



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, WAKI & NYAMU, J.J.A)
CRIMINAL APPEAL NO. 157 OF 2007

BETWEEN

ANTHONY KINYANJUI KIMANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Ojwang, J.) dated 18th September, 2007

in

H.C.C.R.C. NO. 63 OF 2005)

JUDGMENT OF THE COURT

This is the first and last appeal by **Antony Kinyanjui Kimani** more popularly known as “*Baba Kim*”, who was convicted by the superior court (Ojwang J.) on 18th September, 2007 for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the Information laid by the Attorney General before the superior court alleged that on the 22nd day of March, 2005 at Dandora Phase V in Nairobi area, the appellant murdered **Francis Kamanja Ndubai** (“*the deceased*”). The superior court, which sat with the aid of three assessors, heard evidence from seven prosecution witnesses and sworn testimony of the appellant before the assessors returned a unanimous opinion that the appellant was guilty as charged. The learned Judge in a long and detailed judgment, running into 58 typed pages, evaluated the evidence and agreed with the assessors that the offence had been proved beyond reasonable doubt. Thereupon the appellant was sentenced to suffer death without requiring any mitigating circumstances from him, which is one of the complaints raised before us. It is nevertheless confirmed by the State and the appellant, that the death sentence has since been commuted to life imprisonment by the President on advice of the committee on prerogative of mercy.

As this is a first appeal it is our duty to re-assess the evidence on record and re-evaluate it in reaching our own conclusions in the matter. In doing so however, we must always remember, and allow for it, that we did not see or hear the witnesses who testified and therefore where factual findings are based on

credibility of the witness, the trial court would be a better judge on credibility. The two crucial witnesses who provided direct evidence and were heavily relied on by the trial court were: **Tabitha Muthoni Mwangi** (PW1) (Tabitha) and her husband **David Waite Mugo Kamau** (PW2) (David). David was employed by the City Council as an *askari* and was based at the Kariobangi Water and Sewerage Depot. He owned a plot of land at an area called Dandora Jua Kali Block B. It is an informal settlement without electricity supply. On the said plot he had constructed four timber houses in one fenced compound and the fenced compound was accessible through one gate. He and his wife Tabitha who had a small child occupied the main house and had rented one of the houses to Baba Kim. The other one was vacant.

At day break on 22nd March, 2005, Tabitha heard a knock on the gate. She went to open it and found it was a visitor of Baba Kim whom she had seen twice before visiting him. It was Kamanja, the deceased. Baba Kim opened his door for him but within a short while the deceased walked out again to go to a shop outside the compound and returned again to Baba Kim's house. After about 20 minutes since the arrival of the deceased, Baba Kim went to David's house to wake him up. He was complaining that the deceased had stolen his jacket with Shs.600/= in one of its pockets. He asked David to go with him in pursuit of the deceased, which they did. They found him and returned with him to Baba Kim's house at about 7.30 a.m. David however left the house and also the compound, but some two young men joined Baba Kim in his house. It was then that Tabitha looked through the wooden timber walling of the house and saw the two young men beating the deceased and the deceased told them he had left the money with somebody called **Michelin**. The two young men and Baba Kim stopped beating him and left the house leaving the deceased therein. After a short while the three returned and Tabitha again saw the three men resume the beating of the deceased. Baba Kim was using an iron bar while the young men were boxing him. This time the deceased screamed hard and attracted neighbours. On seeing the curious neighbours, the three stopped beating the deceased and carried him to the neighbouring house which was unoccupied, about 8 meters away from Baba Kim's house. They shut the house and left. That was about 10.00 a.m.

Baba Kim returned to the compound alone at about 12.30 p.m. Tabitha told him she had gazed through the wooden walls of the house where the deceased had been and it appeared to her that he was not breathing. Baba Kim went into the house but came out saying " *This friend is okay. It is only that he had been drunk. He is just asleep*". Baba Kim gave his own example that he sleeps the whole day when he is drunk. He also told Tabitha that he had been to the police station to report and showed her some Occurrence Book (O.B) number. No details were given to her about the report but Baba Kim told her it was a precaution in case the deceased went to report to the police, he would find Baba Kim's report there. Satisfied with that explanation, Tabitha continued with her house chores. At about 8 p.m. however, she heard some movements of people in the compound. She peeped through the window of her house, and despite the darkness, she could see something looking like a mattress held by some young men moving towards a handcart. There were soft conversations between them and she managed to recognize the voice of Baba Kim. She could recognize it because he had been their tenant for about six months and she was familiar with his voice. The handcart was pushed away.

David returned home at about 9 p.m. He told Tabitha he had been to his workstation at Kariobangi. As Tabitha was about to tell him about the strange events of the day, there was a knock on their door. It was Baba Kim who was looking anxious. David told his wife to leave them alone and she went into another neighbour's house. She stayed there for the next hour until David went to call her at 10 p.m. He was in the company of Baba Kim and they were both drenched in rainwater. They also had a piece of meat which David told her to cook for them. When the food was being served Baba Kim started abusing David and there was a flare-up which almost led to a fight. David ordered Baba Kim out of the gate which he locked. As Baba Kim walked away he issued a threat to David: "*Utajua mimi ni mume, na nitakufunza adabu leo*". (*You will know I am a man and I will teach you a lesson today*). Forty minutes later, Baba Kim walked back into the compound with policemen. They entered their house and searched it. They also searched Baba Kim's house. They collected David, Tabitha and her young child for questioning at Dandora Police Post. On the way they went through Dandora dump site which was 250 meters away and David pointed out the spot where the body of the deceased was found and it was collected. Tabitha was shocked to see the deceased's body and even more so, to see her husband pointing out the spot where it was. She was kept in the police post until morning when she was released after writing her statement on

the events of the previous day. But her husband together with Baba Kim remained in custody. He would not be free until after another two months.

David's testimony was that when Baba Kim had woken him up at 6 – 7 a.m. on 22nd March, 2005 to complain about his lost jacket and money, they had gone together to a *chang'aa* den of one Michelle (Michellin) where the deceased had been drinking and found him. When they returned with him to Baba Kim's house, the deceased denied he had taken the money or jacket. A quarrel and a fist fight ensued between the deceased who was drunk and Baba Kim who had a hangover but David advised them to report the matter to the police. They stopped fighting and he left to go to his work station at Kariobangi where he was looking for one Onuko, who had his money. He found the debtor had been transferred to another area called Ngunyumu and he went looking for him until he ended up at Onuko's house in Korogocho at about 6 p.m. It was a rainy day and so it took time to move around. Onuko came home and they headed to another man's home where they stayed until 8 p.m. before he started his journey home arriving at about 9 p.m. As his wife started narrating the events of the day, Baba Kim came in looking very worried and called him outside. He told him the deceased had died. He also said he had reported the matter to police and David should not be worried. David was shocked and was gripped with fear. He told Baba Kim he would not believe it until he saw the body. Baba Kim then took him to the dumpsite where he saw the half naked body on a mattress. Baba Kim told him it was a secret which he must keep and further suggested that they both go to the *chang'aa* den of Michelle to take some *chang'aa* since what David had just seen was "*a bad sight*". Baba Kim bought David a lot of *chang'aa* and the two drank to a point where Baba Kim became nasty and insulting. David said they should leave for home and they bought some meat on the way. As his wife was cooking the meat, Baba Kim became even more insulting and David responded. They fought and he threw out Baba Kim. That is when Baba Kim said he would teach him a lesson. Tabitha told him Baba Kim was associating with Mungiki and David thought he would bring Mungiki. Shortly thereafter there was a knock at the gate and he prepared to confront the Mungiki. He felt relieved when he saw from a distance some four police officers in uniform and a walkie talkie. Baba Kim was also there. David opened for them and they came in. They asked for the vacant room in his plot and for the body which had been lying there. Since he had already been shown the body, he took the police to the dumpsite where they collected the body. The two were then locked up at Buru Buru Police Station where he recorded his statement and was eventually released without any charges being preferred against him.

The injuries found on the deceased by **Dr. Peter Muriuki Ndegwa** (PW6) who performed the postmortem on 14th Dec ember, 2005 were consistent with the severe beating he had received on 22nd March, 2005. The body was identified by **Pc. Patrick Mbuvi** (PW7) and the deceased's sister and it had multiple bruises everywhere externally. It also had sub-cutaneous haematomae on the left muscle, and subcutaneous and intra muscular haematomae on both hands. The internal organs were normal. In his opinion, the cause of death was ex-sanguination following multiple blunt traumatic injuries resulting in the loss of blood and haemorrhage. Explaining further, Dr. Ndegwa said due to the bruising, blood had exited out of the vascular system and blood had clotted in the tissues, with the result that there was failure of blood conveyance of oxygen for use by the body.

There can be no doubt that the deceased was alive and well by 7.45 a.m. on 22nd March, 2005. He called his brother, **Peter Muchoki Ndubai** (PW3) on telephone and informed him he was in Dandora Phase IV and that there was a problem but he would find him at home. They were staying together in Eastleigh. Peter waited until 12 noon but did not see his brother. It was after 1 1/2 weeks that he received information from Dandora Police Post that the body of the deceased was at City Mortuary and he went there to confirm it.

The remaining prosecution witnesses were two police officers: **Pc. Muyekho Wamela** (PW4) of Dandora Police Post, and **IP Francis Sembe** of Buru Buru Police Station. It was Pc. Wamela's recollection that Baba Kim went to the police post sometime after 11 p.m. on 22nd March, 2005 and reported that he had seen his landlord while in the company of other people beating his fellow tenant. He reported further that the landlord and those people later carried the tenant on a handcart while still being beaten, to an unknown destination. The name of the landlord was given as David Maina Waite. Pc. Wamela

immediately summoned two other police officers after booking the report in the O.B, and they headed for Dandora Jua Kali estate in the company of Baba Kim. They found David and Tabitha and asked them how many tenants they had and they said it was only Baba Kim. Baba Kim retorted that they were two and showed them his own house and an adjoining room which was vacant. The rooms were made of cartons and plywood. After further interrogation the two led the police to Dandora dumpsite where the body of the deceased was found half naked lying on a mattress. The police officers then arrested Baba Kim and David and also recorded a statement from Tabitha and the lady owner of the chang'aa den where the deceased, Baba Kim and David were last seen together. As far as Pc. Wamela knew, the two; Baba Kim and David, knew what had happened to the deceased and were supposed to be charged in court for the offence but he was surprised to see only Baba Kim in the dock.

The explanation why that was so was given by IP. Sembe who was in-charge of the homicide unit at Buru Buru Police Station and was the investigating officer. His testimony was that he took over investigations upon a report having been made at the station on 7th April, 2005 by the deceased's sister, one Jane Wairimu Ndubai. He and another police officer, as well as Jane, proceeded to Dandora Police Post where two suspects were being held. They visited the houses of Baba Kim and David as well as the dumpsite where the body was collected. All along at those venues, IP. Sembe found little co-operation from members of the public who were fearful as the area was reported to be a Mungiki zone. They tried to get Michellin the chang'aa den owner, where the deceased was last seen alive but the den had been closed down. When Michellin was finally traced, she said David was the last person to be seen with the deceased. IP. Sembe then compiled statements and the file was forwarded to the Attorney-General's Office for perusal and advice. The advice received was that Baba Kim was to be charged with the offence of murder, although IP. Sembe had formed the view that there was "*group involvement*" in the killing of the deceased.

In his defence, Baba Kim gave sworn testimony explaining that on the material day he woke up at 7 a.m. and went to a nearby shop to buy milk for making tea. He left the door of his house open but he locked the gate behind him.

When he returned to the house, he found his jacket and Shs. 600 missing and thought it was David who had taken it. So he went to David's house to enquire but David told him there was a person called Kamanja ("*the deceased*") who was there earlier looking for a housing unit to rent and he was the one who could have taken the jacket. David said he knew where the deceased lived and also knew his sister. He offered to help in tracing him so both of them left the compound in search of the deceased. At some point, at about 10 a.m. they parted company and agreed to meet later. Baba Kim then headed to Dandora Police Station to report the theft and the fact that David knew the thief. From there he went and met David but they parted again because Baba Kim wanted to go to his place of work in the city centre. He did not return home until 7.30 p.m. when Tabitha opened for him. He also found some 8 people including David beating up a person who was lying down. On asking David what was going on, he was told not to bring his drunkenness there, but he left the compound and went to Dandora Police Station to report the beating incident. He stayed at the police station until 11.30 p.m. when he went with the police and found everyone had slept but David opened for them. The police then conducted searches in the housing units in the compound and arrested him and David. They also took Tabitha and they all went through Dandora dumpsite where David pointed out the dead body of the deceased. It was collected by another police vehicle as the one they were in went through the house of Michelle, the chang'aa den owner in Dandora where she was found at 1 a.m. Michelle confirmed that she knew David and the deceased and that she last saw them together drinking chang'aa in her den. The two were then taken to Buru Buru Police Station where they were locked up but David was released after three months while he was detained for another month and was charged with the offence of murder. He denied killing, knowing or ever meeting the deceased in his lifetime, stating that he only saw him once when he was being beaten up by the 8 people. He denied having seen or talked to Tabitha at 10.30 a.m. that day but contended that if she heard his voice at 8 p.m. the same day it was soon after he had arrived to find the deceased being beaten up. He further contended that Tabitha's story was tailored to protect her husband who was implicated in the killing. Explaining what he went to do at the city centre, Baba Kim said he was a hawker of radios and small things along Moktar Daddah Street near Tea room at bus stage 32 which is near Kencom House. According to him Moktar Daddah Street was not near Jeevanjee Gardens but close

to Moi Avenue. He also said he was selling his wares in Accra Road.

The learned trial Judge summed up all the evidence on record, and the applicable law, to the assessors in a fairly comprehensive and detailed manner and all three of them were in agreement that Baba Kim amongst others were responsible for the death of the deceased. In his judgment the learned Judge believed the evidence of Tabitha and found as a fact that it was the appellant together with others who battered the deceased on the morning of 22nd march, 2005. He stated:

“It is for certain, that no witness observed the delivery of the fatal stroke that caused the death of the deceased; but there is evidence of a series of strokes which were served upon the deceased, for a rather continuous period of time, beginning some moments after 8.00 a.m. on the material day. The chain of battery upon the deceased went on, inside the house of the accused, intermittently up to about 10.00 a.m, when the accused and others now lifted the deceased, alive or dead, and dumped him in a disused house in the compound of PW2, in which the accused also lived. The many instances of battery delivered upon the deceased that morning, I would hold, constitute one transaction; they qualify as res gestae,.....”

The chain of beatings dealt upon the deceased, on the material date, if seen as a res-gestae chain, did indeed have eye witnesses, and so there was direct evidence; these were PW1 and PW2. Upon that chain of beatings, death was instantaneous, according to PW6, the government pathologist, I would hold, therefore, that the fact that one single stroke, on the material morning, may have caused the death of the deceased, is immaterial; and so, proof of the prosecution’s case is to be judged from both direct, and circumstantial evidence.”

The Judge dismissed the contention by the appellant that he had never met the deceased and held that he had every reason to assault the deceased whom he believed had stolen from him. He found as a fact that the appellant knew that the deceased had died by 12.30 p.m. and therefore arranged for the disposal of the body by the evening. The Judge stated:

“Death, most probably, had taken place by 10.00 a.m. when the deceased ceased to scream in pain, and when the accused and his accomplices dumped his body in a disused house. The court believes the testimony of PW1, that by about 12.30 p.m. on the material date, she had entertained doubts as to whether the deceased was alive; and she had then spoken about it to the accused, who responded by sheer cock-and-bull stories which ought to be taken to mean that he, the accused, did know at that time that the deceased was dead (indeed, he would probably have known that at 10.00 a.m. already).

From the evidence, it is clear to the court, the accused was well aware of the death of the deceased, during the whole period of daytime, on the material day.”

The learned Judge further believed the evidence of David, and found as facts, that the appellant took him to the dumpsite to show him the body of the deceased; that he threatened David with dire consequences; and that he made a false report to the police. The Judge delivered himself thus:

“This court believes PW2’s testimony, that during that one hour of absence, the accused had gone to show him where the body of the deceased had been dumped.

Now that the accused had brought his special secret to the attention of his landlord, great fear of consequences set in; the accused cautioned his landlord about secrecy; the landlord feared that caution might be enforced through secret-society (Mungiki) initiatives. The accused became extremely irritable and issued threats of undefined consequences against his landlord; and later, after 11.00 p.m. on the material night, the accused thought it better to lodge false allegations at the Dandora Police Post, against PW2; but his malicious report to the police happens to carry the signal that he had all along known that Francis Kamanja Ndubai was no longer alive. Indeed, the accused, clearly, would already have known that, by about 10.00 a.m. on the material day!

In dismissing the appellant’s defence that he found the deceased being battered by David and others at 7.30 p.m. and went to report the incident to the police, the Judge preferred the evidence of Pc. Wamela

that the only report made by the appellant at the police station was at 11 p.m. when he implicated his landlord. On the contrary the Judge found that:

“... the deceased was not alive at 7.30 p.m., and could not have been being (sic) battered at that time by the landlord (PW2) and others. There is no credible evidence that between 7.30 p.m. and 11.00 p.m. the accused was just lolling at Dandora Police Post; he was not there, there is credible evidence that, soon after 7.30 p.m. on the material day, the accused was busy carting away the body of the deceased to the Dandora dumpsite, and between 9.00 p.m. and 11.00 p.m. he was in the company of his landlord (PW2), showing PW2 the place where the body had been dumped, talking to PW2, threatening PW2 with undisclosed consequences, and cringing in fear of possible consequences of the killing of the deceased.”

The appellant was aggrieved by all those findings and now comes to us, as stated earlier on this first appeal. He laid out some 14 grounds contained in a memorandum of appeal and supplementary memorandum of appeal both drawn and filed by him in person. The advocate appointed to represent him, Mr. W.O. Nyende, however argued those grounds as six grounds after combining some and abandoning others. We shall now examine those six grounds and the submissions made thereon.

The first ground of appeal asserts that the superior court erred in failing to warn itself that the evidence of David (PW2) was accomplice evidence, and further erred in accepting the same evidence and that of Tabitha (PW1) when the two witnesses were plainly untruthful. In urging that ground, Mr. Nyende submitted that in the absence of any warning by the trial Judge that David's evidence was accomplice evidence, and in the absence of a direction that such evidence needed corroboration, the evidence was of no consequence and the appellant was entitled to acquittal. In support of that submission he cited the decision of the predecessor of this Court in **Joseph s/o Jeremiah v Reginam (1954) EALR 27** where it was held:

“Applying the “true rule” in Davis v. Director of Public Prosecutions, where in a criminal trial the trial Judge fails to warn himself of the rule of practice having the force of a rule of law that he may convict on the evidence of an accomplice but that it is dangerous to do so unless it is corroborated, the conviction will be quashed even if there is corroboration of such evidence, unless there has been occasioned no failure of justice. A substantial miscarriage of justice will have occurred where the accused has, by mistake, omission or irregularity, lost a chance of acquittal which was fairly open to him.”

In his view, it was David who was last seen with the deceased and was the one who pointed out to Pc. Wamela (PW4) where the body was. Pc. Wamela confirmed it in his evidence and was indeed surprised why David was not in the dock. David was therefore an accomplice or one of the principal offenders.

In response to that issue, learned Senior State Counsel Mr. Monda submitted that there was absolutely no need for the trial Judge to issue a warning since he was in no doubt that David was not an accomplice. The only reason why he was arrested was because the appellant falsely reported to the police that he was involved in battering the deceased. There was also no denial, and David so stated, that he went to the chang'aa den on the morning of 22nd March, 2005 in the company of the appellant and collected the deceased. It is not therefore strange to say that David was seen with the deceased that morning. But he left the deceased alive in the house of the appellant. Mr. Monda further submitted that the fact that he pointed out the body of the deceased was also of no moment because he explained, and was believed, how he came to know where the body was, before the police were brought in by the appellant. Finally he submitted that the evidence of Tabitha (PW1) was not accomplice evidence and it was supportive of David's evidence. In sum therefore, the authority cited in aid of that submission was not applicable, he concluded.

We have carefully considered the issue raised by the appellant and we think, with respect, that it is lacking in merit. The warning envisaged in the ***Jeremiah Case*** (supra), and whether corroboration was called for, must be preceded by a finding that David was an accomplice. What legally constitutes an accomplice is not defined in our statutes but **section 20** of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. **Section 396** of

the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of **Watete v Uganda [2000] 2 EA 559**, the supreme court held that “*in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial*”, The same definition was restated by the same court in the case of **Nasolo v Uganda [2003] 1 EA 181** where the court further stated:

“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

‘On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as failing within the category: (i) on any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).’ This is surely the natural and primary meaning of the term “accomplice.....”

Nearer home in the case of **Kamau v Republic (1965) EA 581** where the main witness to murder was the mother of the appellant who had failed to report the incident to the police and it was contended that her evidence was accomplice evidence, the predecessor of this Court held:

“(iv) while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice but the weight to be given to such person’s evidence should vary according to the reason for the acquiescence; if the acquiescence was based on approval of the crime, the evidence should be treated as no better than that of an accomplice; if, however, the acquiescence was based on indifference, the evidence should be treated with considerable caution; but if the acquiescence was a result of fear then there is no reason why the evidence should not be relied upon;”

The evidence of David was that, as the landlord to whom a complaint of theft was made, he participated in tracing and retrieving the deceased suspect of theft from the chang’aa den of Michelle where they found him. It was also his evidence that he left the deceased alive when he left the compound of his house to attend to his own mission of the day. His *alibi* on what he did the whole day until he returned home in the evening was elaborate and was not challenged. He further explained how it was that he knew where the body of the deceased lay although he did not report to the police forthwith. On all that evidence, which was analysed by the trial court, David was believed. The only reason why David was arrested was because of the report made by the appellant which Pc. Wamela accepted as credible. But the appellant’s story did not add up as analysed by the trial court, and consequently he was not believed. At the end of the day the findings of fact which would lead to the conclusion that David was an accomplice rest on credibility of those two witnesses. The learned Judge saw and heard them testify and we think he was entitled to make the findings he did. We have ourselves examined the same facts and we have no reason to differ from the findings so made in respect of the evidence of David. He was not an accomplice. As regards the evidence of Tabitha, whatever else may be said about it, she was not an accomplice either. She was only held briefly at the police station due to the report made by the appellant. The fact that she was the wife of David did not disqualify her from giving her testimony which stood to be weighed by the court with the totality of all other evidence on record. Nothing in the Evidence Act prevented her from giving her evidence. Much of it was direct evidence which the trial court believed after assessing her credibility. There was no error of law therefore as contended by the appellant in the trial court not issuing a warning to itself or seeking corroboration of the evidence of either PW1 or PW2. We so find and reject that ground of appeal.

The second ground of appeal contends that the whole case was not proved beyond reasonable doubts since it was full of contradictions. The most glaring ones pointed out by Mr. Nyende were that Tabitha testified that the body of the deceased was pointed out by David at the dumpsite while David said it was pointed out by Michelle; that Pc. Wamela was told by David that there was only one tenant in the

premises while Tabitha told him there were two tenants; that Pc. Wamela was told that it was David who was solely responsible whilst IP. Sembe suspected it was a group murder as contended by the appellant in his evidence. In his submission, all that evidence created doubts on the prosecution case and depicted David as a liar.

We have examined the record as a whole and we cannot say with Mr. Nyende that the inconsistencies or contradictions on the evidence materially affect the totality of the evidence or record. Whether or not it was David or Michelle who pointed out the body would not matter since both of them had accompanied the police to the site; Tabitha was not challenged on the information ascribed to her that there were two tenants when she testified on oath that there was only the appellant as their tenant and was not cross-examined on it; and the report of the appellant which was relied on by Pc. Wamela would not outweigh the report of IP. Sembe who was officially the investigating officer and who compiled the full record for perusal and advice by the Attorney General. We reject that ground of appeal also.

The third ground of appeal was premised on the failure to call Michelle who had recorded a statement saying David was the last person she saw with the deceased. The submission was that Michelle would have explained how the deceased died after going away with David. In response to that submission Mr. Monda submitted that there was no lacuna in the prosecution evidence by omitting to call the lady Michelle as a witness and therefore no adverse inference can be drawn. That is because David did not deny that he went away with the appellant from Michelle's drinking den but explained that he was with the appellant and he subsequently left the deceased alive with the appellant. On this evidence David was believed. On our part we think Mr. Monda is right. No particular number of witnesses are necessary for proof of any fact unless the law so requires – **section 143**, Evidence Act. The only fact for proof by Michelle as alluded to by the appellant was that she last saw the deceased with David. In that event it would be for David to explain, under the provisions of **section 111 (1)** of the Evidence Act, what happened to the appellant thereafter. That burden was discharged by David and we do not think in the circumstances that an adverse inference can be drawn against the prosecution. That ground of appeal fails.

The complaint in the fourth ground was that the appellant's constitutional rights were breached as he was kept in police custody for over three months since his arrest on 22nd March, 2005. He did not complain about this detention before the superior court but in Mr. Nyende's view, he ought to be acquitted on that ground alone.

We need not belabor this issue in view of the recent decision of this Court in **Julius Kamau Mbugua v Republic, Cr. Appeal No. 50/2008 (ur)** where it was held that the remedy for infringement of the rights of an accused person in that manner lay in damages as the unlawful detention had no link or effect on the trial process itself or caused trial related prejudice to the appellant. The appellant cannot therefore be exonerated and acquitted of the crime on that basis alone. The belated complaint is not entertained in this appeal.

The fifth ground relates to the defence of the appellant which Mr. Nyende contended was rejected on the basis that the appellant did not prove whether he was at his place of business and at best presented confused evidence as he did not know the difference between Mokta Daddah Street and Accra Road which are streets apart.

It is indeed the law that there is no burden cast on an accused person to prove his alibi – see **Kibale v Uganda [1999] 1 EA 148 (scu)**. The prosecution has the burden throughout of negating the *alibi*. We have examined the record of the evidence complained about in relation to its confusing state and it is clear that the learned trial Judge made reference to it in relation to credibility of the witness. He stated:

“Learned counsel did raise in aid of the accused's case, an element in his testimony which, paradoxically, shows his untruthfulness as a witness. Counsel urged; “The accused in his defence said that on the day of the killing of the deceased he was on Accra Street in the city centre and so could not have committed the offence.” Where exactly, at the city centre had the accused gone? Many times he said he was doing his normal work along Mokhtar Daddah Street; but it turned out he had no knowledge of the location of that street, and Accra “street” was now coming up merely as an afterthought. Moreover,

there was overwhelming evidence that the accused was in the Dandora area, certainly up to sometime after midday, when he had spoken to PW1 about the condition of the deceased as he lay in the unoccupied house in PW1's and PW'2 compound."

The learned Judge not only disbelieved the appellant on his *alibi* but also found that the prosecution evidence was overwhelming thus displacing the *alibi*. There is no merit in that ground of appeal.

Finally Mr. Nyende submitted in ground six that the appellant was not given an opportunity to mitigate before sentence. In view of the recent decision of this court in **Geoffrey Ngotho Mutiso v Republic Cr. Appeal No. 17 of 2008 (ur)** we think there is some merit in that ground of appeal as the record is self evident that he was simply sentenced to death after conviction.

In the result, we hold that the appeal against conviction is not meritorious and we order that it be and is hereby dismissed. As regards sentence, we remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant.

It is so ordered.

Dated and delivered at Nairobi this 18th day of March, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APEPAL

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

DEPUTY REGISTRAR