



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
CRIMINAL APPEAL 68 OF 2007**

**1. WARDI YUSSUF**

**2. ISMAIL MOHAMED**

**3. YAHYA MOHAMED..... APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya**

**Nairobi (Ombijah, J) dated 2<sup>nd</sup> February, 2007**

**in**

**H.C. Criminal Case No. 195 of 2003)**

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**JUDGMENT OF THE COURT**

The three appellants before us namely Wardi Yussuf Ahmed, Ismail Ahmed Mohamed and Yahya Ahmed Mohamed (the first, second, and third appellants respectively) were arraigned before the superior court at Nairobi on an information dated 18<sup>th</sup> September, 2003 in which they were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Chapter 63 Laws of Kenya. The particulars of the offence read:

**“1. Ismail Ahamed Mohamed, Wardi Yussuf, Yahya Mohamed on the 23<sup>rd</sup> day of April 2003, at Eastleigh withing (sic) Nairobi Province jointly with others not before the court, murdered Hassan Sheikh Muktar.”**

They each pleaded not guilty to the charge but after a full hearing with the aid of assessors in accordance with the law then applicable, the superior court, (Ombijah J.) found them guilty as charged, convicted them and sentenced them to death. We may add here that after the learned Judge summed up the case that was before him to the assessors, each assessor returned an opinion of not guilty against each of the appellants. In convicting them, the learned Judge had the following to say:

**“On the premises, I am of the persuasion that the various defences put forward by the three**

**accused are jointly and severally a hollow sham. Accordingly, I reject in toto the defences raised by the first accused, second accused and third accused. Although the assessors returned a verdict of not guilty, I have the misfortune of disagreeing with them. I believe the evidence of the prosecution witnesses. I was particularly impressed by the testimony of Abah (PW1) and Jawahir (PW8). The two struck me as not only candid, but also persons of good character, honesty and integrity.**

**In the result, I find the three accused persons guilty of murder. I sentence each and every one of them to suffer death as provided for by the law.”**

That decision is what has prompted this appeal which is both a first and last appeal. Several grounds of appeal were raised in a supplementary memorandum of appeal which Mr. Ondieki, the learned Counsel for the appellant, relied on in his submission before us. A summary of these grounds is that the prosecution failed to discharge the burden of proof as required by law; that the learned judge shifted the burden of proof to the defence; that the evidence of identification should not have been upheld; that the appellants’ constitutional rights under **sections 74(1), 72(3) (b), 75(1) and 77(1), (2) (a), (b) (e) and (f)** were breached; that material contradictions, inconsistencies and gaps in the prosecution case were not analysed; that the circumstantial evidence adduced fell short of that required by law to sustain a conviction; that the learned Judge misapprehended the facts and applied wrong principles of law; that the defence was not considered; that the evidence on record lacked corroboration and the Judge erred in holding to the contrary; that express provisions of **section 306** of the Criminal Procedure Code Cap 75 Laws of Kenya were not complied with; that the medical evidence was not relevant and that the learned Judge erred in law in failing to resolve that the appellants lacked *mens-rea* as envisaged by **section 206** of the Penal Code.

In his address to us, Mr. Ondieki amplified the above grounds and referred us to several authorities which we have perused and duly considered as is our duty to do. He also referred us to the record and submitted that Dr. Jane Wasike Simiyu (PW 6) was not sworn as is required by law and submitted that that was a fatal omission.

Mr. Kaigai, the learned Senior State Counsel, on the other hand, while contending that the omission to swear Dr. Simiyu was not fatal to the case as it was curable under the provisions of **section 382** of the Criminal Procedure Code Chapter 75 Laws of Kenya, did concede the appeal on the main aspect that the alleged identification of the appellants through a source of light which was over 300 metres away could not be a proper, watertight and non-mistaken identification as required by law.

The record before us shows that there was a dispute over a business premises at Eastleigh from which the deceased, Hassan Sheikh Muktar, was operating his business of a hotel. Abdi Rashid Shalleh (PW 2) testified that the dispute took place in February 2003 and it ended, according to him, in the second appellant being arrested but was released later. Sometimes in March 2003, the deceased sought the assistance of Najib Sheikh Ahmed (PW 5) (Najib) as the deceased alleged that the second appellant, Ismail Ahmed Mohamed wanted to finish him (the deceased) or eliminate him if the deceased failed to leave that business premises. That threat to the deceased’s life was reported to Railway Police Station in Nairobi and Pc Michael Ayabesh (PW 10) (Michael) produced in court the occurrence book (OB) of Railway Police Station covering the period 18<sup>th</sup> March 2003 to 19<sup>th</sup> May 2003 which confirmed that such a report was made by the deceased to the police. That report indicated that the dispute was as to who was to operate the business premises in question and it also included a report to the effect that the second appellant broke into the disputed premises on 28<sup>th</sup> March 2003 and wanted to resume business there. Pc Peter Burara (PW 3) received a report of the break in of the deceased’s hotel, went and arrested the second appellant but who as we stated earlier, was released later. The deceased however continued to run his business of a hotel from the disputed premises despite attempts by the second appellant to take over the business.

On the fateful night Jawair Kihahir (PW 8) said the deceased pointed out Ismail and Wardi in the hotel. Abah Shale Mohamed (PW 1) (Abah) was one of the deceased’s employees at that hotel. She reported on duty at the hotel on 22<sup>nd</sup> April 2003 at 6.00 a.m. The hotel was along Galole Street. She stayed on duty till the next day 23<sup>rd</sup> April 2003 at 4.00 a.m. She told the deceased to escort her to her house. On the

way home some men approached them. Hassan told her that those were bad people. As Hassan and Abah reached the gate these men passed them. One of those people turned back and addressed Hassan and Abah saying “bring money.” Abah told them there was no money. Hassan also said he did not have money. The three men then started struggling with Hassan. One held Hassan’s hands from behind, one held a torch to Hassan’s face while the third person stabbed Hassan’s stomach. They also stabbed Hassan on the neck. Hassan started shouting for help. Abah was certain that the man she saw stab Hassan had dreadlocks and was toothless. Abah then started shouting and all the three attackers ran away. Hassan started running but before long, he fell down. A good samaritan assisted Abah and they carried away Hassan but she did not state where they carried him to. Abah went back to the hotel to look for a taxi to take Hassan to the hospital. On the way back she stopped to buy milk at a kiosk and when she reached where they had left Hassan, Hassan was on the ground. The taxi had not taken him to the hospital.

Hussein Sarrit Omar (PW 4) (Omar) was at that relevant time operating taxi services at Eastleigh. On 23<sup>rd</sup> April 2003 at 5.30 a.m., he was at Dubai Lodge in Eastleigh. The first appellant approached him to go and take a person who had been injured to the hospital. When he went to do so, he found the person who was to be taken to hospital was already dead. He refused to take the body to the hospital. At the time he went to the scene, there were already many people at the scene. We pause here and observe that Abah, in her evidence in chief referred to the attackers merely as “men” who she was told by Hassan were bad people and one of whom had dreadlocks and was toothless and then pointed them out as these appellants. However in cross-examination, she identified one of the attackers as the first appellant and even went further to say that the first appellant was at the hotel some time earlier that night. We will revert to that evidence hereafter in this judgment.

The deceased’s body was taken to the City Mortuary where Dr. Jane Wasike Simiyu (PW 6) performed postmortem on it and as a result of the examination she formed the opinion that the cause of death was hypovolemic shock secondary to severe haemorrhage due to severance of femoral vessels by a sharp object. On 24<sup>th</sup> April 2003, Pc Boniface Marugui (PW 7) (Boniface) was on patrol duties with Pc Sure, Pc Mwiti and Cpl. Miriti. They were approached by a person who introduced himself as Abdullahi. He wanted the police to help him arrest someone who he suspected of murdering their colleague. He took them to the 2<sup>nd</sup> Avenue Eastleigh at Telefana Hotel. Inside the hotel, Abdullahi pointed out three people whom they suspected to have taken part in the murder of the deceased. The police officers arrested those three persons. Thereafter Abdullahi took them to Umba Lodge where after waiting for some time at the hotel door, the door was opened and a fourth person was arrested. Of those in court, the second and third appellants were arrested at Telefana Hotel and the first appellant was arrested at Umba Lodge. One person arrested at Telefana Hotel was not taken to court. After their arrest, IP Stephen Lelei (PW 9) organised an identification parade at Pangani Police Station on 6<sup>th</sup> May 2003, but each appellant declined to take part in the parade. Thereafter they were taken to court and were charged as stated hereinabove. They each denied the charge but at the close of the prosecution case, they were put on their defence as the learned Judge was of the view that a *prima facie* case had been made out against each of them warranting their answer.

In his defence, the first appellant gave an unsworn statement and said he had no knowledge of how the deceased met his death. On 23<sup>rd</sup> April 2003, the day the deceased met his death, he was at the deceased’s hotel. After sometime, the lady in the hotel went out, and later returned and sought assistance. That lady (we presume Abah) told him the deceased who was escorting her was killed by gangsters. The first appellant together with Abdullahi who was a police officer followed Abah outside. Abdullahi told the first appellant to get a taxi. He got a taxi but the taxi man declined to take the deceased to hospital as he said the deceased had already died by then. He then went to sleep and was arrested the following night at 2.00 a.m. The second appellant also gave unsworn statement saying that on 23<sup>rd</sup> April 2003, at 5.00 a.m. he was in his house when many people reported to him that the deceased had been killed by robbers. He and his wife went to the deceased’s hotel where he met Shariff and a taxi driver. Shariff told him Hassan was killed outside the hotel premises. He went back to his house but the same day, he met police officers while he was from duty and he was arrested. The third appellant said he was at his house on the relevant date and it was on 24<sup>th</sup> April 2003 when he was arrested and put in a vehicle where he found a lady Jawair in a vehicle then owned by Abdullahi. He was then taken to Pangani Police Station.

The above is the summary of the evidence that was before the superior court. As we have stated, this is a first appeal. In determining this appeal, we are guided by the principles enunciated by this Court in the case of **Gabriel Njoroge vs. Republic (1982 – 88) 1 KAR 1134** at page 1136 where it was stated:

**“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v. R. (1957) EA 336, Ruwala vs. R (1957) EA 570).”**

We may also add to that list the case of **Okeno v. R (1972) 32**. We were asked by Mr. Ondieki to allow the appeal on grounds that one of the witnesses, Dr. Jane Simiyu (PW 6) was not sworn and that Pc Peter Burara was sworn in English and those omissions violated the rights of the appellants. In the case of non swearing of Dr. Simiyu, the learned counsel submitted that it went against the provisions of **section 151** of the Criminal Procedure Code. In our view, while we accept that the apparent non swearing of Dr. Simiyu was an irregularity, we cannot see the basis of the entire proceedings being vitiated on that account alone. That Hassan indeed died and that he died at the hands of attackers in the wee hours of 23<sup>rd</sup> April 2003 was never disputed and so that irregularity is, in our view, cured by the provisions of **section 382** of the CPC. Equally, that Pc Peter Burara appears to have been sworn in English is neither here nor there. He gave evidence in English and that was his language of communication. There was an interpreter who must have interpreted whatever he said including the swearing part into a language that the appellants understood. He would not have been sworn in Somali if he did not understand Somali.

The other ground in that group of complaints was that the interpreter that was hired after the first interpreter Hassan had interpreted the evidence of the first two witnesses, Adan Abdirahmsa was a Borana and not a Somali, so that there was no Somali interpreter. It is also not based on any cogent evidence. The record shows that Adam Abdirahmsa was a Somali interpreter and there is nothing to contradict that. If he was a Borana by tribe that would not have meant that he was not well versed in Somali language, so as to be able to interpret proceedings into that language. Our courts are full of Africans of different backgrounds who interpret proceedings into English or into Swahili which are not their mother tongue. In any event, if the interpreter was not effective, then these issues should have been raised at the time of the trial and before the trial court. There is nothing on record to indicate that that was done and we cannot act on fresh evidence from the bar introduced without any regard to procedures. We reject that ground of appeal.

That leaves us with what we may call the main ground of this appeal. That is identification. Mr. Ondieki attacked the evidence that the learned Judge relied on in holding that all the appellants were properly identified as being at the scene of the murder and being actively involved in the murder. He argued that the evidence adduced was not sufficient to sustain that holding as the offence took place at night and there was no sufficient light for purposes of proper identification. Further, the only one identifying witness had been on duty at the hotel for too long and must have been too tired by the time the incident took place to be able to identify their attackers properly and, lastly, that in any case, she made wrong identification of one appellant who she said had no teeth at the time of murder but at the time of the trial had teeth. Mr. Kaigai was also not happy with the evidence of identification relied upon by the learned Judge to convict the appellant.

The law as regards the general principles on the standard of evidence required for purposes of visual identification in cases where an accused person denies his participation in an offence is now well settled. In the case of **Cleophas Otieno Wamunga vs Republic (1989) KLR 424**, this Court stated:

**“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the**

special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R vs. Turnbull (1976) 3 ALL ER 549 at page 552 where he said:

*“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”*”

And as a word of caution, the predecessor to this Court stated in the case of Kamau vs. Republic (1975) EA 139:

**“The most honest of witnesses can be mistaken when it comes to identification.”**

Lastly, on the general principles to guide courts in cases where identification is an issue, in the case of Roria vs R. (1967) EA 583 at page 584, Sir Clement De Lestang’ V.P. (as he then was) had this to say:

**“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on s. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:**

*“There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”*

Thus, there is no doubt that in law, the learned Judge and ourselves on first appeal need to exercise caution when considering the points raised by them that the evidence adduced against the appellants on identification was not sufficient to sustain a conviction.

The record shows that the only witness who saw the events that culminated in the deceased’s death was Abah. The record also shows that the incident took place at about 4.00 a.m. That was at night. There were two sources of light. One was a torch held by the attackers, which was described as a powerful torch but that torch according to this witness was put on the face of the deceased. It is not stated in evidence as to how this witness saw the attackers by the use of that torch; that is, it is not stated whether at any time the attackers did shine the torch on the other attackers and how far Abah was from the torch. The other source of light was an electric light which was at a mosque which according to Abah, was 300 metres away. She also said there was a lighting system nearby but did not describe which lights were nearby and at what distance. She did not also state the nature of the lighting system which was nearby. That in effect left the main source of light as the torch held by the attackers and the electric light from a mosque 300 metres away. Was this enough for purposes of identification? We do not think so. In the case of Charles O. Maitanyi vs. Republic (1985) 2 KAR 75, this Court stated:

**“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there could have been a careful inquiry into these matters by the committing Magistrate, State Counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care the evidence of a single witness?”**

The learned Judge in his judgment correctly warned himself of the dangers of convicting on the evidence

of a single identifying witness respecting identification at night but found that evidence of Shalleh (PW 2) on strained relationship between the deceased and the second appellant was part of direct evidence as his evidence went towards motive. With respect, we find it difficult to appreciate that approach as the evidence of Shalleh was clearly meant to constitute circumstantial evidence which could have supplemented Abah's evidence but was, in our view, not in itself direct evidence on the matter. Of even more importance on the question of whether or not there was enough lighting at the scene to enable Abah as a single witness to identify their attackers properly, the learned Judge stated as follows:

**“The place was well lit according to Abah (PW 1). The court also visited the scene and took judicial notice of electricity light near the gate and lighting system in the mosque which was about 300 metres from the gate. I find as a fact that the place was well lit and struggle took sufficient time for proper identification by Abah (PW 1)”.**

With respect, the learned Judge in canvassing matters that were not before the court namely his own observation of the scene and electricity light near the gate to corroborate evidence of Abah and that the struggle took sufficient time for proper identification was plainly in error. The murder took place on 23<sup>rd</sup> April 2003 at night. The superior court visited the scene on 12<sup>th</sup> May 2005, over two years later. Obviously, the situation might have changed. Abah who was the only eye witness was cross-examined at the scene and never mentioned electricity light near the gate nor did she testify as to the period of time that the struggle took to enable the learned Judge draw an inference that it was sufficient for proper identification. The learned Judge imported into his judgment matters not canvassed before him at the hearing. In the well known case of Okethi Okale and Others vs. Republic (1965) EA 555, the predecessor to this court held, *inter alia*:

**“(i) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches.”**

We disregard the parts of the evidence that were based on the learned Judge's own observation on his visit to the scene as that visit was too late in time, and at a wrong time, it being that the incident took place at night when it was most appropriate to know which lights were on and which ones were not on. Thus, the evidence of the source of light that night of murder was electricity light from a mosque which was three hundred metres away, the torch which was shone by attackers on to the eyes of the deceased and some unspecified light. In our view, light however strong from a distance three hundred metres away from the scene of an incident cannot be sufficient light for identification of a suspect at the scene of the incident. In the case of Michael Owuor Ogada vs. Republic – Criminal Appeal No. 7 of 2004, this Court allowed a similar appeal on ground that there was no evidence that electricity light on the verandah of a pub nearby could shed sufficient light 50 metres away. Three hundred metres is six times the distance in the Michael Owuor Ogada's case (supra). Like in this case, there was no evidence of the strength of that electricity light from the mosque. As we have said, we can hardly imagine light of any strength from such a distance would be sufficient for a proper identification of the appellants by a single witness using light from a source three hundred metres away. However, even if that was not the problem with Abah's evidence, we would still have encountered certain difficulties in relying on her evidence. First, she stated in her evidence in chief that:

**“At that stage Hassan started shouting. I saw one stab Hassan. That man had dreadlock hair and was toothless.”**

In cross-examination, she identified the first appellant as the person she saw stab the deceased but went further and stated:

**“Second accused had a gap on the upper jaw. Presently it does not seem he has a gap. Certain changes have occurred.”**

That evidence, in the absence of any evidence as to whether after the murder the first appellant had acquired false teeth is clearly contradicting. Further, in her evidence in chief, she gave the impression

that she did not know the appellants and talked about them as merely people who were referred to as dangerous people by the deceased, but later, in cross-examination, she admitted that when she left the hotel the first appellant was inside the hotel in company of Abdullahi who was a police officer. One wonders why she never came out clean in her evidence in chief that she knew the first appellant if she had been with him at the hotel. One wonders why she had to be referred to her statement to the police to force her to admit that aspect of her evidence. That evidence was important as it tallied with the first appellant's account of the events of that night as read with the evidence of Hussein Sarrit Omar, the taxi driver who identified the first appellant as the person who asked him to go and take the deceased to hospital. All these inconsistencies make it difficult for us to accept that the evidence of Abah, being that of a single witness as to identification, could be relied on. Although the learned Judge was particularly impressed by her testimony, we, on our own analysis and evaluation of her evidence have, with respect, reached a different conclusion. Having tested her evidence with greatest care as is required of us, as was clearly stated by the predecessor to this Court in the well known case of **Abdalla Bin Wendo & Another vs Reginam (1953) 20 EACA 166**, we find that it was not safe to rely on her evidence as to identification. In fact, going by her evidence in cross-examination that she was with the first appellant in the hotel and was with him thereafter after the deceased's death, one wonders why she did not ask Abdullahi – a police officer, to arrest the first appellant if she had indeed seen him at the scene. In these circumstances, it could not be a surprise the appellants declined to take part in the identification parade for Abah had been with some of them both before and after the incident so that it was indeed a question of recognition rather than identification if she was an honest and reliable witness.

The next point is whether there was enough circumstantial evidence to irresistibly point at the appellants or any of them as the perpetrators of the murder. The learned Judge was right that the prosecution in introducing the evidence of threats to the life of the deceased and the dispute over the hotel was adducing circumstantial evidence connecting the appellants to the murder of the deceased. We have, on our own, looked at the circumstances that were available against the time at the trial. To convict on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt – see the case of **Rex vs. Kipkering Arap Koskei & Another 16** page 135. That case was amplified by the case of **Simon Musoke v. R. (1958) EA 715**.

The evidence that was availed was a dispute that started in February 2003 as per the evidence of Addi Rashid Shalleh. That problem witnessed alleged burgling of the deceased's hotel and arrest of the second appellant who was released thereafter. There were threats to the deceased's life in March 2003 which was reported to Railways Police Station. The evidence by Jawair Kihahir to the effect that on 22<sup>nd</sup> April 2003, he went to the deceased's hotel and he was with the deceased at the hotel when the first appellant and the third appellant went to the hotel at 4.00 p.m. and the deceased told him the appellants wanted to kill him and asked him to mark them well was important. However, as we have stated, Abah who was at the hotel must have seen the two appellants. If that was so, one wonders why she was unable to say so in her evidence. Without that evidence being connected to the evidence of Abah, the chain of evidence was, in our view, broken. One would have expected evidence such as that after Jawair left the first and the third appellants in the hotel, Abah saw them still there and that she saw them follow them i.e. Abah and the deceased and that the deceased was thereafter murdered by the two either alone or with others. But here, Abah in her evidence in chief, as we have stated, appeared as if she did not know their attackers and even gave a wrong description of the first appellant. We are unable to find that the chain of evidence was not broken. That being our view of the matter, we cannot find that the inculpatory facts in this case were incompatible with the innocence of the appellants and incapable of any other hypothesis than that of the guilt of each or any of them.

Before we conclude this judgment, there are other matters we need to briefly discuss. One Abdullahi was referred to several times in the proceedings and appeared to have taken a leading role in having the appellants arrested. Indeed the third appellant said in his evidence that when he was arrested, he was put into a vehicle where Jawahir was and that vehicle belonged to Abdullahi. That is the vehicle that took him to Pangani Police Station. Abdullahi is the person that caused each appellant to be arrested. One is not certain on what basis he was having them arrested as he was not called as a witness. We think he was a necessary witness as his evidence could have, for instance, shed some light as to whether Abah told him

that night in the hotel that the first appellant was involved in the murder and if he was told, why he did not have the first appellant arrested immediately. In the well known case of **Bukenya vs. Uganda (1972) EA 549** it was held as follows:

**“(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.**

**(iii) The court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.**

**(iv) When the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”**

We think Abdullahi was a necessary witness. He should have been called. In saying this, we are aware that **section 143** of the Evidence Act makes it clear that no number of witness are required to prove a point but here we are of the considered view that Abdullahi was himself behind the appellants’ arrest and he needed to appear to explain the same.

We think we have said enough to show that this appeal must succeed. We allow the appeal, quash the convictions and set aside the sentences of death in each case. Each appellant is released forthwith unless otherwise lawfully held.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of December, 2007.**

**S.E.O BOSIRE**

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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**