



**Gachanja & 7 others v Republic (Criminal Appeal 51 of 2004)
[2011] KECA 402 (KLR) (20 May 2011) (Judgment)**

Elizabeth Gitiri Gachanja & 7 others v Republic [2011] eKLR

Neutral citation: [2011] KECA 402 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 51 OF 2004
EO O'KUBASU, PN WAKI & JWO OTIENO, JJA**

MAY 20, 2011

BETWEEN

**ELIZABETH GITARI GACHANJA 1ST APPELLANT
FRANCIS KARIOKO MURUATETU 2ND APPELLANT
ROSE NJOKI MURUATETU 3RD APPELLANT
WILSON THIRIMBU MWANGI 4TH APPELLANT
ANNAH NGONYO 5TH APPELLANT
DAVID KARUGA NJUGUNA 6TH APPELLANT
STEPHEN WAMBUA KAMAU 7TH APPELLANT
STEPHEN NJOKI ALIAS BLACKIE 8TH APPELLANT**

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) dated 12th March 2003 in H.C.CR.C. NO. 40 OF 2000)

Guilt inferred from circumstantial evidence must form a complete chain of inference pointing to the accused, with no co-existing circumstances which could weaken or destroy the inference.

Reported by Diana Mutunga

***Evidence** – identification evidence – identification parade – manner in which the identification parade should be conducted – claim that the identification parade was not well organized because there were only six members of the parade as opposed to eight as required by the law - whether the relevant Police Force orders were complied with in conducting the identification parades – Police Force Standing Orders.*



Evidence – circumstantial evidence – circumstantial evidence placing the accused at the scene of crime – burden of proof - burden on the accused to disprove the facts before the court - duty of the court to ensure that they draw inference of the accused's guilt from circumstantial evidence to be sure that there are no other existing circumstances which could weaken or destroy the inference – whether the circumstantial evidence was enough to justify the inference of guilt of the accused person.

Evidence – retracted confession – admissibility of retracted confession – confession implicating other co-appellants – need for corroboration of such evidence - where the retracted evidence had been corroborated – whether the evidence was admissible in the circumstances- whether a conviction could rightly be based on such evidence.

Brief facts

The eight appellants, along with four others who were acquitted after a no-case-to-answer ruling, were charged with the murder of Lawrence Githinji Magondi in Kitengela Reserve, Kajiado District, on 4th February 2000. After pleading not guilty, they were convicted based on circumstantial evidence. Seven of the appellants were sentenced to death, while the 5th appellant received a life sentence due to her pregnancy.

In their appeal, the appellants raised several legal issues, including:

- a. The conviction was based on circumstantial evidence that did not meet the required legal standard.
- b. The convictions relied on statements from co-accused or accomplice evidence without corroboration.
- c. The identification of some appellants was based on improperly conducted identification parades.
- d. Reliance was placed on retracted and or repudiated inquiry statements, and that was in law not proper.
- e. The trial judge in some cases shifted the burden of proof, contravening legal principles.
- f. Non-compliance with Section 169(1) of the Criminal Procedure Code.
- g. Failure to consider the defence case and non-compliance with sections 74(1) and 77(1) and (2) of the repealed constitution.
- h. Improper identification parade numbers and failure to produce essential witnesses, contrary to the provisions of the Force Standing Orders were also raised by the 4th and 6th appellants, respectively.

Issues

- i. Whether the relevant Police Force Standing Orders were complied with in conducting the identification parades.
- ii. Whether the circumstantial evidence relied on was enough to justify the inference of guilt of the accused persons.
- iii. Whether a conviction could rightly be based on uncorroborated retracted confessions by co-accused.

Held

1. The Court had stated in several decisions and it was stated at section 143 of the Evidence Act that there is no set number of witnesses required to prove a fact unless the law so states, and that any number of witnesses' evidence can be relied upon to convict provided the court finds that evidence credible.
2. On the identity of the fourth, fifth, sixth, seventh and eighth appellants as the people who were with the deceased, in their case, it was identification by recognition and not identification of strangers. In law recognition is much more assuring than identifying a stranger.
3. Therefore, whereas the parade in respect of which the fourth appellant was identified was not a properly organized parade because there were only six members as opposed to eight spelt out by the Forces Standing Order, the defective parade was not of any consequence in his case.
4. It is common ground that none saw the person or persons who murdered the deceased. Only circumstantial evidence was availed by the Prosecution to prove that the appellants were responsible for the deceased's death. The law as regards the principles upon which a Court can rely on circumstantial evidence to convict an accused person as held in the often quoted case of *Rex v Kipkering arap Koske & Another* [1949] Volume 16 at page 135, is as follows:“(1)That in order to justify, on circumstantial evidence, the inference of guilt, the incompatible facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt,



- and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”
5. The chain of evidence from the time they were seen with the deceased to the time the deceased was found dead was not broken and fingers pointed to them and to no others as the perpetrators of the murder, in the absence of any other reasonable explanation. Thus, even without any other evidence, the circumstantial evidence that they were the people last seen with the deceased in their vehicle was enough to point a finger at them and no other.
 6. In the court’s considered view, there was overwhelming evidence to demonstrate that the fourth, fifth, sixth and eighth appellants murdered the deceased. That chain of evidence was not broken at all and left only one irresistible conclusion that they were the murderers. The superior court came to the same conclusion though through another route and they could not be faulted for that.
 7. On the role played by the second and third appellants, they were not at the scene and were not seen with the deceased any time prior to his sad demise. They were said to have been the conduits through which the crime was financed. Notwithstanding that, the court agreed with the learned Judge of the superior court that although the second and third appellants were not at Kitengela on 4th February 2000 when the deceased met his death, they were nonetheless the architects of the heinous murder and were rightly convicted as indeed the provisions of sections 20 and 21 of the Penal Code applied to them squarely.
 8. The case of the first appellant was somewhat different. She was the step sister of the second and third appellants. She had also employed the third appellant in one business and was her partner in the other business. The allegation against her was that she financed the planning and execution of the murder. The other evidence relied on by the learned Judge was evidence of statements from co-accused and that was to the extent that she gave money to second, and third appellants some of which money ended up in the account of the fourth appellant and eventually part of it was paid to fifth, sixth, seventh and eighth appellants. The first appellant did not give the police any statement.
 9. In the case of Anyangu and others v Republic, (1968) EA 239, the Court examined the reliance to be put on extra-judicial statements of co-accused by the courts and stated:-“It is the treatment of the statements by the learned trial Judge which has caused us some concern. The learned Judge treated all statements as evidence, albeit accomplice evidence against each appellant. With respect in doing so he was in our view in error. A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial be “taken into consideration” against that co-accused. It is however, not only accomplice evidence but evidence of the “weakest kind” (Anyuna s/o Omolo and another v R (1953), 20 EACA 218): and can only be used as lending assurance to other evidence against the co-accused (Gopa s/o Cridamabanga and others v R (1953), 20 EACA 318).”
 10. It was the court’s view that the inquiry statements made by co-appellants were evidence of the weakest kind as against the other appellants and that was why in their judgment, whenever referring to any of them, they have searched for some cogent evidence that it would lend assurance to.
 11. As regards the first appellant, other than the allegation that a title deed was given to one other appellant, which allegation was again part of the repudiated inquiry statement, there was no other evidence that the statements of co-accused could lend assurance particularly as the first appellant did not make any incriminating or any statement.
 12. The law sets down the minimum standard of a witness upon whose evidence the court can convict in the case of Ndungu Kimanyi v The Republic, (1979) KLR 282 at page 283, where Court stated:-“We lay down the minimum standard as follows: The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”



13. The extrajudicial statements alone without any from the first appellant should not have been relied on as the sole evidence of how the money allegedly withdrawn from first appellant's accounts and children's accounts were used. Further that evidence was circumstantial and the chain needed to be complete and point to none other than the appellant, and an assurance that there were no co-existing circumstances that would weaken or destroy the inference.
14. As much as there was strong suspicion that the first appellant financed the deal, that remained only a suspicion and there was no tangible evidence to remove it from that mere suspicion however strong. There was no evidence to show she knew that whatever money she gave out, if she gave out any, was to facilitate the murder of the deceased other than the repudiated and retracted statements of co-accused persons who had been discredited by the superior court which had seen their demeanor and heard them. The benefit of doubt must be given to the first appellant.

Appeal allowed in part.

Orders

- i. *The appeal by the first appellant Elizabeth Gitiri Gachanja was allowed, her conviction quashed and the sentence of death set aside.*
- ii. *The appeal, of the second, third, fourth, fifth, sixth, seventh and eighth appellants was dismissed.*

Citations

Cases

1. Teper v R ([1952] All ER 447; [1952] AC 480)
2. Abdalla Bin Wendo & another v Reginam ((1953)20 EACA 166)
3. Anyango v Republic ([1968] EA 239)
4. Musoke v Republic ([1958] EA 715)
5. NdunguKimanyi vRepublic ([1979] KLR 282)
6. Okeno v Republic ([1972] EA 32)
7. Rex v Kipkering arap Koske & another ((1949) 16 EACA 135)

Statutes

1. Constitution of Kenya ((Repealed)) — section 74 (1); 77 (1) (2)
2. Criminal Procedure Code ((cap 75)) — section 169 (1); 210
3. Evidence Act
4. Evidence Act ((cap 80)) — section 32, 111, 143
5. Penal Code ((cap 63)) — section 20, 21

Advocates

1. //Prof Gitbu Muigai//
Mr. Ondieki was
2. //Mr Ondieki//
Mr. Nyachoti
Mr. Wamwayi was
3. //Mr Nyachoti//
4. //Mr Wamwayi//

JUDGMENT

1. This is a first and last appeal. Being the first appellate court, we are duty bound in law to revisit the evidence that was adduced before the trial court, analyse it, evaluate it, and come to our own conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing all the sixty one



prosecution witnesses and all the eight appellants together with witnesses called at several Trial within Trials, and giving allowance for that – see the case of *Okeno vs. Republic* (1972) EA 32.

2. The eight appellants, Elizabeth Gitiri Gachanja, Francis Karioko Muruatetu, Rose Njoki Muruatetu, Wilson Thirumbu Mwangi, Annah Ngonyo, David Karuga Njuguna, Stephen Wambua Kamau and Stephen Njoki alias Blackie, 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th appellants respectively, were, together with four others who were acquitted and released at the close of the prosecutions case as they had no case to answer, charged in an information dated 10th May, 2000, with the offence of murder. In that Information, the court was informed that:-

“On the 4th day of February 2000, in Kitengela Reserve in Kajiado District within the Rift Valley Province, jointly murdered Lawrence Githinji Magondu.”

3. They all pleaded not guilty but at the end of the trial, they were found guilty, convicted and seven of them were sentenced to death whereas the 5th appellant was sentenced to life imprisonment as she was pregnant at the time of the conviction and sentence. As we have indicated above, initially twelve people were charged in that information but at the close of the prosecutions case, four of them were acquitted as the trial court found no prima facie case made out against them. In convicting the appellants, the learned Judge of the superior court (Mbogholi Msagha) concluded his lengthy judgment by stating as follows : -

“Whoever plans and executes a scheme to end the life of another human being writes his or her own judgment. I have come to the irresistible conclusion that A₂ - Elizabeth Gitiri Gachanja, A₃ - Francis Karioko Muruatetu, A₄ - Rose Njoki Muruatetu, A₆ - Wilson Thirumbu Mwangi, A₈, Annah Ngonyo, A₁₀, David Karuga Njuguna, A₁₁ - Stephen Wambua Kamau and A₁₂ - Stephen Kagia Njoki alias Blackie are guilty of the offence as charged and stand convicted accordingly.”

4. The appellants were each not satisfied with that decision and hence the appeal before us. Each filed home-made grounds of appeal, but when their respective advocates came to the scene, several supplementary memoranda of appeal were filed. As we intend to consider each appellant’s grounds of appeal separately and as we intend to consider the case against each appellant separately, we will give a summary of those grounds when considering the case in respect of each appellant in this judgment.
5. Brief facts of the entire case may be stated.
6. The first appellant Elizabeth Gitiri Gachanja is the wife of Wilson Gachanja who was the first accused at the trial court and who was acquitted on no case to answer. Wilson Gachanja was, before his retirement, the Commissioner of Lands in the Republic of Kenya. The deceased was at the time of his demise doing the business of Land Agency. Elizabeth was also half sister to the second appellant Francis Karioko Muruatetu and the third appellant, Rose Njoki Muruatetu. In her inquiry statement to the police, which she repudiated and/or retracted, but which the trial court admitted as evidence after trial within the trial, Rose Njoki Muruatetu stated that she received a telephone call from somebody calling himself “Maji Moto” who told her that somebody wanted to eliminate her brother in law Wilson Gachanja. On 21st December 1999, by arrangement, she met that person, Maji Moto, who gave her the names of two people who were planning to eliminate Gachanja and those two people were the deceased, Lawrence Githinji Magondu and one Kamuya. Maji Moto told her those two had hired him to do the work and the price of doing so was Kshs.4,000,000/-. She reported that incident to Kilimani police station. It does not appear that the police pursued that information to its logical conclusion, as there is no evidence on record as to what action the police took to verify the report or even to show it was investigated. Whatever happened, and whether the report was true or not, it would appear from



the evidence that some activities were initiated by some of the appellants which resulted in others being roped into the activities that ended in the death of Lawrence Githinji Magondi, (the deceased). From the retracted statements of Njoki and others, it would appear that the perpetrators of that heinous act needed mobile phones for easy communication between themselves and, in one case, with the deceased. They also needed payment in return for their work and a motor vehicle. Whatever happened before the fateful day 4th February 2000, would only be clear later after the appellants were arrested and after their retracted inquiry statements were obtained. One witness, Harrison Wambugu Kingori (PW1) however witnessed major parts of the action. He was the driver to the deceased. On 17th January 2000, he took the deceased to his (deceased's) office in the deceased's car. While at the reception, two people came to the office. They wanted to see the deceased. One of them had a mobile. He allowed them to see the deceased and they went in to see him. They stayed there for about 30 minutes and left. Immediately after their departure, the deceased told King'ori he had acquired new buyers for his plot at Kitengela. He further told King'ori, that of the two people who came to see him, the one with mobile phone was called Mwangi. The deceased told King'ori the two new buyers were more serious than the previous ones. The next day, King'ori was informed that the deceased had gone to Kitengela as somebody had called him to meet them. At about 4.00 p.m., the deceased returned to the office and found King'ori there. He told King'ori he had shown the plot to some people, one of whom was Mwangi who was one of the two who had seen him the previous day. The deceased told King'ori further that on that day Mwangi was accompanied by his sister and mother. On 2nd February 2000, the deceased, King'ori and Patrick Machira Wahome (PW14) were at Garden Estate. The deceased told King'ori to drive him to Athi River. He did so and Patrick Wahome was with them. He dropped the deceased and Wahome at the offices of Eunice Muthoni Kabui (PW18). The deceased talked to somebody on phone and told King'ori, that that was Mwangi's sister he was talking to on the mobile, but he did not tell King'ori her name at that juncture. Later the deceased again talked to Mwangi's sister and sent King'ori somewhere. When King'ori went to Buruburu, the deceased's house, he saw a lady in front of the vehicle bending down and looking at the vehicle's number plate. The deceased called her. She greeted the deceased and Wahome. All three went upstairs leaving King'ori in the vehicle alone. After 40 minutes, Wahome came out and told King'ori the lady seemed more serious on buying the plot than the previous person who worked at Portland Cement Factory. After 10 minutes the deceased and the woman came out and went to another vehicle Toyota Corolla KAK 004, the last letter of which King'ori could not remember. King'ori said in court that he saw that lady clearly and described her dress at that time. He identified the lady as the fifth appellant, Annah Ngonyo. He also pointed her out at an identification parade later organized by Ag. I.P. Jeremiah Ndurai (PW39). The fifth appellant left and later returned with a young man. They stayed with the deceased for another ten minutes and she left together with the young man. The fifth appellant was introduced to the deceased as Mwangi's sister working in Switzerland. According to King'ori, at that time, the deceased had made up his mind to sell the property at Kitengela to none but to Mwangi, his sister the fifth appellant and their mother, all of who wanted the plot as a family. Then came 4th February 2000. King'ori reported on duty as usual at 6.45 a.m. at the deceased's house. After washing the vehicle, the deceased and King'ori proceeded to the deceased's office but before they reached City Stadium along Jogoo Road the deceased called the buyers to whom he was to sell the Kitengela property. At the end of their conversation, King'ori heard the deceased say "I am just going to drop my driver and you will meet me at Kitengela." The deceased thereafter directed King'ori not to proceed to town but to proceed to Kitengela. They arrived at the plot at 10.00 a.m. They were in Toyota Corolla KAE 059Z. By that time the fourth and the fifth appellants had not joined them at Kitengela but after about ten (10) minutes, King'ori saw the two approaching them in the same vehicle he had seen previously. They were the same people he had seen on 2nd February 2000 and who had been introduced to him as Mwangi and his sister. Mwangi was driving the vehicle and the fifth appellant sat on the co-drivers seat. In the back seat there were three



people who were at that time not known to King'ori for he had not seen them before. They all came out of the vehicle. The fourth appellant (Mwangi) had the same telephone set King'ori had seen him with the previous time. The fourth appellant introduced the other three as his workers. He opened the boot of his car and asked the deceased if the barbed wire that was there was appropriate for fencing. In that boot there were iron bars, two crow bars, and a new panga. Thereafter, the deceased, fourth and fifth appellants started moving towards the tarmac road nearby on foot, and King'ori, on the request of the deceased followed them. The three new men who came with the fourth appellant were left standing near the vehicles. The deceased, 4th and 5th appellant and King'ori went around the plot from one beacon to another beacon and then went back to where the vehicles were. They had been shown water and electricity service points but the 4th appellant still wanted the deceased to show them more area development. The deceased agreed to do so and together with the 4th and 5th appellants went into the vehicle KAK 004. The other three men now entered the vehicle King'ori was driving. The deceased told King'ori to drive towards Masai Ostrich Farm. The person later identified by King'ori as David Karuga Njuguna, the sixth appellant sat next to King'ori in the car whereas the person he identified as the seventh appellant Stephen Wambua Kamau, sat on the back right-hand side. The 8th appellant Stephen Kagia Njoki alias Blackie sat at the back seat left-hand side. As the two vehicles were being driven towards Masai Ostrich Farm, King'ori was driving ahead of the vehicle in which the deceased, 4th and 5th appellants were. The two vehicles went upto Masai Ostrich Farm and were both parked into the Hotel Parking Bays. They were parked next to each other. The deceased, 4th and 5th appellant went into the hotel. After about 10 minutes, they came out of the hotel and the two appellants were carrying mineral water. This allegation is confirmed by Isaac Cherroor (PW3) who was working at Masai Ostrich Farm and who remembered selling two bottles of mineral water to two men and one woman who were strangers to him at about 11.30 a.m. on 4th February 2000. As King'ori and the other three men were waiting outside the hotel, they were seated and were talking to each other. On their coming out of the hotel, the 4th, 5th appellants and the deceased went back into the same vehicle while the 6th, 7th and 8th appellants went into the vehicle driven by King'ori. As they started the two cars, the 4th appellant told King'ori to drive behind them. He did so. On reaching near the then Vice President's home, in the area Mwangi's car turned left whereas King'ori drove straight to the main road. From that point, as King'ori did not have enough fuel, he drove towards the main road to wait for the 4th appellant's vehicle there. At that juncture the 8th appellant remarked to King'ori that that place was not a safe place. Although King'ori told him that there was nothing to fear as they were not criminals, he nonetheless drove his vehicle to the plot at Kitengela and waited for the vehicle in which the deceased was. The deceased, 4th and 5th appellants joined them there and the fourth appellant requested the deceased if lunch could be prepared before the whole team could proceed to Nairobi. He also suggested that before lunch could be ready, they could go towards Kitengela Prison area. The fourth appellant then gave King'ori Kshs.1,000/-. The deceased directed King'ori to go to Tarino Butchery and instructed King'ori how to divide the meat into fried and roasted pieces. King'ori then went back into the vehicle he was driving. Before 4th, 5th, appellants and the deceased took off in the vehicle driven by the fourth appellant, the sixth appellant left King'ori's vehicle and joined them in their vehicle. King'ori was left with the seventh and eighth appellants only. That was the last time King'ori saw the deceased alive. King'ori drove his vehicle with the two to Kitengela. He went to the butchery as the two, ie, seventh and eighth appellants went to buy cigarettes. After ordering meat, King'ori went to where he had parked the vehicle and noted that the eighth appellant was not there. When King'ori looked back, he saw the eighth appellant running towards Mwangi's vehicle which was about eleven metres away. King'ori enquired from the seventh appellant as to what was happening and was told by seventh appellant that the fourth appellant had called the eighth appellant. King'ori told the seventh appellant to get into his vehicle and they drove to Tarino butchery and sat outside that building. After about 20 minutes, King'ori saw Mwangi's vehicle passing near the butchery. He confirmed with the seventh



appellant that it was the vehicle driven by the fourth appellant. King'ori saw it turn towards EPZ, he saw it stopping far away from where he was seated at Tarino butchery. The eighth appellant came out of that vehicle and the vehicle ie, that was driven by Mwangi proceeded towards Nairobi. The seventh appellant went and met the eighth appellant and both joined King'ori outside Tarino butchery. The eighth appellant told King'ori that the deceased had directed that King'ori follow him to Nairobi where he was going to complete the transaction about the sale of the plot. When King'ori asked about lunch, the eighth appellant retorted that he heard the people in the other car say they would first go to Nairobi and later, deceased, 4th and 5th appellants would return to Kitengela for lunch. After some exchanges between King'ori and eighth appellant, King'ori told them to get into the vehicle so as to drive behind the vehicle driven by the fourth appellant. When King'ori was near Portland village, he saw the vehicle Mwangi was driving crossing Athi River bridge. King'ori accelerated to catch up with them so as to remind the deceased about fuel and that the car he was driving could not go beyond Mlolongo. The fourth appellant diverted towards Old Mombasa Road but heading towards Nairobi. Then fourth appellant slowed down. King'ori drove close to that vehicle and observed that the deceased was not in that vehicle. King'ori sensed danger. He went closer and ascertained the deceased who had left him while in the fourth appellant's vehicle was definitely not in that vehicle. He asked the eighth appellant who was one of those left with the deceased when King'ori and another were sent to prepare lunch, the whereabouts of the deceased. The eighth appellant said the deceased was sleeping on the back seat of the car driven by fourth appellant. King'ori, drove faster and his vehicle came parallel to that of the fourth appellant. He looked at the back and ascertained that deceased was, not in that vehicle. He got frightened and asked where the deceased was the second time, and he suggested that in case he had been left behind, he would go back and pick him up. Both the seventh and eighth appellants told him to shut up and follow whatever they ordered him to do. The fourth appellant then diverted his vehicle to the left towards Nairobi National Park. The eighth appellant ordered King'ori to follow that vehicle and he obeyed. The fourth appellant's vehicle stopped. King'ori decided to go straight to the main road, but the fourth appellant made a U turn and drove very fast blocking King'ori's vehicle. When he stopped, the seventh appellant got hold of his neck, while the eighth appellant ordered him to engage a free gear and then got hold of his hands. At that time people in Mwangi's car came out and joined the two. They then started beating him severely. We do not want to go into details of how he was beaten as we understand that is the subject of another case in court. However, it is important that during the beating, King'ori heard them say that they were to hit him at the part of his body similar to the place at which they had hit his boss- meaning the deceased. At that time one of them pointed at his temple region, but as the eighth appellant aimed at his temple with a crow bar, he blocked it with his hand. His head was hit on several parts until it was bleeding all over. When that happened, they felt they had "finished" him. They tried to ascertain that King'ori was dead and he pretended he was dead and they were satisfied; pushed him into the vehicle then closed the vehicle and they drove off. Shortly thereafter King'ori rose up. He took a bottle of water which was in the vehicle and used it to wash his face. He then walked to a nearby bus stage near Mlolongo and got assistance from two members of the public who untied his hands and drove him to the office of Eunice Muthoni Kabui (PW18) at Athi River town. He was driven there in the vehicle KAE 059Z ie., deceased's vehicle. From there, another person, Muthoni's tenant, drove King'ori to Athi River Police Station. He made a report of assault on him and also that his boss, the deceased had been kidnapped. He narrated this to IP Lazarus Wambua (PW7) then at Athi River Police Station. After the report, IP Lazarus instructed one P.C. Benjamin Mwangangi to take King'ori to the hospital. IP Lazarus thereafter made a call to Kitengela Patrol Base and reported the incident to P.C. Musyoki Wambua (PW8) of Kitengela Patrol Base. King'ori was taken to Isinya Medical Clinic and later went for a P3 Form from Nairobi Area Police.

5. As all these were going on, Wilfred Ngugi (PW5) a taxi driver operating from Kitengela was hired on 4th February 2000 to take pupils from home to school and back. As he was driving the children home



from school, and as he approached home, he saw an object. When the vehicle approached the scene, he noted it was a human being. This was between 5.00 p.m. and 5.30 p.m. The head of that person was facing the bush and the legs were in the middle of the road. He noted that the person's hands were tied with sisal rope and there was blood there. He reported the incident to Kitengela Police Patrol Base. Police Officers asked him to take them to the scene. He did, and police inspected the scene before he drove them back to the base. This witness identified the sisal rope when he gave his evidence in Court. As this witness was making his report Cpl. Musyoki W. Wambua was at the station as he was the deputy in charge of the station. Cpl Musyoki assembled P.C. Kinyua, and P.C. Abdi Guyu and they accompanied Ngugi to the scene. This was about 7.30 p.m. They found the person was already dead. The head had visible injuries including deep wound at its forehead and on the back of the head. Later that evening Cpl Musyoki received information that there had been a report of a person who had been kidnapped. In the meanwhile, Muthoni who was a friend of the deceased received information from her driver, that the deceased and his driver had been kidnapped and that the driver- King'ori had been injured badly and was at the hospital. She went with her driver to Athi River to see King'ori at a nursing home. She was told by the nurses that King'ori had gone to the police station at Athi River. She proceeded to the police station where she found King'ori as King'ori was narrating to police the incident. Jennifer Muthoka (PW13) was also there. Muthoni and Jenifer returned King'ori to the Nursing Home where he was examined and discharged. Later King'ori and Jennifer went to Buruburu while Muthoni went to her house at Garden Estate, but thereafter she went back to Athi River Police Station to find out the position as regards the deceased. She was told of a person who had been found murdered. She was told further that the message had been received from Kitengela police base. She went to Kitengela Police Base and after she told police she was inquiring about the deceased, she was taken to the scene by about eight police officers. She identified the body as that of the deceased Lawrence Githinji Magondi. With the permission and in company of two police officers, she took the body of the deceased to the City Mortuary. Later on 8th February 2000, Dr. Alex Onzere Kirasi Olumbe (PW2) carried out post mortem on the body of the deceased on request from PC John Gachini (PW10). The body was identified to Dr. Olumbe by Charles Githinji (PW12) the son of the deceased and one John Wahome. After examination, Dr. Olumbe concluded that the cause of death was due to head injury consistent with infliction by blunt object due to use of severe blunt force. The police then started their investigations as none was arrested in the act though King'ori was certain as to who had kidnapped the deceased and who had beaten him severely leaving him for dead. He nonetheless did not know their names and whereas he had seen the fourth and the fifth appellants sometime prior to the incident, he had not seen the sixth, seventh and eighth appellants sometime time prior to the incident, neither was he aware of any arrangements, finalized or otherwise that might have been carried out to facilitate elimination of the deceased.

6. In their investigations, the police officers led by IP Johnston Libese (PW59) made several revelations and discoveries. PC Bernard Amboko (PW57) and IP Libese interrogated King'ori on 5th February 2000. On 6th February 2000 they interrogated Muthoni and Jenifer. As a result of the information received, a letter which they recovered in which the deceased had complained to Telkom Kenya of the misuse of the deceased's phone, they contacted Telkom Kenya and having obtained a print out of the phone, they established that the deceased had made a call to the fourth appellant on 4th February 2000 at 10.15 a.m. They discovered that the fourth appellant's mobile number was 0724XXXX5 and had been sold to the fourth appellant on 13th January 2000. They also found out from a car hire firm that motor vehicle Toyota Corolla KAK 004J had been hired out to the fourth appellant. They also collected a police abstract from Personal Tours and Safaris offices and a copy of the fourth appellant's ID. Sgt Charles Njogu (PW45) one of the members of the investigation team, on seeing the copy of the identity card, positively identified the fourth appellant as the son of one Cpl Mwangi who was a driver at CID Headquarters. The same Cpl Mwangi was summoned and asked to show the



investigation team the house of his son. He was not certain of his house, but together with his daughter (4th appellant's sister) who knew the house they led the police team which included IP Christopher Chesoli (PW55) to the fourth appellant's house at Uthiru. They found him and he was arrested. On a quick search of his house, they recovered a mobile phone, iron bar, new panga, original identity card original receipt; and Ksh.80,000/-. On interrogation about the incident, the fourth appellant offered to take them to a person who knew the house of the fifth appellant. He was also interrogated on phone numbers 072410627 and land line No. 0260094 together with another Landline No. 02532322. It was established that phone No. 072410627 belonged to the second appellant, Francis Karioko Muruatetu whereas Landline No. 02572322 belonged to the third appellant, Rose Njoki, and Landline No. 0260094 belonged to Hightech Café at Langata, managed by the third appellant. The fourth appellant then led police to Umoja to the house of one Agnes. On the house being opened, Agnes offered to show the police the house of the fifth appellant which was within Umoja Estate. The fifth appellant was arrested. The police then asked the fourth appellant to show them the whereabouts of the others whom he referred to as his workers. He said he got the three from one Stephen Kanyoro who knew their places. He took police to Kayole estate to look for the driver of Kanyoro. Kanyoro was found and showed the police officers the house of the seventh appellant who lived at Kawangware. They went there the next morning and arrested seventh appellant. Thereafter the seventh appellant and Kanyoro led police to Waithaka where the sixth appellant was arrested. The sixth appellant then took them to Kibera Mashimoni where the eighth appellant was arrested. When asked to show the house of the second and third appellants, the fourth appellant stated that he did not know in particular their houses but he suggested that he could contact them by phone. He was allowed to do so and he contacted the second appellant. After a short while the second and third appellants approached them driving motor vehicle KAE 600G BMW. They ambushed the two at Jamhuri Estate and Ngong Road and arrested them. The two i.e. second and third appellants led the police team to the house of Wilson Gachanja where the first appellant was also arrested together with her husband who was acquitted on no case to answer. On searching the house of the eighth appellant, a white T-shirt fitting the description given by King'ori was found. A land title deed in the name of Wilson Gachanja was found in the house of the second appellant and agreements of the sale of a motor vehicle for Ksh. 290,000/- was also found in his house. They later went to the scene where a crowbar was found. The police team also investigated the accounts of the first appellant together with that of her husband. They found that the first appellant had on more than one occasion during the period close to the date on which the deceased was murdered, sent the third appellant to cash her cheques at her bank and also had removed from her children's bank account about Ksh.1,000,000 without telling her husband. There were also phone calls to her number from the second appellant who was, according to the police investigations, in constant contact with the fourth appellant. Further, after the murder of the deceased, there was evidence that a party was held at the house of the third appellant. Each appellant except the first appellant made an inquiry statement which were repudiated and/or retracted at the trial but were, except the second statement of the second appellant, admitted as evidence after trial within the trial held in respect of each.

7. After all the above, the appellants were charged with the offence of murder as stated above. Each denied the offence. In her defence, the first appellant stated in an unsworn statement that on the relevant date 4th February 2000, she, together with her sister the third appellant, were at their business place at Langata shopping centre from about 7.30 a.m. upto 5.30 p.m. On 10th February 2000, she was arrested and taken to CID Headquarters and left there for three days without being told why she was being held there. Later, she was taken to Central Police Station and on 17th February 2000 she was taken to court. While at CID Headquarters all she was asked once was how she spent her money, a question she refused to answer as she did not know why she was being asked that question. In early January 2000, she remembered helping her two brothers who had requested for help as they had financial problems.



One had a loan outstanding and his house was threatened with auction and the other needed money to stock up his business which was running down. The money would be refunded once the problems were solved. On 26th January 2000, she took her brother and sister to the bank, withdrew Ksh.1,000,000/- from children's account without her husband's knowledge and gave them the money. This money was to be refunded and be placed into the children's account before her husband knew about it. She stated further that the third appellant who is her sister had been operating with her since 1996 and she had been sending her to the bank to do withdrawals for her and to deposit money for her on several occasions. She had been supervising her business and was a partner in two of the businesses where the first appellant is the Director while the third appellant was the Secretary. On two occasions she wrote cheques worth Ksh.600,000/- for expansion of the business.

8. The second appellant gave a sworn statement and denied the offence. He stated that before his arrest, he was running a business at Ngara. That business was dealing with surgical supplies. He was also involved in Transport business as well. He had a bus which he sold in 1992 for Ksh.480,000/-. He had also been given a contract with Masai Villa Ltd to sell their properties and another contract to sell a plot and collect rents. He operated that on commission basis. He did not know of one Ken or Maji Moto and he did not know the deceased. He denied the offence and was categorical that he never participated in any plan to kill the deceased and never received any money from anyone to kill the deceased, neither did he pay anyone to kill the deceased. He bought his BMW vehicle in 1999 with funds from British American Insurance. The vehicle cost him Ksh.150,000/=. He admitted having received money from first appellant who was his half sister but that was for school fees. On 4th February 2000, he arrived at his office at about 8.30 a.m. At 9.30 a.m. he took his car BMW to the garage for repairs. The garage was near Wilson Airport and was owned by Cyrus Ngare. He was in that garage upto 3.30 p.m. At 3.30 p.m. he left for Jamhuri Estate to meet one Alex Wambua his landlord. One Macharia, who was a co-accused before the trial court but who was acquitted under section 210 of the Criminal Procedure Code, is the person whom he accompanied to the deceased's house at Buruburu to offer condolences to the bereaved relatives of the deceased. He did not know the fourth appellant at Kamiti Prison and knew him only after their arrests. In cross-examination, he denied the contents of his inquiry statements he made to the police and specifically denied that he had stated in that statement that a substantial amount of money was paid to him by first appellant through the third appellant and said the first appellant did not pay him anything to eliminate the deceased. He further said he signed that statement because he was tortured to sign it and asserted that what was in the statement about first appellant was completely untrue and fabricated. Shown Exh.48, which provided the data from his phone, he accepted that the data showed that his phone called that of the fourth appellant seven times. He also denied buying a mobile phone for the fourth appellant. Lastly, he said he had his own sources of funds although his sister would help him at times with school fees.
9. The third appellant gave unsworn statement in her defence. She was a business lady before her arrest. She ran a hotel that belonged to first appellant called Hightec Fish & Chips and also a salon called Unique Hair Beauty Salon & Tailoring all in Nairobi. On 26th January 2000, the first appellant took her and her two brothers to Barclays Bank Hurlingham and withdrew Ksh.1,000,000/- and gave it to her two brothers. This was not the first time she was helping her siblings. In the same month, she gave her Ksh.600,000/- to enable her expand the hotel and add salon driers and to start a tailoring school and add more seats to the hotel. She was a business associate of the first appellant. On 4th February, 2000, the first appellant took her from her house at 8.00 a.m. in the morning. They went to their business premises and stayed there upto 5.00 p.m. when the first appellant dropped her home. On 10th February 2000, she was arrested together with second appellant at the Jamhuri road junction by police. She was taken to Isinya Police Station and was tortured there. The following day she was taken to CID Headquarters where she was forced to sign some papers. On 17th February 2000, she was taken



to court and charged with the offence she knew nothing about as she did not know the deceased. The party held at her house was a birthday party for one of her children. That was not the first time she held a party at her house and there was a home made birthday cake which was baked for the children as they remained in the flat whereas the adults stayed on the compound in the garage. It was not in celebration of the death of the deceased and none of the appellants except the second appellant attended the party as would have been expected. She further said that she had earlier received a threatening call and was very worried. She looked for the second appellant on mobile, told him of the threat and together they reported the matter to Kilimani Police Station. She denied the charge. The fourth appellant stated in his unsworn statement that he first knew the deceased in 1996 as they were both involved in the business of garnate gemstones. On 2nd February 2000, the deceased went to his office seeking him to get him a market for gemstones the deceased had. He (deceased) left the gemstones with him. On 4th February 2000, the fourth appellant took his wife to a butchery in Westlands. Thereafter he went to his office and was engaged by many people who had come to see him. The deceased contacted him on phone several times that day asking whether he had found market for his gemstones. Eventually he told deceased to go to his office at about 3 to 3.30 p.m. That time passed before the deceased went to his office and he went away to surrender the car he had hired. Upto 8th February 2000 when he was arrested he did not know the deceased had died. He denied having given any statement to the police about the case and ended by saying the money produced in court and that in his account was not paid to him for killing the deceased as he had his business from which he got money. He never planned with anybody to kill the deceased who was his friend and business associate.

10. The fifth appellant also denied the offence in her defence given in an unsworn evidence. Before her arrest, she was selling second-hand clothes. She had a small stall and hawked in several offices in Nairobi. On 9th February 2000, she was arrested and taken to CID Headquarters where she was interrogated about the death of the deceased. She was beaten and Chesoli gave her papers to sign. On 4th February 2000, she went to town at 11.00 a.m. to visit her customers who had promised her payment. She was paid Ksh.7,000/- and she returned home. She had her own money saved from her business and also money she got from women's group in which she was a member which gave her Ksh.30,000/-. She denied any involvement in the death of the deceased. The sixth appellant also in unsworn statement stated that before his arrest, he was a businessman at Gikomba market and was selling clothes. On 4th February 2000, he went to his place of work as usual and spent the whole day there returning home in the evening. On 10th February 2000, he was arrested and taken to CID Headquarters. He was moved to other police stations without being told anything. On 12th February 2000, he was taken to CID Headquarters again and was interrogated on the death of the deceased. He denied any knowledge and was beaten by policemen on that day, on other subsequent days, and was later forced to sign some papers he knew nothing about. He denied knowing the deceased and also denied being at the scene of the incident. He denied having made any statement to the police. The seventh appellant also gave unsworn statement in his defence in which he also denied the offence saying on 4th February 2000 he woke up at 5.00 a.m. and went to B.P. Petrol Station Kawangware where the motor vehicle in which he was working was parked. He worked there until evening at 9.00 p.m. when he went home and slept. On 10th February 2000, he was arrested as soon as he arrived at the petrol station to work. He was eventually taken to CID Headquarters on 11th February 2000 and was tortured. On 13th February 2000, he signed a statement by force and after beating. He denied receiving any money to kill the deceased. He did not know him. On 17th February 2000, he was taken to court and charged together with people he did not know, with the offence of murder which he denied. The last appellant, ie, eighth appellant stated in his unsworn defence statement that on 4th February 2000, he was at Grogan Road area where he worked behind Mbucho butchery. He worked there till evening. On 10th February 2000, he was arrested at his place of work. His house was thereafter searched and a white T-shirt which



was blood stained was taken by police, but he maintained the blood came from his body when he was bitten by a woman in a bar at Kangemi. He was beaten seriously on 13th February 2000 and was, on 17th February 2000 taken to court and charged with the offence of murder which he did not commit. He denied receiving any money to kill deceased and also denied attending any meeting to plan the death of the deceased. Lastly he denied having made any statement at the Police Headquarters.

11. We cannot say we have given a complete summary of all the facts in this case which was long and which attracted sixty one prosecution witnesses, other witnesses at Trial within Trial, several exhibits which included statements of accounts of the children's accounts, savings account Passbook of the first appellant, copies of cheque leaves, various receipts, inquiry statements of seven appellants and identification parade forms, to mention but a few, together with defence statements of all the appellants. The above summary however reflects the salient aspects of the facts that were before the learned Judge of the superior court together with the submissions by various defence counsel and prosecution. The learned Judge summed up the evidence to the assessors and gave them his advice on the law. The assessors returned a unanimous opinion which was that they found that there was common intention to commit the offence and they returned a "verdict" of guilty as charged. Thereafter the learned Judge, upon analyzing and evaluating the evidence before him, convicted the appellants as we have stated hereinabove.
12. Each appellant was dissatisfied with the conviction and, of course, the death sentence, but which we understand has been commuted to life imprisonment. We will nonetheless still view the appeal against sentences on the basis that if that sentence was not lawful, then commuting it to life sentence would be neither here nor there. Only a valid sentence can be commuted. Each appellant has filed memorandum of appeal and at least one supplementary memorandum of appeal either in person or through their advocates, except the first appellant who filed only one memorandum of appeal through her advocate. Each appellant was represented by an advocate. Professor Githu Muigai represented the first appellant; Mr. Ondieki was for the second appellant, Mr. Nyachoti for the third appellant, Mr. Wamwayi was for the fourth and fifth appellants whereas Mrs. Rashid represented the sixth, seventh and eighth appellants. These memoranda of appeal and supplementary memoranda of appeal are so numerous and voluminous that it would not be proper to reproduce each of them in this judgment. The common issues raised by all of them are that the learned Judge of the superior court erred in law and in fact in basing the convictions on circumstantial evidence whereas the evidence did not meet the standards required in law; that the conviction in respect of each case was based on statements made by co-accused or accomplice evidence which was not corroborated; that the identification of some appellants was based on improperly conducted identification parades; that reliance was based on retracted and or repudiated inquiry statements and that was in law not proper; that in some cases, the learned Judge of the superior court shifted the burden of proof contrary to the legal principles; that the learned Judge erred in law in failing to comply with the demands of section 169 (1) of the Criminal Procedure Code; that the learned Judge failed to consider the defence case and that the learned Judge failed to comply with the provisions of sections 74 (1) and 77 (1) and (2) of the repealed constitution. In respect of the fourth appellant, he contended further in his supplementary memorandum of appeal, that the members in the parade at which he was identified were less in number than what Force Standing Orders allow whereas in the case of the sixth appellant a ground was raised that the prosecution failed to avail essential witnesses.
13. Each of the learned counsel addressed us at length on his/her client's grounds of appeal and in some cases we were referred to several decided cases. We are indebted to each of them. Again, as the submissions were extensive and covered several aspects, we will only attempt a brief summary of the same. Professor Muigai, for the first appellant in his submissions stated that although at the onset, the prosecution set out to advance a conspiracy theory to connect the first, second and third appellant,



that theory collapsed as only retracted and repudiated inquiry statements of the second and fourth appellants made that allegation. There was no admissible and independent evidence to corroborate that conspiracy theory as the fourth appellant was categorical that no one gave him money to kill the deceased. In his view, there was no evidence to prove that whatever money that was given to the second appellant by the first appellant was for elimination of the deceased. Professor Muigai concluded his submissions by stating that the learned Judge erred in law in relying on the retracted statements of co-accused to convict the first appellant notwithstanding that in that judgment, the learned Judge had made a finding that all the appellants were unreliable. To buttress his submissions, he referred us to the case of *M’Inanga v. Republic* (1985) KLR 294 which we have considered together with all other decided cases to which we were referred. Mr. Ondieki was of the view that as far as the second appellant was concerned, only the phones connected him to the case. The statement of the second appellant should not have been admitted as he was tortured and he pleaded with us to reject that statement as this was a first appeal. He felt it was not proper to consider the fourth appellant’s statement as against the second appellant although he conceded that in law, the statement of a co-accused could be considered as against another co-accused. Mr. Ondieki cited several instances of what he submitted, were misdirections by the learned Judge and lastly contended there was no evidence of common intention in the entire case. For the third appellant, Mr. Nyachoti submitted that the third appellant was not at the scene of the crime and the evidence advanced against all the appellants was circumstantial. He emphasized that the third appellant, being sister to first appellant, could not be convicted on the mere fact that she accompanied her sister to the bank where money was withdrawn. He said the theory that the money withdrawn was for eliminating the deceased was not proved and remained no more than a mere theory. In any case he contended, the third appellant not being the holder of the account, could not know why the first appellant withdrew that money. As to the alleged party held in the third appellant’s house after the death of the deceased, Mr. Nyachoti reiterated what the third appellant said and that was that the party was for the birthday of her child and had nothing to do with the murder of the deceased. Lastly, he submitted that the defence of the third appellant was not properly considered by the learned Judge and cited certain instances to demonstrate that contention. Mr. Wamwayi, who represented the fourth and fifth appellants, submitted that the identification parade organized for the identification of the 4th appellant could not be relied upon as there were only six members of the parade as opposed to minimum eight members required as provided by the Forces Standing Orders. He submitted further that the fourth appellant had many sources of income and being found with Ksh.1,500,000/- was no big deal as he was a man of substance. In any case he said, the learned Judge erred in relying on the retracted and/or repudiated statement he gave to police as there was no corroboration sought and found before the court could rely on the statement. There was no movement record to show the fourth appellant led police to various places where the other appellants were arrested. As to the fifth appellant, Mr. Wamwayi’s take was that the parade at which she was identified was not proper as she was the only person in the parade with a scar. Lastly, she had her own business of selling clothes and that being so, no money was given to her for committing the alleged offence. Lastly, Ms. Rashid addressed us on behalf of the 6th, 7th, and 8th, appellants. In her view, the judgment of the trial court was not signed and so was not a valid judgment. The identification parade organized for the sixth appellant was not proper as members of the parade did not resemble him as he was of peculiar features in that his teeth were peculiar and in any case all the identification parades were flawed as the police had no description of the appellants prior to their organizing the parades for the witness never gave the police the description of the appellants and lastly she submitted that the defences of the sixth, seventh and eighth appellants were not considered by the learned Judge of the superior court. As we have stated, each of the learned counsel for the appellants addressed us at length and in depth and therefore this is only a summary of the various submissions they made before us.



14. We have anxiously considered the record, the evidence, the grounds of appeal, the submissions, the exhibits, the judgment of the superior court which we find was properly signed despite the contention of Ms. Rashid, and the law. As we have said, this is a first appeal. We are duty bound in law to revisit the evidence a fresh, analyse and evaluate it and reach our own independent conclusion but always being mindful of the fact that the trial court had the opportunity of seeing and hearing the witnesses and giving allowance for the same. In our view, the starting point is to divide up the appellants into four categories. These are, the first appellant who is said to have been the source of funds which was allegedly passed to the second and third appellants for onward transmission to the fourth appellant who would pay it to the sixth, seventh, and eighth appellants allegedly recruited by him (fourth appellant) for the work of eliminating the deceased. The second category is composed of the second and third appellants. They never went to Kitengela on the material and fateful day but they were allegedly the conduit through which finances flowed to the fourth appellant who in turn gave it to the “foot soldiers” to eliminate the deceased. The third category was the fourth and fifth appellants who played the parts of ensnaring the deceased to the death trap and also of receiving the dirty money from the 2nd and 3rd appellants and ensuring that the “foot soldiers” together with him carried out the assignment. The fourth category is composed of one appellant and that is the seventh appellant who remained in the car that King’ori was driving and never left that car except after King’ori had been seriously assaulted and left for dead in that car. The last category is that of fourth, fifth, sixth and eighth appellants. The allegation against these four is that they were the last people seen with the deceased who was thereafter, the same day found dead in an area not far from where they were last seen with him in a motor vehicle, whatever was the description of the vehicle driven by the fourth appellant.
15. It cannot be gain-said, that the entire case was based on circumstantial evidence. That legal position was accepted by the learned Judge of the superior court and all the counsel who appeared before us did accept that there was no witness who saw the macabre murder take place nor saw the appellants or anybody killing the deceased. The other aspect which again is not in doubt is that the main evidence as to the events immediately connected with the disappearance and discovery of the deceased’s body was that given by Harrison Kingori, who was himself also brutally assaulted immediately after the disappearance of the deceased but before the discovery of the deceased’s body. The categories above is based on the evidence of King’ori, the evidence related to the allegations as allegedly revealed by the bank accounts in respect of children’s account for first appellant’s children, all the evidence gathered from the various inquiry statements of the appellants which were retracted and/or repudiated but were nonetheless admitted and to an extent relied upon by the trial court. In short the categories above are as apparrent in the evidence which is in the record before us. The fourth, fifth, sixth, seventh, and eighth appellants in their defences denied having been at the scene of murder or having been at Kitengela and its surroundings on the material date ie, on 4th February 2000. King’ori, the main witness on their identity said he saw each of them at Kitengela and that the fourth, fifth and sixth appellants were in the car that was being driven by the fourth appellant and in which the deceased was when he saw the deceased last. The eighth appellant was at first with King’ori but ran to that same car of Mwangi leaving only the seventh appellant with King’ori. He came back into King’ori’s car later after sometime and thereafter King’ori next saw that car but without the deceased inside it. Thus whereas King’ori said he saw them at Kitengela and that he was all the time with seventh appellant, the fourth, fifth, sixth, seventh and eighth appellants say they were not there at Kitengela on 4th February 2000 at any time. The question is to whether King’ori’s identification of these appellants was water-tight such that his evidence on that issue can oust the alibi defence by those appellants. Thus the issue of identification inevitably comes into consideration and not only identification but identification by a single witness. This Court has stated in several decisions and it is stated at section 143 of the Evidence Act that there is no set number of witnesses required to prove a fact unless the law so states, and that



any number of witnesses' evidence can be relied upon to convict provided the court finds that evidence credible. Thus if King'ori's evidence was believed, a conviction can ensue relying on it. However, if such evidence is on identification of a person who says he was not properly identified then the court must examine such evidence with greatest care before relying on it to convict. In the well known case of Abdalla Bin Wendo & Another v Regina, [1953] 20 EACA 166 the predecessor to this Court had this to say:-

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on testimony of a single witness, can safely be accepted as free from possibility of error.”

16. In this case, on the identity of the fourth, fifth, sixth, seventh and eighth appellants as the people who were with the deceased at Kitengela most of the day on 4th February, 2000, although only Kingori is the witness who testified on that aspect, we have no hesitation whatsoever in accepting his evidence. Although, the learned trial Judge did not specifically deal in detail with the question of identification of the five appellants as the ones who were at Kitengela with the deceased, he rightly concluded that they were there with the deceased and that some of them namely the fourth, fifth, sixth and eighth appellants eventually went away with the deceased to his last journey on earth. The reasons why we also accept Kingori's evidence on this aspect are that in this case, those five appellants, deceased and King'ori were at Kitengela in broad light - in fact King'ori said he and the deceased arrived at the plot at Kitengela at 10.00 a.m. After about 20 minutes, the five arrived with the fourth appellant driving, the fifth appellant seated in the passenger seat while the other three were behind. Thus they started being together with deceased and King'ori at about 10.20 a.m. and were together, though sometimes in different vehicles till lunch time. There was no evidence that visibility was in any way impaired all that time. Secondly King'ori also talked to the appellants at times and thus had reason to remember their features only too well. As to the fourth and fifth appellant, King'ori had seen them on 17th January 2000 and on 2nd February 2000. In their case, it was therefore identification by recognition and not identification of strangers. In law recognition is much more assuring than identifying a stranger. Thirdly, King'ori did not merely identify them in Court (dock identification). He also identified them at properly organized identification parades. We readily agree with Mr. Wamwayi that the parade in respect of which the fourth appellant was identified was not a properly organized parade because there were only six members of the parade as opposed to eight spelt out by the Forces Standing Order, but as we have stated, the fourth appellant was recognized by King'ori who had seen him on two previous occasions so that the defective parade was not of any consequence in his case. Lastly, the appellant's inquiry statements which were retracted or repudiated but were admitted by the Court, clearly put each of them at Kitengela at the relevant times on 4th February 2000. All these are other evidence that would go to show that King'ori could not have been mistaken in his identity of these five appellants as the people with whom he and the deceased were at Kitengela before the deceased was later found dead in the same area. In any event the finding of some of the items like the white T-shirt in the eighth appellant's house and other items in the 4th appellant's house only confirm Kingo'ri's evidence that the five were at Kitengela on 4th February 2000.
17. We do accept as we have stated that upon King'ori's evidence and the aspects we have mentioned above, the fourth, fifth, sixth, seventh and eighth appellants were with the deceased at Kitengela for a long time



during day time on 4th February 2000. That however is not the end of the matter. As we have said, it is common ground that none saw the person or persons who murdered the deceased. Only circumstantial evidence was availed by the Prosecution to prove that the appellants were responsible for the deceased's death. All the appellants have challenged that evidence and it is now upon us, as a first appellate Court to revisit that evidence. In doing so, we will revert to the categories we spelt out above. But first the law as regards the principles upon which a Court can rely on circumstantial evidence to convict an accused person. In the often quoted case of *Rex vs Kipkering arap Koske & Another* [1949] Volume 16 at page 135, the Court of Appeal for Eastern Africa held as follows:-

“(1) That in order to justify, on circumstantial evidence, the inference of guilt, the incompatible facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

18. This legal principle was updated by the predecessor to this Court in its decision in the case of *Simoni Musoke v R* [1958] EA 715 when it quoted with approval the decision of the Privy Council in *Teper v R* (2), [1952] AC 480 at page 489 where that Court stated:

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference.”

19. In the matter before us the fourth, fifth, sixth, seventh and eighth appellants were with the deceased at deceased's plot at Kitengela, area for sometimes. They moved to various places within the vicinity of the plot from 10.20 a.m. upto the time King'ori, the seventh appellant and eighth appellant went to arrange for lunch. The fourth, fifth, sixth and deceased were in the motor vehicle driven by the fourth appellant, while King'ori had the seventh and eighth appellants in his vehicle, but as King'ori went to make arrangements for lunch at a butchery, the eighth appellant ran and joined the fourth appellant's vehicle in which we have said the deceased was. That is why we see that group as being in their own category. That vehicle went out of King'ori's sight for sometime. When King'ori next saw it, it was after the eighth appellant had again left it and joined King'ori. He told King'ori that the deceased had ordered King'ori to follow them to Nairobi and that lunch would be looked into later. Although King'ori had no fuel he obeyed the alleged order as conveyed to him by the eighth appellant. However, in his attempts to see if the deceased was indeed in the vehicle driven by the fourth appellant and where he (the deceased) was, revealed to him that the deceased was then no longer in the vehicle. He had seen him earlier on in the vehicle. At that time when he saw him last, he was with the fourth, fifth, sixth and eighth appellants. When he next saw the vehicle three of the appellants were there except the deceased. The eighth appellant had returned to his vehicle. In such scenario, the obvious questions that arose were where was the deceased, and what had happened to him. The only people who could answer that question were the fourth, fifth, sixth and eighth appellants for they were the ones last seen with him. This is what section 111 of the Evidence Act provides for. It says:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially with the knowledge of such person is upon him.”

20. In the scenario that clearly was revealed by the acceptable and credible evidence of King'ori, the fourth, fifth, sixth and eighth appellants were the only people who had special knowledge as to what had happened to the deceased, i.e. when he left the vehicle in which they were together, where they left



him and what had happened to him that he was no longer in that vehicle whereas all of them were still in that vehicle except the eighth appellant who had returned to King'ori's vehicle. No explanation was availed by them and the same day in the afternoon, the deceased body was found not far away from the general area. The chain of evidence from the time they were seen with the deceased to the time the deceased was found dead was not broken and fingers point to them and to no others as the perpetrators of the murder, in the absence of any other reasonable explanation. Thus, even without any other evidence, the circumstantial evidence that they were the people last seen with the deceased in their vehicle is enough to point a finger at them and no other. However, matters did not end there. The sixth appellant in his detailed inquiry statement made to the police which was admitted in evidence after what we find was a proper trial within trial, admitted taking part in the murder of the deceased. This statement though retracted, was not exculpatory. It mentioned all the five appellants who were at Kitengela, namely fourth, fifth, sixth, seventh and eighth appellants. The English translation of what he said in part was as follows:

“The vehicle was turned suddenly and I heard as if it had a puncture and Mwangi stopped it. I came out of it leaving others in the vehicle and while going round to enter the vehicle I heard voices with Mwangi saying “You want to kill us.” I saw Mwangi and Annah struggle with the old man. I joined them and tied the hands of the old man using a rope that was inside the vehicle. I did that because I had seen the old man with a pistol as he was struggling with Mwangi and Annah Mwangi then opened the door of the vehicle, went to the boot came with an iron bar and told Kagia to remove the old man from the vehicle. Kagia asked Mwangi for the iron bar saying that he wanted to hit him at the legs and he was given the iron bar by Mwangi. Kagia hit the old man with iron bar on the head (slightly behind the head) and Mwangi pulled the old man outside the vehicle and threw him on the ground and we left the old man there and we drove towards the shops.”

21. The inquiry statement by the eighth appellant was in effect the same as that of the sixth appellant and was also inculpatory. These confessions were corroborated by the evidence of King'ori we have narrated in depth above and were also corroborated by the evidence of PC. Bernard Amboko (PW57) who on arresting the fourth appellant at his house, searched the house and found mobile phone relevant to this case as it was used in contacting the deceased and the second appellant and was bought for the fourth appellant by the second appellant. They also recovered an iron bar mentioned by King'ori as having been seen in the fourth appellant's boot and mentioned by the sixth appellant in the part of the inquiry statement we have reproduced above.
22. In our considered view, there was overwhelming evidence to demonstrate that the fourth, fifth, sixth and eighth appellants murdered the deceased. That evidence was composed of the inculpatory confessions fully corroborated by the proper identification of them by King'ori as the people who were last seen with the deceased. That chain of evidence is not broken at all and leaves only one irresistible conclusion that they were the murderers. The superior court came to the same conclusion though through another route and we cannot fault it in its conclusion which is the same as ours.
23. The seventh appellant was in his own category. He did not go with the fourth, fifth, sixth and eighth appellants in the same car where the deceased was and which was driven by the fourth appellant. He remained with King'ori in the vehicle driven by King'ori. In short, although he was at Kitengela plot with the rest, he was not one of the kidnappers at the relevant time. That he was at the plot and was with the others is certain as King'ori's evidence is already accepted by us as credible. The inquiry statement of the sixth appellant we have referred to herein above clearly demonstrates that he was recruited together with sixth and eighth appellants by the fourth appellant for a job in Kitengela. Further, after the fourth, fifth, sixth and eighth appellants had accomplished their mission and came back and the eighth



appellant joined him in Kingo'ri's vehicle, he must have noted as King'ori did, that the deceased was no longer in that vehicle, yet his conduct shows that he was still one of the team and indeed thereafter joined in assaulting King'ori seriously. That behavior clearly shows that he was one of the team that set out to murder the deceased and his being left in Kingo'ri's vehicle was just a role assigned to him to keep King'ori company and detract him from pursuing the vehicle that was kidnapping the deceased and from discovering immediately what was going on. Such assignments are not out of the ordinary in the criminal world and we take judicial notice of it. He was one of the murderers and only played a different role with a common purpose in the whole episode.

24. That leads us to consider the role played by the second and third appellants. We had put them in the second category. They were not at the scene and were not seen with the deceased any time prior to his sad demise. They were said to have been the conduits through which the crime was financed. The fourth appellant made two statements under inquiry implicating the two appellants and narrating the plans that were made to eliminate the deceased. These statements were inculpatory. They stated that the said appellant purchased a mobile phone for the fourth appellant to enable him to accomplish the deal. George Machira Miriugi (PW 31) worked for Mobitel (K) Ltd as a salesman. He said that on 8th December 1999, he sold mobile phone to the second appellant and facilitated the connection. He knew the second appellant. Later the second appellant went to him with the fourth appellant and he wanted a mobile to be connected for the fourth appellant's use. The second appellant was given mobile No. 072410627 and the fourth appellant was given No. 072411165. This evidence corroborated in material aspects the statement of the fourth appellant. In addition, the sixth appellant also stated in his inculpatory statement under inquiry that he met the second appellant together with the fourth appellant at Ngong Hills Hotel. The other man in that company had been acquitted at no case to answer stage. Lastly, in his own lengthy inquiry statement which was admitted after a full trial within trial, which we consider was well conducted, the second appellant explained fully how he was involved in the entire planning and eventual execution of the murder of the deceased. Although this statement was, like others repudiated or retracted, the evidence of Machira Miringi cited above corroborated it and a conviction could rightly be based on it notwithstanding the other statements of co-accused which under section 32 of the Evidence Act, could also be considered although they were evidence of the weakest kind and could only be used to lend assurance to the other evidence already adduced. See case of Anyangu and others v. R, (1968) EA 239 to which we shall refer to later. In the case of the third appellant, she also gave a statement under inquiry. It would appear that it was the telephone she received from one Maji Moto, threatening the life of the first accused in the trial court, who had been acquitted, that triggered the entire saga. She admitted in that statement that she received money from the first appellant and gave it to the second appellant. In that statement she said that early January 2000, Gachanja gave Francis Karioko Kshs.200,000/= to take to Maji Moto. The money was for the "boy" to finish Githinji. After one week Gachanja gave Francis Karioko Kshs.1.8 million to take to Maji Moto on a date he could not remember and that Gachanja also gave Karioko Kshs.600,000/= which he took to Maji Moto whom she had now pleaded with to drop the name Maji Moto and was now using the name "Ken". In short, she was in the thick of it and she admitted as much. We do not attach any weight to the allegations that a party was held at her house after the death of the deceased to celebrate that death because it was clear that the majority of the actual participants were not at that party. We believe if it was to celebrate the success of their mission, most of the participants would have attended it. Notwithstanding that, we do agree with the learned Judge of the superior court that although the second and third appellants were not at Kitengela on 4th February 2000 when the deceased met his death, they were nonetheless the architects of the heinous murder and were rightly convicted as indeed the provisions of sections 20 and 21 of the Penal Code applied to them squarely.



25. The case of the first appellant is somewhat different. She was the step sister of the second and third appellants as we have stated. She had also employed the third appellant in one business and was her partner in the other business. The allegation against her was that she financed the planning and execution of the murder. Her husband who, according to third appellant paid Kshs.200,000/=, Kshs.1,800,000/= and Kshs.600,000/= to the second appellant and was seen by the sixth appellant, sitting with third and fourth appellant at Ngong Hills Hotel during the planning stages of the matter was acquitted on no case to answer. She did not make any statement to the police and all the evidence that was adduced against her was circumstantial and was to the effect that some money was withdrawn from her account was alleged in retracted or repudiated statement of co-accused, to have been paid to them for onward transmission to the assassins. She was also alleged to have given out a title deed for a property to one of the appellants in appreciation for work done. She denied all the allegations and admitted that she did give out money to the second and third appellants at times but as to the second appellant, she did so as a sister helping her sibling in financial problems and not for furtherance of any ill activities and as to the third appellant, she was given money to expand her business and again not for payment out to murderers. The learned Judge, after considering all that, convicted the appellant on the evidence that she withdrew Kshs.1,000,000/= from children's account without telling her husband; that she gave contradictory statement as to why she gave her brother the second appellant money from that given by third appellant and on the basis of retracted or repudiated statements of co-accused notwithstanding that the learned Judge had found those statements not proper evidence against her husband and acquitted him on no case to answer. He found further that the second and third appellants implicated their sister, the first appellant in the scheme which lent assurance to the evidence of the withdrawal of the money in question, and that as they were close family members, the implication must have been there for they could not lie against their own sister. We note that these findings were made immediately after the learned Judge had made the following findings:-

“My assessment of the accused herein, viewed from the point of view of the evidence adduced, vis-à-vis their defences and circumstances as a whole is that they are contradicting, self-serving, dishonest and outright liars.”

26. Be that as it may, the learned Judge's concluding remarks about the first appellant were as follows:-

“A2 cunningly provided the funds and sat behind the curtains for others to execute the mission.”

27. We have anxiously considered the evidence that was adduced against this appellant; and the judgment in respect of that evidence. It was conceded by Mr. Kaigai that the main evidence against the first appellant was that the money allegedly used to execute the offence appeared to have come from the accounts of a company where she was a director and from children's account. The other evidence relied on by the learned Judge was evidence of statements from co-accused and that was to the extent that she gave money to second, and third appellants some of which money ended in the account of the fourth appellant and eventually part of it was paid to fifth, sixth, seventh and eighth appellants. The first appellant did not give the police any statement and so all that evidence was deduced from the state of those accounts as related by IP Johnstone Libese (PW59) but which entries did not specify the destination of any withdrawal. That aspect remained and was strengthened by the inquiry statements of the second, third and fourth appellants who repudiated their statements. In the case of Anyangu and others vs. Republic, (1968) EA 239, this Court examined the reliance to be put on extra-judicial statements of co-accuseds by the courts and stated:-

“It is the treatment of the statements by the learned trial Judge which has caused us some concern. The learned Judge treated all statements as evidence, albeit accomplice evidence



against each appellant. With respect in doing so he was in our view in error. A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial be “taken into consideration” against that co-accused. It is however, not only accomplice evidence but evidence of the “weakest kind” (Anyuna s/o Omolo and another vs. R (1953), 20 EACA 218): and can only be used as lending assurance to other evidence against the co-accused (Gopa s/o Cridamabanga and others v. R (1953), 20 EACA 318).”

28. In this case, in our view the inquiry statements made by co-appellants were evidence of the weakest kind as against the other appellants and that is why in this judgment, whenever we have referred to any of them, we have searched for some cogent evidence that it would lend assurance to. As regards the first appellant, other than the allegation that a title deed was given to one other appellant, which allegation was again part of the repudiated inquiry statement, there was no other evidence that these statements of co-accused could lend assurance particularly as the first appellant did not make any incriminating or any statement. In any event, as the learned Judge had made a finding that all appellants were contradicting, self-serving, dishonest and outright liars, what could have prevented the second and third appellant from telling lies against their own sister? In any case, the learned Judge in the same judgment described the second appellant as follows:-

“The priestly presentation by A3 concealed a shrewd human character ready to go to any lengths to achieve selfish ends. His conviction for the offence of drug trafficking when he was an Inspector in the Administration police force and the role he played in this crime tells it all.”

29. Yet that is the person on whose statement, the learned Judge convicted the first appellant. The law sets down the minimum standard of a witness upon whose evidence the court can convict in the case of *Ndungu Kimanyi vs. The Republic*, (1979) KLR 282 at page 283, where Court stated:-

“We lay down the minimum standard as follows: The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

30. We think the extrajudicial statements alone without any from the first appellant should not have been relied on as the sole evidence of how the money allegedly withdrawn from first appellant’s accounts and children’s accounts were used. Further that evidence was circumstantial and the chain needed to be complete and point to none other than the appellant, and an assurance that there were no co-existing circumstances that would weaken or destroy the inference. Here, Harriet Muthanje Ndunga (PW20) who worked at HFCK, Kenyatta Market Branch where first appellant and her husband had an account, said in court that Gachanja and first appellant had, instructed them to pay the third appellant wherever she went to withdraw from their account and so it was true that as a sister, an employee and a partner, she would be paid money by the first appellant. Equally, the second appellant being a brother to the first appellant, would also be given some money at times. These were co-existing circumstances that did weaken the inference that money paid to them was only to facilitate a crime.

31. We have said enough to indicate that much as there was strong suspicion that the first appellant financed the deal, that remained only a suspicion and we cannot find any tangible evidence to remove it from that mere suspicion however strong. We cannot find any evidence to show she knew that whatever money she gave out, if she gave out any, was to facilitate the murder of the deceased other than the



repudiated and retracted statements of co-accused persons who had been discredited by the superior court which had seen their demeanour and heard them. The benefit of doubt we entertain must be given to the first appellant.

32. In conclusion, the appeal by the first appellant Elizabeth Gitiri Gachanja is allowed, her conviction is quashed and the sentence of death set aside. She will be set at liberty forthwith unless otherwise lawfully held. The appeal, of the second, third, fourth, fifth, sixth, seventh and eighth appellants namely Francis Karioko Muruatetu, Rose Njoki Muruatetu, Wilson Thirimbu Mwangi, Annah Ngonyo, David Karuga Njuguna, Stephen Wambua Kamau and Stephen Njoki alias Blackie respectively are dismissed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2011.

E. O. O’KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

