



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAIROBI

**CRIMINAL APPEAL 9 OF 2003**

**TIMOTHY IRUNGU NDEGWA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Oguk, J)  
dated 3<sup>rd</sup> December, 2002*

**In**

**H.C. Cr. C. No. 65 of 1996)**

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**JUDGMENT OF THE COURT**

The appellant in the appeal, the subject matter of this judgment, is **Timothy Irungu Ndegwa**. We shall hereinafter refer to him simply as the appellant. On 14<sup>th</sup> November, 1996, the appellant appeared in the High Court of Kenya on an Information that charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the Information were that on the night of 13<sup>th</sup>/14<sup>th</sup> November, 1995 at Kahawa Sukari Estate in Thika District of the Central Province, jointly with others not before the Court, the appellant and those others murdered GEOFFREY BAARIU LURUTI, hereinafter "*the Deceased*." The appellant pleaded not guilty to that charge and between 17<sup>th</sup> March, 1998 and 20<sup>th</sup> November, 2001, the appellant was tried on the charge by Oguk, J, as he then was, sitting with the aid of three assessors. The trial of the appellant ended when the learned Judge summed up the case to the assessors on the 20<sup>th</sup> November, 2001 and in the afternoon of the same day, the three assessors unanimously returned a verdict of guilty as charged against the appellant. The learned trial Judge then reserved his judgment which he eventually delivered on **3<sup>rd</sup> December, 2002**. The Judge found the appellant guilty as charged, convicted him and duly sentenced him to death. The appellant now appeals to this Court and this being a first appeal to the Court, the appellant is entitled to expect from us afresh and exhaustive re-evaluation of the evidence upon which he was convicted and decide on our own whether the conclusions of the trial court ought to be sustained or not. In doing so, we are also equally obliged to bear in mind that while the trial court had the advantage of seeing and hearing the witnesses testify before it, we ourselves have not had that advantage and we must duly give allowance for that position – see for example OKENO V. REPUBLIC, [1972] EA 32.

The Deceased, at the time of his unfortunate demise, was 43 years old and was a Lt. Colonel in the Kenya Army and was based at Kahawa Barracks. He however, lived with his wife Rosemary Karimi Baariu (P.W1) and their three children at Kahawa Sukari Estate. At the time of his death, the Deceased was, however, attending a two week management course at the Kenya Institute of Administration. He could

have chosen to live at the Institute but he opted to be coming daily from his home in Kahawa Sukari Estate. Col. Henry Nyambok (PW. 11) was with the Deceased and other officers at the common room of the Institute during the evening of 13<sup>th</sup> November, 1995. The Deceased left them between 11.00 p.m. and 12 midnight. That was the last time they saw him alive because in the morning of 14<sup>th</sup> November, 1995, the body of the Deceased was found lying some two houses away from his own house at Kahawa Sukari Estate. The Deceased owned a car Reg. No. KAD 819R, a Subaru. He must have left the Kenya Institute of Administration in that vehicle. When Rosemary, the wife of the Deceased, realized in the morning of 14<sup>th</sup> November, 1995 at about 5.00 a.m. that her husband had not returned home as she had expected he would do and get into the house using his own key, Rosemary woke up her maid and together the two went to the watchman at the gate. The watchman confirmed that the deceased had not come home but went on to say that he (the watchman) had seen two vehicles following each other and when the vehicles reached the gate of their neighbours, the watchman had heard a loud bang and then saw the two vehicles being driven away. Rosemary and the maid went to check the place from which the loud bang had come; they found the body of the deceased lying there. The vehicle of the Deceased was found abandoned along the Thika Nairobi Road; the vehicle was facing Nairobi direction. The driver's window was completely shattered and the front passenger door was wide-open. A pistol was lying on the floor of the passenger seat. That was the evidence of P.C. Jackson Kikwai (P.W9) who was the first police officer to inspect the vehicle that morning. Kikwai took the gun and handed it over to Inspector Samuel Njeru (PW5) and also reported to the Inspector what he had seen. Thereafter Chief Inspector Michael Chege Wanoruru (PW4) of Nairobi Area Scenes of Crime was summoned to the different scenes at Kahawa Sukari Estate where the body of the Deceased was lying and next to the scene where the vehicle of the Deceased had been abandoned. He took various photographs at both scenes.

What injuries did the Deceased succumb to? Dr. Alex Onzere Olumbe (PW12) produced on behalf of Dr. Samuel Odero Ywaya the Post-mortem report on the Deceased, (Exh.10). According to that report the clothings of the Deceased was blood stained and had bullet holes. On examination of the body there were various injuries as follows:-

- (i) Bullet wound on the right shoulder with blackening around the edge of the wound with an entry measuring 6 cm from the neck, and the entry being 1.5 cm in diameter.
- (ii) Bullet wound entry on the upper right arm 12 cm from the shoulder tip and measuring 5 mm in diameter.
- (iii) Bullet external holes on the upper left arm 10 cm from the tip of the shoulder with a corresponding 15 cm diameter exit.
- (iv) Bullet wound from the mid shoulder which hit the second vertebra;
- (v) Bullet wound from upper right side of the arm and the bullet had also hit the 3<sup>rd</sup> rib on the side of chest and had passed between 2<sup>nd</sup> and 3<sup>rd</sup> ribs on the left side of the chest to exit in the 3<sup>rd</sup> wound. There was massive haemothorax.
- (vi) Bullet wound from the right upper arm rest through the right lung to the left lung. The bullet from the upper mid shoulder had hit the mediastinum Aorta to the second vertebral bone.

As a result of these injuries, Dr. Ywaya who was apparently unavailable to testify, came to the conclusion that the cause of death was massive haemothorax due to the tearing of both lungs and consistent with bullet wounds. Dr. Onzere, who produced the report and who was himself the then head of the Medical Legal Services based at the National Public Laboratory Services at Nairobi explained to the Judge and the assessors that because of the blackening around the wounds the bullets must have been fired within a very short or contact range as opposed to intermediate and distant range of a firearm shot. It is clear from the post mortem report that the body of the Deceased was riddled with bullet wounds and we have no difficulty in concluding that the person or persons who shot the Deceased in this manner must have or could only have intended to kill him. The next question must be: who did all these things?

To answer that question, we must now turn to the evidence of Zipporah Wangechi Mwangi (PW3). The learned Judge repeatedly

described her as “*the star witness*” for the prosecution, first in the Judge’s summing-up to the assessors and next in his own judgment. That description of Zipporah was entirely correct because the case for the prosecution stood or fell depending on whether she was believed or disbelieved. With several intervals of adjournments, Zipporah’s evidence, inclusive of cross-examination and re-examination, covered from page 37 to page 51 of the typed record. After a grueling cross-examination, Zipporah told the prosecuting counsel, Mrs. Ondieki, as follows:-

***“I mentioned that what I have told this court regarding the said incident is the truth and that I actually witnessed what had happened.”***

What did she say she actually witnessed?

Her story starts from the 11<sup>th</sup> November, 1995. We must recall the Deceased was killed sometime immediately after or immediately before 12 midnight on the night of 13<sup>th</sup>/14 November, 1995. Zipporah stayed in Eastleigh in Nairobi. She was unmarried and unemployed. On 11<sup>th</sup> November, 1995 at about 6.30 p.m. she was at Bamboo Bar in Nyamakima area of Nairobi. She had left her house at Eastleigh at around 3.00 p.m. and had passed by the house of her boy-friend known as Watoro who also stayed in Eastleigh. She came to town alone and met Watoro there. She thereafter left Watoro and went to Bamboo Bar.

While at the bar, she met persons whom she named as Gerald Wambugu Munyeria, Wacucu, Matheri and the appellant. She knew those people by those names except for Wambugu who used to call himself Wanugu. But she had previously met them and she knew all of them. Each one of them bought a beer for her and she drank all the beers they bought for her. Wambugu then gave her KShs.5 and told her to play music in the Juke Box. She did so and then rejoined them. They were all drinking at one table. While they were so drinking she heard them talking and Wambugu was saying that they do it on Sunday but Irungu, the appellant was saying they do it on Monday because there were normally many visitors on Sunday who were Government employees . She was not able to follow the conversation. She then left with the appellant who was a friend of her cousin and they went to Eastleigh where the appellant also stayed. They arrived at Eastleigh at around 8.00 p.m. When later cross-examined on this aspect of her evidence, Zipporah said:-

***“We then drove towards Githurai – Kimbo, when Timothy Irungu (Accused-Appellant) spotted the vehicle of Baba Tony. He spotted the vehicle at Githurai – Kimbo. We had passed Roysambu. It was not my first time to hear of the name Baba Tony. I had heard it before. I first heard the name on the same day when we were still at Bamboo bar when I had come from the Juke Box to play some music. I heard Gerald Wambugu mention that name. Wambugu was saying that they should not kill Baba Tony on the road but Timothy Irungu stated that he should be killed at his home so that it can be said it was his wife who did it. I heard all these while we were still inside Bamboo bar. I had never met Baba Tony before then. As we left Bamboo bar, I knew that those people were planning to kill one Baba Tony. I did not make any effort then to make a report of such conversation immediately to the police. I know that it is an offence to kill someone without any reason. I had to wait to witness the incident before reporting the matter to the police. I had to witness the actual killing before I make a report to police.”***

We have set out this page from the cross-examination of Zipporah because, Mr. Wamwayi, the learned counsel who represented the appellant before this Court vigorously submitted that Zipporah was in fact an accomplice in the crime, that her evidence was uncorroborated, that the learned trial Judge did not at all direct the assessors on the issue of an accomplice evidence and that even in his own judgment, the learned Judge did not direct himself at all on the issue of Zipporah being an accomplice whose evidence required corroboration. We shall deal with this issue later on in the judgment.

We return to the evidence of Zipporah. We left her at the stage where she had left Bamboo Bar with the appellant and they had arrived at Eastleigh at 8.00 p.m. in the evening of 11<sup>th</sup> November, 1995.

Her story next begins on 13<sup>th</sup> November, 1995. She left her house at Eastleigh at 6.00 p.m. and took a vehicle to town; the appellant was with her in that vehicle. The vehicle dropped them at the city centre at about 7.00 p.m. Another car came and the appellant stopped it. The two of them entered the car which was a white saloon. She did not see its registration mark. Inside the car were Wambugu,

Matheri and Wacucu. They went to the Akamba Bus Stage. She remained in the car with Wambugu while the appellant, Irungu and Matheri went for another taxi. Wacucu (Wambugu) also left the vehicle but she did not know where he went to. It was then about 8.30 p.m. The appellant and Matheri came in a taxi and Wacucu also arrived. She thought Wacucu must have just been standing nearby. The taxi had a driver but Zipporah did not see its registration mark. Wambugu or Wacucu then asked the watchman outside Akamba Bus Stage to guard his car throughout the night till the following morning. That was the car in which they had gone to the Akamba Bus Stage, and the watchman agreed to guard it. The party then boarded the car which had its own driver and in which the appellant and Matheri had come. Let us once again break from the evidence of Zipporah and interpose the evidence of Jackson Waiganjo Maru (PW2). Jackson was a taxi driver based at the City Market, Nairobi. In November, 1995, he was based at Kenya Cinema and he used to park his vehicle outside International Life House. He was employed by one Keritu. The vehicle he was driving was Reg. No. KMY 667, Mazda.

On 13<sup>th</sup> November, 1995 at about 7.00 p.m., he had parked his taxi at the usual place and his taxi had taken position No. 1. He was alone in his vehicle. The driver in the taxi in position No. 2 flashed Jackson indicating that some passengers wanted No. 2 to take them to some place. Jackson came out of his vehicle and went to the vehicle at No. 2. The driver in No.2 was Njoroge and the vehicle was Reg. No. KME 575 Toyota Crown. The people who had approached Njoroge asked Jackson if he could take them to Dagoreti Corner. Jackson said he would, if he was paid Kshs.500. The people said they did not have such money. Jackson's vehicle had on it a "for sale" poster and those people told him they could buy the vehicle from him during the trip to Dagoreti. Jackson said it was already night and he would not sell the vehicle at night. The people Jackson talked to were two in number. They entered Njoroge's vehicle and since then Jackson did not again see Njoroge alive. We now know that Njoroge's body was to be found in the City Mortuary where it had been taken to; it is not clear from the evidence who took the body of Njoroge to the City mortuary. We can now return to the evidence of Zipporah.

We left her when she and her party, including the appellant had boarded the vehicle brought by the appellant and Matheri. The appellant sat in the front passenger seat; Wambugu and Matheri sat at the back; Wacucu was also at the back. Wambugu was in the middle of the two. She sat with them at the back seat and they were carrying her. The taxi driver asked the appellant where they were going to, and the appellant said they go towards Dagoreti. They, however, did not go to Dagoreti. Instead they went towards Mathare North, to John Saga area in Huruma Estate. On arrival at the John Saga Area, Wambugu left the taxi and went to change his clothes and shoes in the house of Mama Gerald. He changed the jacket and shoes and came back to the taxi. He told the driver to go back the same way they had come and proceed to Githurai. The driver refused and the appellant told him to proceed where he was being asked to go if he did not want to die. The driver complied.

Near Safari Park Hotel, the appellant pointed out that there was a police road block ahead and that they should take the road through Marurui. The party took that route and came out through Roysambu Petrol Station. They were heading towards Githurai Kimbo and Zipporah heard the appellant say that 'there is Baba Tony's car'. The appellant told the taxi driver to follow Baba Tony's car. Another car came from the road ahead and made Baba Tony's car to stop. They caught up with Baba Tony and Baba Tony put out his hand through the driver's window and asked the appellant in Kimeru language: "What is wrong?" ; kitu gani mbaya?" The appellant did not reply. The car which had made Baba Tony stop had passed by then and Baba Tony branched heading towards his residence, followed closely by the car in which Zipporah and her party were in.

As they followed Baba Tony, Wambugu was saying they should shoot Baba Tony there but the appellant insisted that they should not kill Baba Tony on the road. The chase continued and the appellant said they should go and kill Baba Tony outside his house so that on the following day people would say he was killed by his wife.

On reaching the police post in the area, Baba Tony switched off the lights of his vehicle as he was aware that he was being

followed. The appellant instructed the taxi driver to put on full lights; Baba Tony was then driving towards his house. As he was about to reach his gate the appellant instructed the taxi-driver to block Baba Tony's car before he could knock at his gate. When Baba Tony's car was facing his gate, the taxi came round the car and that was when the appellant shot him. We must now quote Zipporah verbatim:-

***“He first shot at Baba Tony while he was still in the taxi and then he saw Baba Tony also taking out his pistol and before he could fire his shot, Timothy Irungu shot him and the shot from Baba Tony shot the floor of our taxi. This 2<sup>nd</sup> shot was fired by Timothy Irungu while he had already got out of the taxi. By then we were still inside the taxi vehicle. Among those who were in the car, it was only Timothy Irungu who fired at Baba Tony and shot him. When Timothy alighted from the taxi the taxi driver reversed the car a short distance from that of Baba Tony. When Timothy Irungu fired the 2<sup>nd</sup> shot he was standing about 7 to 10 metres from the car of Baba Tony. I could not tell whether Baba Tony had drawn his driver's door window or pulled it down. After the 2<sup>nd</sup> shot was fired by Timothy, Baba Tony fell down inside his car. The taxi was reversed for a long distance by the driver. Wambugu and Wacucu alighted from the taxi and proceeded to the car of Baba Tony and opened the driver's door. They held him by both hands and legs and took him near his gate and laid him on the side of the road to his house slightly behind. Since Baba Tony's eye glasses had fallen down, Timothy Irungu picked them and put them on the face of Baba Tony. By then he was already dead. They put his body to lie properly facing upwards. Wacucu stated that he thought the man was not dead and he kicked him on the left leg and he then proved that he was dead. Wambugu then took the car of Baba Tony which he started driving towards the direction we came. I joined Wambugu in the car of Baba Tony. The rest of the people entered the taxi car and were going ahead of us as we followed Baba Tony's car.”***

Zipporah then continues that near Thika-Nairobi Road, Wambugu asked her to alight from Baba Tony's car. The appellant asked Wambugu to give her some money to take her to town as they were taking the driver of the taxi somewhere. According to Zipporah the taxi driver had called the appellant by his name while they were near Baba Tony's gate. The taxi driver appeared to have known the appellant. Zipporah was given Kshs.800 by Wambugu and she alighted from the car. It was then around midnight. The car of Baba Tony was left just along the Thika-Nairobi Road. Wambugu wanted to take the pistol of Baba Tony but the appellant told him not to take it so that it would be said he was shot by his fellow workmen. The vehicle was abandoned a short distance from the junction to Baba Tony's road. His pistol was left in the vehicle. A matatu came and brought Zipporah back to town. She was dropped near Amuka Bar near Kamukunji police station. She was given a room there and slept.

When she woke up in the morning, she went to Pangani Police Station and found the O.C.S, a Mr. Njuguna. She explained to Njuguna what had happened the previous night but according to her, Njuguna simply dismissed her by saying,

*“hayo ni maneno ya upusi, enda nyumbani – that is all nonsense, go home.”* She went home.

But she later went to see the PCIO, Mr. Mukira and told him what had happened. He also told Mukira about her earlier report to Njuguna. Mukira asked her if she knew the house of any of the people she had mentioned and she said she knew the house of the appellant. She was asked to wait for a while but she was not called again. The following day the appellant was arrested in his house, i.e. according to Zipporah the “*following*” day would have been 15th November, 1995. The appellant was arrested by Ag. Inspector of Police Thomas Mukabwa (PW7). This officer said he proceeded to the appellant's house on 17<sup>th</sup> November, 1995 after he had been given some information by an informer. Naturally, Inspector Mukabwa did not disclose the name of his informer; in fact he said he did not know a lady called Zipporah Wangechi (PW3). But when cross-examined Zipporah had this to say:-

***“I wish to clarify that I never saw the PCIO but the DCIO, Mr. MUKIRA. He met me at the house of Timothy Irungu on the day of his arrest. I was there when he was arrested. He was arrested with my cousin called Nyambura. I do not know whether she was a girl-friend to Timothy but they were together. I was aware that the lady was there when I went there with the police. I confirm that I am the one who lead (sic) the police to the house of Timothy Irungu.”***

Despite the understandable denial of Ag. Inspector that he knew Zipporah, it is clear to us from the recorded evidence that Zipporah was among the party of police officers who arrested the appellant on 17<sup>th</sup> November, 1995. There would be no reason at all for her

to disclose her presence at the arrest of the appellant. Such disclosure could only be harmful to her safety and on this aspect of the matter, we think she was telling the truth. We only need to add that inspector Daniel Kirorei (PW6) recorded a cautioned inquiry statement from the appellant on 1<sup>st</sup> January, 1996. That statement was admitted in evidence without any objection. The statement did not amount to much in support of the prosecution's case since the appellant merely said that on the night of the killing, he slept alone in his house. He, however, confirms the evidence of Zipporah that it was Zipporah who led the police to his house on 17<sup>th</sup> November, 1995 when he was arrested.

What was the appellant's answer to the prosecution evidence? In his unsworn statement made on 4<sup>th</sup> May, 1999, the appellant told the Judge and the assessors:-

***"I do not know anything concerning the death of the deceased person. I am a taxi driver in Eastleigh Section II , 7<sup>th</sup> Street. I started working there in 1976. I was residing near my place of work along Galole street near a bar known as MATESO BILA CHUKI BAR.***

***The Flying Squad police officers on the 20<sup>th</sup> September, 1995 came to my place of residence under the command of C.I Mweke. They were more than 10 police officers. They searched my house and they did not find anything illegal except that they took some of photographs. I was detained at Pangani Flying Squad base on that day and later in the evening I was taken to Pangani and released. On the 17<sup>th</sup> December, 1995, I was in my house with my girlfriend known as Irene Nyambura Maina who is a cousin to PW3 – Zipporah Wangechi Mwangi. On the following morning Zipporah came and knocked the door and called Irene Nyambura. When the door was opened for her, she entered the house while carrying a wooden padlocked box. She went out with Irene for about 10 minutes. Irene came alone to the house. I asked her why Zipporah Wangechi had left her box in the house and she stated that it contained her clothes. We started quarreling with her over the said box. She told me that Zipporah had gone to collect her child as she had quarreled with the man she was staying with. After about 20 minutes I heard a knock on the door, two police officers in civilian clothes armed with pistols entered the house. By then Zipporah Wangechi was standing outside the house in company of another police officer. She was asked whether I was the one who had run away from Mateso Bar and she replied in the affirmative. I was then ordered to sit down by the police officers . I was asked if I was at the said bar on the previous night and I denied.***

***The police officer who was standing with Zipporah Wangechi outside the house ordered that I be shot on the foot. I was then shot on the right foot and then hand-cuffed. I was taken out of the house. When I was till outside the house, I saw C.I. Mweke and Snr. Sgt. Ongora both of Flying Squad. They greeted me and asked me what was wrong. They entered the house and then came out and went away.***

***I was then taken to a police vehicle and (sic) Irene Nyambura. We were taken to Pangani Police Station. On the following day, I was taken to Kenyatta National Hospital and admitted in the ward. While I was in the hospital being hand-cuffed on the bed, a police officer warder who was guarding me went out to buy a newspaper. He came back with a Daily Nation of 18<sup>th</sup> December, 1995. On the 20<sup>th</sup> Page there was a place where I was staying and the nearby Mateso Bar. Below the photograph was writings that a lady had been arrested in possession of two pistols in a bag at the said bar and that the man who was drinking with her had escaped by jumping over the wall. The police officer who was guarding me asked me if I had been to that bar. Later CID Officers came to the hospital and ordered that my legs should not be raised up. The leg was later put on plaster. They then took me to Kasarani Police Station.***

***On the following day, I was taken to the office of the DCIO Kasarani. I found officers of the Flying Squad then together with Irene and Zipporah Wangechi. They asked me how I came to know the two ladies and I explained to them that Irene was my girlfriend and Zipporah was her cousin. I was then taken back to the cell.***

***On 22<sup>nd</sup> of December, 1995, I was again taken to the office of the DCIO Kasarani and I was questioned about the pistols allegedly found in my house. I denied that any pistol was found in my house. I was taken back to the cells.***

***Later, on the 3<sup>rd</sup> of January, 1996 I was brought to court and I was charged with the offence of being in possession of two pistols jointly with Nyambura Maina and I was also charged with murder. I denied both offences.***

***I wish to say all the mentioned criminals mentioned by Zipporah Wangechi, Wanugu, Wacucu and Matheri were not known to me except to see their photographs in the Daily Papers. They were not my associates at all. That is all I wish to say."***

We have already set out as fully as we can the evidence of Zipporah Wangechi; it is chiefly on that evidence that the prosecution relied in support of its charge. We have now fully set out the whole of the appellant's unsworn statement . That was the entire record upon which the trial Judge and the assessors had to determine the matter. We have already said the assessors were unanimous in their opinion that

the appellant was guilty of the charge of murder. The learned Judge agreed with them. In other words the assessors and the trial Judge found Zipporah to be a truthful witness, accepted her version of events and rejected the unsworn statement of the appellant. Was the trial court right in believing Zipporah?

Of course, Mr. Wamawayi's main ground of appeal was that Zipporah was an accomplice whose evidence remained uncorroborated and ought not to have been believed. That, in our respectful view, is mixing two issues. Our understanding of the law is that where a witness is said to be an accomplice, the first issue to determine is whether the evidence of that witness, standing on its own, is one that can be believed. If the witness is not believable in the first place, then the question of corroboration of that witness's evidence does not really arise. One can only corroborate something that is capable of being corroborated. If something is a lie, corroboration cannot turn it into truth to be believed. Dealing with that issue in the Ugandan case of UGANDA VS. KHIMCHAND KALIDAS SHAH & TWO OTHERS [1966] EA 30, the then Court of Appeal for Eastern Africa had this to say at page 31, letters F to I:-

***“Before dealing with the grounds of appeal, it may be convenient to dispose of a question of law which was argued both before the High Court and before us. It was argued for the respondents that the learned resident magistrate in his judgment, after directing himself correctly on the principles to be applied erred in his approach to the evidence of accomplices in that he reached the decision that the witnesses were to be believed before he looked for corroboration of their evidence. The learned judge who heard the first appeal upheld this submission holding that the learned magistrate had ‘put the cart before the horse’ by first deciding that he believed the three accomplices and then looking for corroboration. With respect, we cannot agree and we think that there was nothing wrong in the learned magistrate’s approach. The absence of corroboration or the inadequacy of the corroboration of the evidence of an accomplice is not of itself a reason for disbelieving that evidence but merely precludes the court (save in exceptional circumstances) from basing a conviction on it. Of course, quite apart from any question of corroboration, a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject. When it accepts the evidence of an accomplice, it then, save as aforesaid, looks at other evidence which it has accepted to see if it affords corroboration of the evidence of the accomplice.”***

We think this extract sets out the correct legal position in Kenya as well as in the case of OTIENO VS. REPUBLIC [1985] a KLR 241, the High Court ( Todd & O’Kubasu, JJ) must have had that position in mind when they held at page 247, paragraphs 35 to 40:-

***“It is quite true that Spte Cleophas K. Musyoka (PW3), Spte Nicholas Mutua (PW4) Spte John P. Thairu (PW5) Spte Edwin Martine (PW6) and Spte Edward K. Magori (PW7) are convicts having been convicted of offences committed, we understand, arising out of events which occurred on August 1, 1982, and they should therefore be treated as accomplices and their evidence should not generally be accepted unless they are believed and that there is some other independent evidence which points to the guilt of the accused, or at least, tends to do so.”***

The principle implicit here is that you believe the accomplice first and then see if there is evidence to corroborate his evidence. KWACH BOSIRE & O’KUBASU, JJA put it thus in MUKUNGU V. REPUBLIC [2002] 2 EA 482 at page 485:-

***“Corroboration is in effect other evidence to give certainty or lend support to a statement of fact. In sexual cases corroboration is necessary as a matter of practice to support the testimony of the complainant. However, there have been instances, as, in Republic (sic) vs. Cherop A Kinei and another (1936) 3 EACA 124 and Chila vs. Republic [1967] EA 722 at 723 (ca), in which the courts held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be is satisfied, after duly warning itself on the dangers of convicting on the uncorroborated evidence, of the truth of the complainant’s evidence.”***

The chain running through all these decisions is that if the evidence of a witness, whether an accomplice or a child of tender years, or in sexual offences, requires corroboration, the court must first decide whether that witness is credible and it is only when the court has decided that the witness is credible that it next looks at other evidence to see if that other evidence corroborates that of the witness. If the witness is not believable or credible in the first place then of course there really is nothing to corroborate. That, in our understanding, is the legal position in Kenya.

Having seen Zipporah testify before them for many days, the Judge and the assessors believed her. She gave evidence in great details, starting from 11<sup>th</sup> November, 1995 when she said she was at Bamboo Bar with the appellant and the other men. There can be no

doubt that she knew the appellant well; the appellant himself admitted they knew each other as the appellant was a friend to Irene Nyambura, a cousin to Zipporah. It was Zipporah who took the police to the house of the appellant. At Bamboo Bar, she talked of small things like having been given Kshs.5 to feed into the Juke Box for music. It looks to us extremely unlikely that she would have dreamed up those details to spice up a false tale. Then her explanation as to what happened on the night of 13<sup>th</sup>/14<sup>th</sup> November, 1995 is so detailed that the only inference one can draw from the details is that she must have witnessed them. They went to Akamba Bus Stage in Wambugu's vehicle and when they were there, the appellant and another person left and came back in a taxi. Of course Jackson Maru (PW2) the taxi operator near International Life House did not recognize the people who went there and hired the luckless Njoroge. But Jackson says those people were two and Zipporah says the appellant left with another man and returned in a taxi. Could this be a coincidence? Before the party left Akamba Bus Stage, Wambugu asked a watchman there to guard his car until the next morning; why would Zipporah make-up such details?

They left for the mission and on the way, Wambugu leaves the vehicle, goes into the house of Mama Gerald and changes his jacket and shoes. Could this again be a creation of Zipporah's imagination? The details of the actual killing as narrated by her are so graphic that to think that she made them up, one would have to conclude that Zipporah would qualify as a very good fiction-writer. Like the Judge and the assessors, we are satisfied that she witnessed what she told the court; she could not possibly have made them up. The appellant, in his unsworn statement merely concentrated on the day of his arrest and what followed thereafter. He did not say anything about the detailed evidence of Zipporah and if Zipporah had any reason for making that story up.

Mr. Wamwayi submitted that if Zipporah is believed then she must be treated as an accomplice. Of course, even Mr. Wamwayi or Mr. Musyoka who represented the appellant during his trial never suggested to Zipporah that apart from her presence at the scene, Zipporah ever played any part in the actual killing or that she encouraged or supported it. She was branded an accomplice because she first heard about the murder plot on 11<sup>th</sup> November, 1995 and failed to report it. Not only did she fail to report it but she was actually present two days later when the crime was committed. On her presence on 13<sup>th</sup> November, 1995, however, it must be pointed out that on 11<sup>th</sup> when the matter was first brought up, no date for the crime had been fixed and there is nothing on the recorded evidence to show that on 13<sup>th</sup> when Zipporah joined the group, she knew or suspected that the crime would be committed that same night. In any case, having joined the group in the vehicle, it is unlikely that she would have been allowed to drop out even if she had wanted to. The taxi driver tried to drop out and was threatened with death.

But let us assume in favour of the appellant that Zipporah was an accomplice because she failed to report to the police what she had heard on the 11<sup>th</sup>. Was there corroboration of her evidence? In our view, there was abundant corroboration of her evidence. She said the appellant fired at the deceased several times. The body of the deceased when examined by Dr. Ywaya was found with several bullet wounds. She said the appellant stood between seven and ten metres away from the deceased as he fired at him. Dr. Alex Olumbe (PW12) said that the blackening of the edges of the bullet wounds were an indication that the firing must have been from a very short distance. Zipporah also said that after killing the Deceased, his body was pulled out of the vehicle and he was laid "*properly*" on his back. Photographs Nos. 11, 12, 13, 14 and 15 which were taken at the scene of the crime show the deceased lying on his back. Zipporah said the glasses of the Deceased had dropped from his face and that the appellant picked the glasses and put them back on the face of the Deceased. The photographs show the Deceased lying on his back and wearing his glasses.

We are satisfied these factors fully corroborated the evidence of Zipporah. We have found she was a witness of truth.

But then it was contended that the learned trial Judge having totally failed to direct himself and the assessors that Zipporah was an accomplice whose evidence required corroboration, we must give the benefit of that failure to the appellant. It is true the learned Judge said nothing at all about Zipporah being an accomplice; he did not direct the assessors on it and he did not direct himself either. Mr. Musyoka

had specifically submitted before the Judge and the assessors that Zipporah was an accomplice and that her evidence remained uncorroborated; we do not appreciate why the learned Judge chose to ignore this issue.

A similar situation arose in the Ugandan case of FABIANO OBELI AND OTHERS VS. UGANDA, [1965] EA 322. There, three men were charged with murder and with regard to the first two, the evidence was entirely that of accomplices while in respect of the third man, there was further evidence that he had confessed the commission of the crime to a fellow prisoner who testified to that effect. The Court of Appeal for Eastern Africa held as follows:-

***“(i) the trial judge having failed to direct the assessors or himself on the need for corroboration of accomplice evidence and there being in fact no evidence except accomplice evidence against the first two appellants their conviction must be quashed.***

***(ii) with regard to the third appellant the confession made by him to the fellow prisoner corroborated the accomplice evidence against him and accordingly, he was properly convicted.”***

We understand from this holding that in respect of the third appellant the failure of the trial judge to direct himself and the assessors on the need for corroboration of accomplice evidence did not occasion to the third appellant an injustice. With respect, we agree. We have no doubt at all that in the appeal before us, if the learned trial Judge had directed himself and the assessors on the question of accomplice evidence, they would have still come to the conclusion that the appellant was guilty as charged. We so find and hold.

Mr. Wamwayi then raised the point that after the committal proceedings were completed in the subordinate court and the Magistrate ordered that the appellant be produced before the High Court to take his trial, the appellant was kept in prison custody for a total of three months before he was actually produced before a judge. Mr. Wamwayi contended that the period of three months violated the appellant’s constitutional right to be produced in court within a reasonable time. The simple answer to that contention must be that after being committed to prison to await his trial, the appellant was being held upon a lawful order of the court. The Magistrate did not and could not have specified any period within which he was to be brought before the High Court. But the period of three months detention before he was produced before the High Court amounted to lawful detention and we reject his complaint on that point.

Nor did the alleged failure by the prosecution to call Njuguna and Mukira, the two police officers whom Zipporah said she reported the matter to the day following the murder caused to the appellant an injustice. As we have said the main question was whether Zipporah was a credible witness and whether her evidence was corroborated. We have agreed with the trial court that she was a credible witness and that her evidence was fully corroborated. We reject that contention as well.

Accordingly the appellant’s appeal against the conviction must fail, and is hereby dismissed.

The appellant is among those lucky ones whose sentence of death was commuted to life imprisonment by the President. He must continue to serve that sentence.

Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2009.

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**D.K.S AGANYANYA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**