miss Kiura and Joseph Kariuki Kiura that were revealed by a comparison of it with what was recorded as their testimony at the preliminary inquiry or from them when they made their statements to the police were not sufficient to make the assessors or the learned judge, who saw and heard them tell of the attack on Kiura, doubt the truth of what they said. Nor do they make us to do so.

The claim that he was the victim of manoeuvre by local politicians and Mrs Njagi and Naragwi, the local DCIO, to wipe out Kiura and Njagi because they were, so to speak, robbing the locals was not put clearly to the witnesses for the republic and was vague and, in all, incredible.

The assessors and the judge rejected the alibi of Ngoroi and the judge gave his reason for doing so. He

believed those who saw Ngoroi attacking the Kiura homestead and not Ngoroi who said he was at home and his mother who did not hear her dog herald his going out or his coming in that evening when she was asleep in her house near us. He remembered that the Republic had to prove the alibi was beyond any reasonable doubt false though he did not put it in those exact words. We do not find that his finding was an error of fact or law or both.

The truth is, we conclude, that Ngoroi was recognized by the Kiura's who knew him well, in conditions which were reasonable for doing so, and he was a member of the group that murdered Kiura. His appeal must be dismissed.

For these reasons we allow the appeals of Karukenya and Kiong'o, quash their convictions, set aside their sentences and order that they may be released forthwith if they are not otherwise lawfully held. And we dismiss the appeals of Ireri, Cheru and Ngoroi.

Dated and delivered at Nairobi this 26th day of July, 1984.

A. A. KNELLER

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JUDGE OF APPEAL

A. R. W. HANCOX

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JUDGE OF APPEAL

Z. R. CHESONI

.....

Ag. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR