



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

Criminal Appeal 75 of 2005

YUSUF RASHID WANASORO *alias* TOTO APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Bosire, J.) dated 13th December, 1995

in

H.C.CR.C. NO. 30 OF 1995)

JUDGMENT OF THE COURT

On Sunday, 31st July, 1994, a gruesome orgy of murder, rape and robbery took place at the residence of **Adam Cecil Winter**, near Bomas of Kenya in Karen – Langata area, Nairobi. A gang of 5 – 6 thugs invaded the residence at about 12.30p.m, bludgeoned **C W** to death after raping her, battered Mr. W and stole a large quantity of household and personal items. The gang left on foot and headed towards the Ngong forest nearby but security men caught up with them and shot one of them dead. The rest escaped. Some of the stolen loot was recovered from the dead man and from the forest. Ten days later, **Yusuf Wanasoro alias Toto** was arrested on allegation that he had sold some of the stolen property to two people within one week of the robbery. Two others; **James Washikomba** and **Alexander Shikavale** were also arrested in connection with the crime. The three of them were then committed for trial on Information filed by the Attorney General on 21st October, 1994 for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that the three persons, on 31st day of July, 1994 at *Particulars withheld*, Nairobi within the Nairobi area, jointly with others not before the court murdered Caron Winter. A lengthy trial, in which 27 prosecution witnesses testified, was conducted before Bosire J. (as he then was) with the assistance of assessors and at the end of it Alexander Shikavale was acquitted of the charge. Yusuf Rashid Wanasoro alias Toto and James Washikomba were however convicted and sentenced to death which is the only lawful sentence for the offence. The two subsequently filed appeals before this Court but on 9th February, 2006 information was received from Prison authorities that James Washikomba had died on 3rd September, 1997 while undergoing treatment at Kamiti Prison Hospital. His appeal thus abated and was so marked under **rule 68 (1) (a)** of the rules of

this Court. What is before us now is the appeal filed by Yusuf Rashid Wanasoro alias Toto (hereinafter “Toto” or “the appellant”).

Toto raised six grounds of appeal in a memorandum of appeal drawn in person and filed on 20th February, 2004. Subsequently the advocate provided to him, Mr. Muriithi Kihara, filed a supplementary memorandum raising another four grounds of appeal. Mr. Kihara however consolidated the grounds of appeal and raised the following issues in submissions before us: -

- “1) *The prosecution evidence was so full of contradictions and inconsistencies that it could not sustain any conviction of the appellant.*
- 2) *The defence of the appellant was not considered at all.*
- 3) *The identification of the appellant was doubtful and improper.*
- 4) *Investigations carried out in the crime were insufficient and improper.”*

We shall return to those issues presently. As this is a first appeal, the appellant is entitled to expect that we shall re-evaluate the evidence on record afresh and arrive at our own conclusions in the matter but giving allowance for the fact that the superior court had the advantage of seeing and hearing witnesses – see **Okeno V. R. [1972] EA 32**. We must now therefore examine the evidence relating to the appellant and how the superior court treated such evidence.

A CW (PW6) (“W”) was a pilot employed by *particulars withheld* since August 1993. He lived with his 30 year-old wife of five years, C W (“*the deceased*”) in *particulars withheld* near Bomas of Kenya (“*the W residence*”). They had a young daughter and had employed a baby sitter or ayah, **P M E** (PW9) (“*Patricia*”), and a gardener, **M A**(PW10) (“*M*”). Both P and M were residing in servants quarters within the W residence.

On the material day, W left the house in the morning to go flying. P and M were off duty and they also left in the morning to their respective places of worship: P to Kikomba All Nations Gospel Church, and M to Jerusalem Church, Kawangware. They returned in the evening. So, on that fateful day, only the deceased and the small baby were left at home.

At about 1 p.m. Mr. W returned home and after parking his car, he went to the front door of the house and found it open. Inside the house he saw 5 – 6 men ransacking the house. He also saw his child playing with papers in the living room floor. He asked the men what they were doing in the house and one of them approached him and ordered him to lie down as he hit him on the back of his head. As he fell, others closed in on him and set on him with repeated kicks and blows. They demanded money and he gave them his wallet containing 330 U.S Dollars. They continued to batter him until he pretended to be unconscious and they left him. They removed the safari boots he was wearing. After sometime, the robbers left and W gathered himself up and pressed the security alarm. He then picked up his child but could not see his wife. He checked the main bedroom but she was not there. He went to the baby’s bedroom and there, sprawled on her back on the floor, naked from the waist downwards and in a pool of blood, was the deceased. He tried to resuscitate her to no avail. He called some neighbours and friends among them **Phillips Francis Owen Mathews** (PW2) who arrived on the scene shortly thereafter.

The alarm he had switched on was received at 1.01 p.m. by security officers from M/S. Ultimate Security Guards based in the Langata neighbourhood at Park Place. Among them was **Samuel Wamalwa** (PW4) who was in-charge of the base, **Juma Kiema** (PW3) who was a security guard, and **Peter Bulimo Musalia** (PW14) the driver of their patrol base Datsun pickup vehicle. They arrived at the W residence within 5 minutes and found the blood-stained Mr. W who told them about the attack and asked them to check on his wife. Both went into the house and found the deceased. They told W that she was dead and they enquired about the robbers. W told them they were about 5 and had left 5 minutes or so earlier but did not know which direction they followed. After sending a signal to report the incident to their head office, the three officers went to the residence of Mr. Amos Wako nearby. Mr. Wako was at the time, as

he still is, the Attorney General of the Republic of Kenya (“*the A-G*”) and the officers knew that his house was guarded by armed police officers. There, they found **Pc Nahashon Kipsoi** (PW5) who was on guard duty and was armed with a G3 rifle and ammunition. Pc. Kipsoi agreed to accompany them in pursuit of the robbers. They set off on Muricho road and met some two members of the public who told them they had seen some 4 – 5 people heading towards Ngong forest carrying some luggage. Kiema, Wamalwa and Pc Kipsoi left the vehicle and entered the forest. Shortly they saw 4 – 5 people ahead of them carrying some luggage. One of them who wore a red hat and was carrying a gunny bag was behind the others but he suddenly dropped it and apparently tried to hide when he sensed that there were people behind them. But it was too late. Pc. Kipsoi, who thought the man was armed and was trying to shoot at them, aimed a shot at him from about 15 metres away and the bullet hit the man’s head. He died instantly. The others scattered deep into the forest. The dead man, later identified as one **Tom Muhanji Lubembe**, had a sword tucked inside his trousers. On checking the gunny bag dropped by the dead man, the officers found a radio cassette which was later identified by M (PW10) as his, four pairs of bed-sheets, and other household items which were identified later by P (PW9) as hers and her employer’s.

The place was near the Police Dog Section Headquarters. Kiema and Pc Kipsoi reported the matter there leaving Wamalwa at the scene of the dead man, and requested for police dog handlers to pursue the robbers. They were given one dog and two handlers, among them Pc **David Koskei** (PW7) who was also armed. The police dog followed a scent heading towards Kibera and stopped at a bush some 50 metres from the spot where the dead man lay. The officers found a blue suitcase hidden in that bush. They removed it and upon opening it, they found a loud speaker, a sewing machine, a pair of safari boots and items of clothing later identified by W as either belonging to him or the deceased. The search for the robbers was abandoned at about 5 p.m. that day.

The incident had in the meantime been reported to Langata Police Station and several police officers were dispatched to the W residence and the Ngong forest scene. Among them were **Supt. James Wandeto** (PW 26), the DCIO Langata Police Division, who took charge of the investigations, the Scenes of Crime personnel led by **Pc Josiah Ngetich** (PW 19), and other officers from the anti-robbery squad based at Pangani. All the recovered items were handed over to the investigating officer who subsequently produced them in Court after identification by W and his servants. Photographs were taken, finger prints were dusted, Mr. W was taken to hospital for treatment and the deceased was taken to Lee Funeral Home. A postmortem on the deceased was subsequently conducted on 3rd august, 1994 by Dr. Samuel Odero Ywaya (PW23) and he made the following findings:

“She had a bruise on left side of face and neck; another on right side neck; bruise on both hands, 4 cut wounds on left side of head; right side head deep wound deep into bone; wound on forehead, parietal region left side; back of head; right of occipital area, cyanosis in both finger-tips. Bruises on scalp left and right side of head.

Internally bruises in neck muscles, private parts, depressed fracture right occipital region, - running down to base of skull nasal intracranial haemorrhage. There were other fractures. Cause of death Asphyxia due to manual strangulation, massive intracranial haemorrhage, laceration of brain, depressed fracture of skull – caused by blunt object.”

Shakespeare would have said “Twas *murder most foul!*”

Investigations continued in earnest to find the killers and many people, among them W, the servants, neighbours and friends were interviewed but no arrests were made. The breakthrough came on 4th August 1994 at 7.30 p.m. when **Godwin Wanyonyi Wakhungu** (PW8) (*Wanyonyi*) his brother **Maurice Bwayo Kunani** (PW20) (*Bwayo*) were drinking busaa in a local den called ‘Kitale Club’ in Siranga area of Kibera. There were about 10 customers at the club. At the time, Bwayo was a Police constable attached to Kilimani Police Station. As they drank their busaa, a person they had both known before who was popularly known as “Toto” approached them. He said he had some things for sale and took them outside the club to show them. One was a video machine and the other a Sonny radio alarm clock. Bwayo saw the items but did not express interest in any of them. Wanyonyi examined and liked the radio alarm clock and he bought it at a bargain of Shs.200/= . Both Wanyonyi and Bwayo testified that there

was electricity lighting both inside and outside the busaa club. The two then went to Bwayo's residence where they spent the night and Wanyonyi left for his residence at Umoja with the radio clock the following morning. None of them knew at the time that a robbery had taken place at the residence of the deceased four days earlier.

Three days later on 7th August, 1994, Bwayo learned from an informer that the radio alarm clock his brother had bought had been stolen in the course of a robbery at Langata. He called his brother at his workplace, B.A.T Kenya Ltd, and informed him that he had bought stolen property. He counselled him to surrender it at Langata Police Station. Wanyonyi followed the advice and went to Langata Police Station the same day and found Supt. Wandeto. Wanyoyi told him how he had bought the radio alarm clock at Kibera for Shs.200 from someone he knew and could easily identify. Supt. Wandeto took possession of the radio clock and refunded Shs.200 to Wanyonyi. He asked him to assist the police in tracing the seller of the item. Supt. Wandeto summoned W's workers, P and M, who went to the police station and identified the radio alarm clock as the property of W. Then he organised a contingent of ten officers from the anti-robbery squad and others from Langata Police Station, among them **Cpl. Mwangi** (PW 13), **S/Sgt. Kuiya** (PW 17), **Pc. Muli Muli** (PW 15) and **Pc. Kahiga** (PW 22) and detailed them to accompany Wanyonyi and Bwayo in an effort to trace the seller of the radio alarm clock, Toto. Up to 9th August, 1994 the group went back and forth but failed to trace Toto. However on 10th August, 1994, they found Toto in Kitale busaa club in Siranga area and arrested him. He was taken to Langata Police Station where he was shown the radio alarm clock and he allegedly admitted that he had participated in the robbery at the W residence and had sold the radio alarm clock to Wanyonyi. On further interrogation he allegedly volunteered information that he had also sold a video machine, its remote control gadget and an iron box to one **Michael Njenga Kamau** (PW 11) (Kamau). He offered to lead the police to Kamau and so he did.

Kamau was a small businessman selling provisions in Soweto area of Kibera. He was alone at his kiosk on 31st July, 1994 at 5 p.m. when one youngman (later identified as Toto) came carrying a bag and bought some cigarettes. Toto told Kamau that he had something for sale which was in the bag. It was a video machine which he bargained to buy for Shs.8,000/=. He asked for documents but Toto said he would bring them later. Kamau paid him 2,000/= deposit and took the machine pending production of the documents. Toto went and returned the following day without the documents but brought the remote control for the video and an iron box which he said he was also selling. Kamau paid Shs.400 for it. Toto then left after Kamau refused to pay the balance for the video without the documents and did not return. Kamau handed over the items to the police when Toto was arrested on 10th August, 1994 and led the police to his residence. Kamau was at first arrested as a suspect but was later released when no other evidence was available to connect him with the offence and was treated as a prosecution witness. Toto was subsequently, together with others, presented before the Chief Magistrate's Court in Nairobi who committed him for trial before the High Court as the procedure required at the time.

Upon examining the evidence relating to Toto, the learned trial Judge surmised that it was both direct and circumstantial. He found, and such findings were not challenged before us, that Mrs. C W was murdered on 31st July, 1994; that the murderers, whoever they were, went to her house with the common intention to rob and all would be guilty of murder even if only one of them applied violence on the deceased; that several items were stolen in the course of the raid; that some were recovered in a nearby forest near the body of one of the assailants who was shot dead by police; and that the appellant was arrested at Kibera. The issue, according the learned Judge was whether the appellant was part of the gang that committed the offence and whether the video machine, iron box and radio alarm clock which were produced in evidence were stolen from the Winter residence on 31st July, 1994. He then delivered himself as follows as regards Toto on those issues: -

“The case against the 1st accused is based on the doctrine of possession of recently stolen property. It is a doctrine based on presumption of facts and statutory force has been given to the doctrine. Section. 119 of the Evidence Act, Cap: 80 Law of Kenya provides:-

“the court may presume the existence of any fact which it thinks likely to have happened, regard

being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

The presumption relied upon in our case is that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account or explain reasonably how he came to be in possession of them.

The prosecution case against the first accused is that on 31st July 1994, the day the deceased’s house was raided by a gang of people in the course of which she was murdered, the 1st accused soon thereafter sold a video machine, and an electric iron box to MICHAEL NJENGA KAMAU, and four or so days later he sold a radio alarm clock to MR WANYONYI. All those items having been identified as having been stolen during the raid a rebuttable presumption arises that he was a member of the gang.

Before that presumption can be invoked there are preliminary matters which must be established. Firstly, that there was a theft. Secondly, that the items which were stolen have been positively identified as having been stolen on the material date of the theft. Thirdly, that the accused was found in possession. Lastly, that the possession was soon after the theft.

The last aspect is crucial. It is a fact that certain items change hands faster than others. A period that may be regarded as soon respecting one item may not be respecting another. So in determining whether or not a certain period is soon consideration must be given to the rate at which things change hands in the locality in which the theft occurred, and the nature of the goods stolen. If they are of a type which change hands quickly, then a much shorter period must be considered before the presumption may be raised. However if they do not change hands fast then a much longer period may be regarded as soon.”

He then considered the evidence on record and, in agreeing with the assessors, made the finding that the items were stolen from the Winter residence on 31st July, 1994. Was possession of the stolen items traceable to the appellant? Again, the learned Judge examined the relevant evidence and concluded:

“I have considered the evidence in totality and I find that the 1st accused had possession of the items. His possession was also recent. He had at least the video machine and its remote control gadget a few hours after the robbery. The radio alarm clock was sold to WANYONYI on 4th August 1994. I consider that to be recent. The radio alarm clock is unique. It was sold at night and in a busaa club suggesting that the seller did not want to sell it openly.

The foregoing circumstances and the demeanor of both WANYONYI and BWAYO, which in my assessment was good, lead me to the conclusion and I so find that the 1st accused had possession not only of the radio alarm clock but also of the video machine, its remote control gadget and iron box.”

Finally, the learned Judge considered a confessionary statement made by the appellant’s co-accused, James Washikomba, in which the appellant was named as a member of the gang that raided the W residence, as further corroboration of his complicity in the crime, hence his conviction for the offence charged.

We now turn to the issues raised in this appeal. Mr. Kihara submitted on the first issue that there were material contradictions and inconsistencies in the evidence and it was not possible therefore to establish the truth of the prosecution case. As there was no sufficient resolution of those contradictions, the appellant, in his view, was entitled to an acquittal. Mr. Kihara picked out seven examples of contradictions and inconsistencies as follows:

1) *The evidence by Kiema (PW3) that they met members of the public who told them about the gang before they went to the Attorney General’s house, as compared to the evidence of Wamalwa (PW4)*

who said they met the members of public after collecting Pc. Kipsoi from the A-G's house.

- 2) *The evidence of Kiema that they saw people going into the forest carrying some goods as compared to the evidence of Wamalwa that the members of the public told them the gang was carrying some luggage.*
- 3) *The evidence of Pc. Kipsoi (PW5) that he was seated in the driver's cabin on the left side as compared with Wamalwa's evidence that Pc. Kipsoi was kneeling at the back of the pick-up.*
- 4) *The evidence by Kamau (PW11) that he was given one remote control gadget by Toto and then again saying there were two remote controls.*
- 5) *The evidence of Pc. Muli (PW15) that he saw the appellant sitting at the Busaa club with Wanyonyi (PW8) and Bwayo (PW20) as compared to the evidence of the two witnesses that they were not drinking with the appellant.*
- 6) *The evidence of Spt. Wandeto (PW26) that he refunded Shs.200 to Wanyonyi which he took from a cabinet in his office as compared to Wanyonyi's evidence that the money was given from Spt. Wandeto's pocket.*
- 7) *The contradicting dates on which the officers detailed to trace the appellant set out on their mission; and the date on which the video machine was sold to Kamau which was allegedly on 31st July, 1994 when it was seen on 4th August, 1994 as stated by Wanyonyi and Bwayo."*

We have carefully examined the record on the issues as raised by counsel but we cannot, with respect, accept that the contradictions or inconsistencies, if they were, were material enough to affect the substance of the prosecution evidence which must be assessed in its totality. Nit-picking isolated contradictory statements by witnesses is not the right approach in assessment of evidence unless the contradictions fundamentally affect the evidence. Our view on each of the examples raised as issues is as follows: -

- 1) Both Kiema (PW3) and Wamalwa (PW4) were the first to arrive at the scene and had just witnessed a most horrid spectacle before setting off to seek assistance from the A-G's house nearby. They were traumatised. There is no doubt that at some point - whether before reaching the A-G's house or after leaving it – they met members of the public on the road who told them about seeing some people carrying luggage and they acted on that information with positive results. That was the material evidence. At all events the two were also accompanied by the driver Peter Bulima Musalia (PW14) who testified that they met some members of the public soon after leaving the Winter residence heading to the A-G's house.
- 2) The evidence on record does not bear out the complaint by the appellant. Both witnesses were consistent that they saw members of the gang going into the forest and they were carrying some luggage. That confirmed the earlier information given by some members of the public.
- 3) There is no dispute that Pc. Kipsoi, Kiema and Wamalwa were all in the Datsun pickup driven by Peter Bulimo Musalia (PW14) as it sped out of the A-G's house in hot pursuit of the gang. The exact positions they occupied in the vehicle would not dislodge the fact that they were all together. Musalia was not cross-examined at all on his evidence about his passengers.
- 4) The remote control for the video machine bought by Kamau was produced in evidence and both were identified as the property of Winter. The mention of another remote control which had no relevance to the case was immaterial.
- 5) The complaint is erroneous as it is based on the wrong premise. There was obvious confusion by counsel of the dates when the appellant first met Wanyonyi and Bwayo on 4th August, 1994, at Kitale

busaa club and the date when the appellant was arrested at the same place on 10th August, 1994.

6) The material fact was that Shs.200 was refunded to Wanyonyi. There is no contradiction on that fact.

7) The disparity in dates was dealt with by the learned trial Judge. He resolved the first disparity by accepting the evidence that the officers detailed to search and arrest the appellant commenced their search on 8th and returned again on 9th but were unsuccessful. They succeeded the following day when they arrested the appellant. We think the resolution of the disparity was justified in view of the totality of the evidence received from the four officers who testified (PW13, PW15, PW17 and PW22), Wanyonyi, Bwayo and Spt. Wandeto who was in-charge of investigations.

The second disparity in dates was resolved as follows:

“An issue was raised that the 1st accused had a video machine on 4th August 1994, and could not have sold it to MICHAEL NJENGA KAMAU on 31st July 1994. True both WANYONYI and BWAYO testified that the 1st accused had a video machine on 4th August 1994. However, BWAYO said he did not examine it closely that he would positively say that the one A W identified is the same one the 1st accused had. WANYONYI was not asked about the identity of the video machine. The two witnesses were not interested in it because they said they did not have the money to buy it.

Moreover, MICHAEL NJENGA KAMAU appeared to me truthful. He did not hesitate to produce the video machine and the other items when police approached him. He readily admitted having bought them from the 1st accused. That is the story the 1st accused had allegedly told the police at Langata Police Station before they set off to go and look for MR NJENGA.

From the foregoing facts and circumstances I am satisfied beyond reasonable doubt that the 1st accused was a member of the gang that raided the W’S residence and robbed them of several items and in the course of which they raped and assaulted the deceased causing her death, and also causing injury to her husband.”

With respect, that resolution is borne out by the evidence on record and we agree with it. On the whole, we find no merit in the first ground of appeal and we reject it.

The second ground raised by Mr. Kihara was that the appellant’s defence was not considered. That however is not borne out by the record. The appellant made a short unsworn statement at the trial in which he merely related how he was arrested on 10th August, 1994 at 12 noon in Kibera and was put in the boot of a 504 vehicle. He was taken to Langata Police Station where he was placed in cells and later shown a list of names of people he did not know. He was then handcuffed and beaten unconscious. He recovered consciousness in a prison cell on a charge of murder. He denied the offence.

That denial was considered by the learned trial Judge as well as a further contention put up at the trial that the appellant was framed up by the police. Both were rejected in view of all the circumstances and the prosecution evidence on record. On our own evaluation of the defence, we find nothing in it that would dislodge or cast reasonable doubts on the prosecution evidence. We think the superior court had in mind the appellant’s defence and was satisfied that it was not true and therefore this case is distinguishable from **Ouma V. R [1980] KLR 619**. That ground of appeal has no substance.

The third and fourth grounds of appeal may be considered together. Mr. Kihara submitted that the two prosecution witnesses – Wanyonyi and Bwayo - had been drinking busaa for more than six hours and must therefore have been drunk. He further submitted that there was no clear evidence on the lighting at the busaa club although the two witnesses allegedly met the appellant after dark at 7.30 p.m. No other witness identified the appellant at the scene, on the way to Ngong forest, in the forest or anywhere else. In his view, investigations which were carried out were superficial and were not properly conducted.

We think for ourselves that the issue of identification was put beyond doubt by the evidence of Wanyoyi and Bwayo that they had known Toto before. The two witnesses also testified that there was electric lighting both inside and outside the busaa club. On both counts their evidence was not displaced and they stuck to it in cross-examination. Wanyoyi stated in cross-examination:

“1st accused greeted us. I had met him twice before. He first approached my brother. I walked outside with my brother with Toto. We went behind the Busaa Club. I see the clock. It had no knob. It is sonny. The arms inside were loose as they are. It had a crack. It was carried in a khaki paper bag. I discovered what Toto had outside the club. Club has electricity bulbs. Cannot remember how many. Behind the club there is only one big bulb. It is on way to the toilet.”

And Bwayo stated in cross-examination:

“At about 7 p.m. Wanyoyi said he wanted to leave. He did not leave immediately. I asked him to wait for me. 7.30pm. is when Toto came in. I knew him before. We know each other. He greeted us. I shook hands with him. I was seated side by side with Wanyoyi. It was then he said he had things to sell. We went to the back side of club. He showed us a clock. I did not know it was a radio clock. There was light at the back door. Inside the club there was electric lights bulb type. Do not remember how many they were but they were at least two. At that time there was electricity.”

We do not find any evidence that the two witnesses were too drunk to recognise a person they knew before. The learned trial Judge found them credible. As was stated in Anjononi v. R. [1980] KLR 59:

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).”

It is evident from the record that the prosecution called 27 witnesses to establish the case against the appellant and his co-accused. The law does not require any specific member of witnesses to establish a fact - See *s.143*, Evidence Act. There were other persons who had not been arrested despite police efforts but there is no time limit for this type of criminal liability. On the face of it, it was a complex case involving a foreign national who lost a life and property in this country in violent circumstances. It is also evident that the learned trial Judge was careful and diligent in the treatment he gave to the evidence on record and the law applicable in the matter. In dismissing this last ground of appeal therefore, we agree with learned State Counsel, Mr. Kivihya that the superior court properly appreciated the evidence before him and evaluated it in accordance with the law. We find no reason to interfere with the conviction, which we uphold, and we order that the appeal be and is hereby dismissed.

Dated and delivered at Nairobi this 12th day of October, 2007.

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR