IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox, Nyarangi JJA & Platt Ag JA)

CRIMINAL APPEAL NO. 69 OF 1984

Between

SIMON KIPTUM ARAP CHOGE & 3 OTHERS.....APPELLANT

AND

REPUBLIC.....DEFENDANT

(Appeal from the High Court at Nakuru, Masime J)

JUDGMENT

On the morning of March 30, 1982 the deceased Michael Kiptanui Tenai, who had two farms in the district, left Murkuywo Farm, near Moi's Bridge in the Kitale area, driving his red Mazda pick-up KUC 475. After giving instructions to his driver, Francis Okumu, he made various calls during the day and was seen by witnesses in Kitale, Matunda and Moi's Bridge. He returned to Moi's Bridge at about 7 pm, made two calls there and left at about 8 pm in the Mazda driving along the Cherangani Road to his home. This vehicle was one of four oncoming vehicles seen by the ploughing contractor, Solomon Kipyator Seuree, near the Moi Ben Bridge as he was on his way home from Karara to Kilimo Farm at about 8.15 pm that evening.

The red Mazda was next seen in the ditch alongside the Cherangani Road by Michael Bett Siror and his passenger Julius Mutai as they passed shortly afterwards. At first they decided to stop their car, but then thought better of it. Julius Mutai saw two men leaning on the red car. Both these witnesses mentioned that they saw an oncoming white Peugeot 404 station wagon about 200 meters further on.

Meanwhile Okumu had traveled to Kakamega in another of the deceased's vehicles, a white Chevrolet pick-up (KSD 087). He also returned to Moi's Bridge at 8 pm and left it at 8.20 pm, taking the same road. As Okumu reached the turning to Pembeni Farm, which is about 3 ½ miles from Moi's Bridge and belongs to the first appellant, who was the deceased's next door neighbour, he saw the red Mazda in the ditch on the left side of the road. He reversed to see what had happened and was then shot in his left hand, his neck and again in the left eye. It is probable that there were two shots and not three. He heard someone saying in Swahili "push him aside" and""remove the key'.

After the assailants had left, Okumu managed to crawl to Murkuywo Farm where he met the deceased's wife and his workmen. They had already heard gunshots and had sent a milk lorry to report to Moi's

Bridge Police Station. When Okumu arrived the wife sent another report to Cherangani Police Station.

The Moi's Bridge police were the first to arrive. Both the deceased's vehicles were facing Cherangani, the red Mazda in the ditch and the white Chevrolet at an angle on the road. There were some maize seed bags and a robe on the Mazda. At this stage the deceased called from the nearby bushes asking if they were police. He was found by them some 20 paces away, with a stomach injury and in great pain. He was taken to Kitale District Hospital and admitted there at around 11 pm with bleeding wounds in the right lumbar area and the left upper abdomen. There were indications of damage to internal organs. Dr. Witte testified at the preliminary inquiry that he had told the patient his chances of survival''were not very good'. Tenai nevertheless asked the doctor to help him, in effect to do what he could for him. This formed the basis of the submissions of Mr. Etyang on behalf of the Republic that the statements made by the deceased that evening were admissible as those which are compendiously called 'dying declarations' under section 33 (a) of The Evidence Act, Cap 80.

The deceased underwent an operation and blood transfusion that night (Dr. Witte said he was given as much as 16 pints of blood), but his condition remained serious and he was airlifted to Nairobi Hospital by the flying doctor services the following day. A further operation was carried out there, but he died on April 7 as a result of his injuries, and specifically because of respiratory failure and a shattered kidney due to a bullet wound. Francis Okumu was taken by the Cherangani Police from the deceased's farm, also to Kitale District Hospital and admitted the same night. He had a serious injury to his left eye and a small swelling on his left arm, which, on incision on April 13, was found to be caused by a 7.65 mm bullet which had lodged there. No bullet was found in the deceased's body, in which there was both an entry and an exit wound.

The three appellants were arrested on the present charge respectively on April 13, 1982 May 14, 1982 and May 19, 1982. They were charged before the examining magistrate with two others, Peter Baraza, in respect of whom a *nolle prosequi* was entered, and Samuel Macharia Mbugwa, who was acquitted after trial by the High Court. They were each convicted of murder and sentenced to death. Each now appeals to this court against his conviction and sentence.

The prosecution case as presented against the three appellants at their trial was that prior to March 30, 1982, there was an arrangement between a group of people which included Charles Musosi, two Nandi tribesmen, the second appellant, and Samuel Macharia Mbugwa, formerly the fourth accused, to arrest a certain old man, who was Tenai, and to take him to the house of another old man, who was Simon Kiptum arap Choge, the first appellant, a former assistant minister in the Government, and a Member of Parliament until 1979, when he lost his seat; who would pay them Kshs 36,000 for carrying out that order which was described as 'the work'. If the prosecution case was accepted there could be no question but that Charles and the second appellant were to be armed with guns when they went to arrest Tenai.

On the evening of March 30, at a place called Kitale House the group hired the vehicle of Peter Baraza for Kshs 130 to take them to Moi's Bridge. At Moi's Bridge it was arranged that they would proceed to Cherangani Road, which runs through Pembeni Farm, throw two bags of maize seed on the road and then waylay and arrest the old man (meaning Tenai) who would be in a red Mazda which was seen to be leaving Moi's Bridge about that time.

They then proceeded in Baraza'a vehicle and in a yellow Mazda, which appears to have joined them at Moi's Bridge, and which some of the group entered, along Cherangani Road, following the red Mazda, until they came upon Tenai picking a bag of maize seeds from the road and the red Mazda, which was by then stationary. This was the man to be arrested. Tenai who was a big man (of very strong physique according to SSP arap Tuwei who had known him since 1979), proved stronger and more difficult to

subdue than was expected and the efforts of three of the gang to tie him with rope were unsuccessful.

According to the first written statement of the second appellant, made on May 16 1982, one of the two Nandis, whom he described as the brown Nandi tribesman (and who, in his second written statement of May 19 he named as the third appellant) told him to 'shoot'. He had already cocked his gun ready for firing as he was afraid of the two Nandis. In this statement, which was repudiated at the trial, the second appellant continued:

"Therefore when I was told to shoot I fired one shoot in the air. At that time the two Nandi tribesmen and that man whom we were required to arrest stood up. That man started to run away and the brown Nandi tribesman kept on pressing me to shoot the man. Therefore I aimed at his foot but before I aimed properly and through bad luck my finger pressed the trigger and only one bullet came out. The man was hit by the bullet and fell down.'

Later on in this statement he described how, when the Chevrolet vehicle came along, he hid himself under the red Mazda, and was again ordered by the Nandi tribesman to shoot the driver. He shot him 'as he was trying to come out'. He then fired a second shot at him. Thus, as Mr. Kapila, appearing for the first appellant, Choge, on this appeal, said, in addressing the court on ground 2 of his memorandum of appeal, the statement was to that extent exculpatory, in as much as that in that passage the second appellant was claiming that the shooting of the deceased was unintentional. Therefore, Mr. Kapila said, whatever might be the position as regards the second appellant in relation to that statement's admissibility or value, it could not even achieve the weak status of evidence which section 32 of The Evidence Act, Cap 80, would give it because it did not amount to a confession under sub-section (2) of that section, which he contrasted with the definition in section 25.

While some of them were still trying to subdue Tenai the Chevrolet pickup driven by Francis Okumu arrived and stopped, with the result we have already stated. Shortly before or shortly after the attack on Tenai a party of men in a vehicle invaded Tenai's home, where his wife and other employees were, and fired three shots, one of them damaging the water tank. But since none of these men nor the vehicle was identified this portion of the evidence did not carry the case any further, save that a cartridge of the same calibre as the others was found at the gate three days later.

After the shooting of Tenai the assailants made off. There was a suggestion in the various statements that the two vehicles met on the way back to Kitale and that Kshs 6,000 was paid to Charles, with the promise that the remaining Kshs 30,000 would be paid at Choge's house. Some money in excess of the agreed fare was offered to the taxi-driver, Baraza, but it was refused. The case against the first appellant, Choge, consisted of the following:

(i) That which we may at this stage and for convenience refer to as dying declarations made by Tenai after the police arrived at the scene of the crime and subsequently in hospital.

(ii) Evidence by Wislon Birech (PW 14) of a meeting between Choge and others at the Kitale Hotel, on the morning of the fatal day, at which Choge said words to the effect that Tenai and his friend, (or hanger on) Birech, would perish. On that occasion Choge was said to be wearing a rain coat, dark glasses and a green poloneck sweater. A green polo-necked sweater (exhibit 39) was recovered from the house of Choge by the police on April 1, 1982 and identified in court as belonging to her husband by Mrs.Sarah Choge (DW 1).

(iii) Francis Okumu's evidence that he recognized the voice which said "*sukuma kando*" ('push him aside'), '*toa kifunguo*' ("remove the key") and then "*kwisha*" ('finished') as that of Choge. He said he

was familiar with the voice of Choge, with whom he had spoken and whose voice he had heard at rallies.

(iv) The unsworn and subsequently repudiated police statement of Peter Baraza a former accused person, on May 21, 1982 that Choge was the man who joined the two Nandi tribesmen after they had stopped and alighted at Moi's Bridge before proceeding along Cherangani Road. He saw Choge at a distance of about 15 paces in the lights of his car, which he switched on and off.

Choge was wearing a coat which looked black, and he conversed with the Nandi tribesmen for about ten minutes. Baraza saw them return to the Modern Bar, from which they had come. Baraza was eventually called as a defence witness for the second appellant. A great deal of his testimony comprises an account of long periods of ill-treatment of him by the police, but he expressly said that he was not beaten for the purposes of procuring this statement. Mr. Musyoka Annan, on behalf of the third appellant reminded us that Peter Baraza had testified to the court that he was reporting a traffic incident that had occurred at 8 pm at Kitale police station. No oral or documentary evidence was called to support this.

(v) The recorded, but unsworn, police statements of John Wanzila Musamali, the second appellant, which stated respectively that according to 'Charles' (meaning Charles Musosi), Choge was their paymaster, at whose house they would receive the remaining Kshs 30,000 for 'the work', on the following day, and that there was a well built man, bald at the front, and wearing a green sweater, whom he saw talking to the two Nandis at Moi's Bridge, and who came out of the bushes at the scene of the shooting. In the second oral statement to C/I Kuria on May 14, the second appellant named Choge as being present when Tenai was shot.

The alleged dying declarations of the deceased were, first, that as he was about to enter the police Land Rover, which had arrived at the scene, he paused, pointed at Choge's farm and said to police corporals Makhoka and Kahiga 'Tumewawa na hii gasia', the literal meaning of which is 'we have been killed by this rubbish'. Secondly, according to the deceased's driver, Wilson Tarus, as they were crossing the fence in order to get to the police vehicle the deceased said to him:

'When I came from Moi's Bridge I found a maize seed bag on the way; I stopped and put the maize bag into the vehicle; then I drove ahead a bit and found another maize seed bag; whilst I was trying to get the maize bag and put it onto the vehicle people sprang on me; the man who sprang on me was the son of Nahashon the one who brought the vehicle from Exakta; they were seven in all; we struggled until I overpowered them. Whilst I was still struggling with them another vehicle came from Moi's Bridge direction; as that vehicle arrived they left me and shot at me."

The son of Nahashon to whom he referred was Samuel Macharia s/o Nahashon Mbugwa, the former fourth accused, whom the judge acquitted. He had purchased the Toyota, pick-up vehicle KLP 647 (photographs, exhibits 43 P and Q) from Ramnik Shah (PW 13), a spare parts dealer, who ran the Exakta agency in Kitale, on the March 13, 1982. He was seen with it by Julius Kirwa (PW 24) (who also saw him at the Modern Bar in Moi's Bridge on the fatal evening) during the three days prior to the shooting. This was the vehicle which was stopped on the morning after the crime by Cpl Mukwana as it was coming from Moi's Bridge past the scene, and the driver, who was the fourth accused, was the first suspect to be arrested. It was also one of the four oncoming vehicles seen by the farming contractor, Solomon Kipyator Seuree (PW 17), at the Moiben Bridge on the Cherangani Road to pass him at about 8.15 pm on the night of the shooting; the others being KSD 430, KUC 475 (the deceased's Mazda) and KSG 271.

This declaration did not, of course, name the first appellant, but its importance was, as Mr. Kapila

stressed during his submissions on his behalf in this appeal, that, having been made very shortly after the shooting, it would reasonably be expected that Tenai would have mentioned Choge in it, had he been at the scene. Yet, according to Mr. Kapila, the judge, in that which may be compendiously described as an inconsistent verdict, and one made solely in deference to the opinions of the assessors, convicted Choge and acquitted Samuel Macharia, against whom there was a stronger case.

The third declaration, assuming it may be so called, was made to Senior Superintendent Walter arap Tuwei, when he saw Tenai in the Kitale Hospital at about midnight on the night of the shooting, the English translation of which is as follows:

'Arap Tuwei, I have been killed by arap Nahashon who bought a vehicle recently from an Asian in Kitale.'

Also at the hospital, Tenai made a declaration to Joel Rono (PW 70) similar in terms to the one spoken to Tarus, mentioning the son of Nahashon but not Choge. He also complained that Kshs 2,000 had been taken from him by his attackers, and we note that the police who found him observed that Tenai's back pockets had been turned out. We note also that Tarus, who also accompanied the deceased to the hospital, did not refer to the declaration, about which he had testified, being repeated at the hospital, and that neither he nor Joel Rono mentioned that the deceased said "*Tumewawa na hii gasia*" to the police officers as he was being assisted away from the scene. Moreover, on the way to Kitale in the police Land Rover, according to PC Rotich, the deceased,volunteered that he knew who had shot him, but he did not say his name. Finally, on the day following the shooting the deceased said to his sister, Mary Chebotale (PW 21), that he had been shot by an enemy who he did not know. All these factors were relied on by Mr. Kapila as showing that which he claimed was the inherent unreliabliltiy of the only declaration which named Choge, apart altogether from the question of its legal admissibility and evidential weight at the trial.

We now turn to summarise the case against the second appellant. Apart from the police statements, on the morning after the shooting of Tenai Corporal Mukwana and PC Wainaina found one expended cartridge and one live bullet (which was subsequently fired by the ballistics expert) (exhibits 67 and 68 at the trial) on the road opposite the red Mazda and the white Chevrolet, at the respective positions shown in photographs A and B of exhibit 43, and on the plan (exhibit 112). Close to these they saw some broken glass (the right window of KSD 067 had been shattered) and a sandal, shown in photograph F, which does not seem to have been traced to any of the attackers. Both items of ammunition were handed to Suprintendent Kariuki of Scenes of Crime, CID Headquarters, and marked exhibit 68 at the trial. Another cartridge (exhibit 66) which was found by the deceased's eldest son early on April 2, close to the gate of his farm, and the live bullet head which had lodged in Francis Okumu's arm (exhibit 70) were also given to Mr. Kariuki, on April 17. He marked the former and wrapped the later in wire gauze. All this ammunition was of 7.65 mm caliber.

In the early part of May 1982, five robberies took place in the Kitale area. Of these, as Mr. Kibuthu rightly said in his submissions before us on behalf of the second appellant, only two were supported by the evidence of the persons robbed, namely one committed on the night of May 6, a the home of John Kimeto Nyikei (PW 32) at Chebalungu farm, and another on the night of May 9 at the dwelling of Esther Ngulabi Abwochi at the Makutano scheme. The admission of the evidence relating to these two robberies was strenuously resisted by the defence at the trial, and vehemently attacked during the appeal, on the grounds that it related to evidence of crimes in which the second appellant was said to have been involved, other than those charged. It was thus claimed that it was inherently inadmissible as being gravely prejudicial without there being any foundation for its admission, for example as showing a state of mind or an alleged system under sections 14 and 15 of the Evidence Act or otherwise.

John Kimeto said he knew the second appellant well and had met him at the Gakumo Hotel in Kitale on May 3, while he was purchasing spares in Kitale, and that they had tea together. There was a discussion about whether he should buy a vehicle at an auction sale. During the robbery on May 6, which was carried out by six people, Kimeto said he recognized the second appellant, who took a leading part and who threatened to kill him with the gun which he had if he did not produce Kshs 20,000. He was beaten with a flexible rod (exhibit 73) and a simi (exhibit 74), and his left little finger was broken. The judge, however, did not accept Kimeto's identification of the second appellant, but he did not reject the rest of his evidence. Two gunshots had been fired as the robbers approached the house. Many items were taken. Similarly, during the robbery of May 9, some shots were fired and there were demands for money, though no identification was made. Esther purported to identify the gun as exhibit 71.

The two empty cartridges were found outside the window of John Kimeto's house by I/P Mbogo on May 7, and two in the house of Esther, and one just outside her kitchen door by by I/P Mbogo and C/I Kuria on My 10. All these cartiridges, which comprised exhibits 77 and 79, were likewise of 7.65 mm calibre and were handed over to Superintendent Kariuki for transmission to the ballistics expert.

Three items were purportedly identified by Kimetio as having been used by the gang in the course of the robbery, namely a three-cell torch which he gave them, the flexible rod with which he was beaten, and the simi, produced as exhibits 72, 73 and 74. These items were said to have been discovered by the police when they were led by this appellant to the place where the Skorpion pistol was found five days later, on May 14. Finally, as regards this portion of the case, a watch belonging to Esther Ngulabi, was found in a box inside the house in which the appellant was arrested, also on May 14. Much was made by Mr. Kibuthu on behalf of the second appellant during the appeal regarding the discrepancy in the dates as to when this watch was found, and when it was identified by its owner, and of other discrepancies which, he submitted, cast doubt on the credibility of all the police officers who testified as to the search of the second appellant's house and discovery of the gun and led to the inevitable inference that some, if not all, of these items were planted on him by the police.

Early on May 14, 1982 a party of 14 police officers under C/I Kuria (PW 52), and including I/P Mbogo (PW 42), PC Corporal Matolo (PW 36), and PC Kinyoti (PW 56) raided a house in Shimo-la-Tewa village near Kitale. They found the second appellant and his wife sleeping there. On searching a box inside the house the police found keys which on being tested by I/P Mbogo were found to fit Tenai's vehicles and padlocks in his house. Dinah Tenai swore that these keys had been in the possession of the deceased. C/I Kuria also found the watch belonging to Esther Ngulabi.

The second appellant was arrested and taken to Kitale police station. There in the course of interrogation, he revealed to the police that he had a gun. This verbal statement was challenged and admitted after a trial within a trial. The appellant then led the police party in a vehicle across a river and to a forest near Shimo-la-Tewa Village. There, in what appears to have been a hollow beneath a large tree at the appellants direction. PC Kinyoti dug in the soft soil with his hands and recovered that which he said was a two cell torch, (nevertheless identified as exhibt 72) and a simi in a sheath. Upon the appellant's instructions to dig further he found the Skorpion pistol (exhibit 71), with a magazine of six rounds of 7.65mm ammunition (exhibit 76) and one round of 7.65 mm ammunition in the gun chamber. The gun was cocked and ready to fire. Nearby the flexible metal rod (exhibit 73) was found. There was that which would appear to have been unseemly rejoicing and singing by the police at the discovery of the weapon which was in due course collected by the ballistics expert, Senior Superintendent Ndunguga (PW 33), who flew to Kitale for the purpose on May 15. He identified it as a 7.65 mm caliber. After carrying out tests and firing five rounds of the ammunition in the magazine from the Scorpion pistol he formed the opinion that the cartridges found by the police near the two vehicles on March 31, that found at Tenai's gate on April 2, the bullet found in Francis Okumu's arm , the two cartridges cases found

outside John Kimeto's house, and the three found in Esther Ngulabi's house were all fired from the Skorpion pistol. He based his opinion on microscopic examination of the ejection markings on the spent cartridges and the rifling striations on the bullet extracted from Francis Okumu's arm.

The evidence of the ballistics expert as to his conclusions does not appear to have been seriously challenged in cross-examination. Thus, the prosecution established the link between the Skorpion pistol, which is of Czechoslovakian manufacture, on the one hand and the spent cartridges found at the scene of the shooting, at Tenai's gate, and at the houses of the two robbery victims of 6 and 9 May, and the live bullet taken from Francis Okumu's arm, on the other. It follows that if the evidence of the police officers as to the finding of the skorpion pistol on May 14 is, contrary to the submission of Mr. Kibithu –who demonstrated by close analysis that there were several inconsistencies therein – to be accepted, there existed a strong circumstantial case against the Second Appellant without the necessity of resorting to his three recorded statements tendered in evidence by the prosecution.

Apart from the verbal statement, which was the first intimation to the police that the second appellant knew the location of the Skorpion pistol, which the judge thought was admissible as real evidence under section 31 of the Evidence Act, without the necessity for a trial within a trial (although one was in fact held), this appellant made one other oral statement in the forest on May 14 as to the identities of the other suspects, two recorded enquiry statements under caution on May 16 and 19 1982 (exhibits 104 and 105) and one charge and caution statement on 22 May (exhibit 107). All of them were inculpatory, and all were challenged, with the result that no less than five trials within trials were held during the hearing of this case with respect to statements allegedly made the second appellant. Medical evidence, put forward as consistent with his allegations of ill-treatment, was called by the defence during the trial within a trial to determine the admissibility of the second oral statement, but on none of the other occasions when the assessors were absent. The two medical witnesses, Dr. Gathua and Dr. Patel were, however, called on behalf of the defence in the main trial. This procedure was strongly criticized by Mr. Kibuthu because he said his client had been deprived not only of having evidence in his favour considered by the judge as each issue of a statement's admissibility arose, but also because the seperate allegations by the defence in relation to each statement could not thereby be considered by the assessors. Indeed, we note that it was at the behest of the magistrate conducting the preliminary inquiry in this case that the second and third appellants were examined by Dr. Patel and Dr Gathua; that on May 22, 1982 by Dr. Njenga having revealed no evidence of injuries on the second appellant, nor any complaints thereof. The remaining material against him was Peter Baraza's statement to the police of May 21, to which we shall shortly refer.

We now come to the case against the third appellant. This consisted almost entirely of statements incriminating him made by the second appellant and by Peter Baraza, in as much as the name of the third appellant appears from the context of these statements to have been suggested to their respective makers by the assistant commissioner of police, Mr. Okoko (and he did not shrink from admitting this in his evidence), who had recorded the two enquiry statements from the second appellant and the one from Peter Baraza. In addition Birech said that two of the people with Choge in the Kitale Hotel on the morning of March 30 'resembled' the third appellant and the fourth accused. Finally, there was the evidence of the bus tickets found in his pockets on being searched after his arrest on May 19 which suggested that this appellant had travelled between Eldoret and Moi's Bridge on the fatal day. The third appellant made an exculpatory statement under caution to Mr. Okoko on May 25 1982 (exhibit 106) stating where he had been on March 30 and denying any knowledge of the circumstances of the death of Tenai.

According to the First Appellant, Choge, his relation with Tenai since he had moved to the area and purchased PEMBENI farm in 1973 had been good throughout. Tenai was a nominated Councillor of the

Trans-Nzoia County Council Choge disagreed with the deceased's wife, Dinah, that there had been serious disputes between them, some involving the police, starting with incidents in 1981 when Choge was said to have ordered someone to cut down Tenai's trees, and when Choge himself fell into that which was described as "a river of hyenas" for which alleged the deceased was responsible. Choge said this was the product of his political enemies inciting her to tell lies against him to the Court. Birech did not agree as to the origin of the ill-feeling. He said it began after Choge lost his parliamentary seat at the 1979 Elections and that Choge had blamed it on Tenai, who was allegedly responsible for his losing his friendship with the Vice President.

On the fatal day Choge testified that he went to Kitale in the morning and confirmed that he was at Kitale Hotel, his normal place for refreshment, at about 11 am. At no time did Birech join him, nor was he there with any of his co-accused. In the evening he had left the Kitale Hotel at almost the same time as Mr. Muliro, (who was offered to the defence for crossexamination of PW 66) to whom he had lent his driver. This was between 6.30 and 7.15 pm Mr. Muliro put the time he left at 7.30 pm. He drove to PEMBENI farm via Moi's Bridge, had some milk and retired to bed.

Under cross examination he said he arrived at his house by 7.25 pm. He did not see any vehicle at the side of the road, nor did he hear any shots that night. He only learned of the shooting of Tenai the following day, and was angry with the police for not calling for his assistance. He was interviewed briefly by I/P Mbogo on March 31, and arrested for the first time at 1 am on that which would appear to have been April 1. He was released some three days later, re-arrested about April 7, and finally on April 13. He suggested that Birech had lied because he was jealous of his, Choge's farm and large income. He also said that the second Appellant had implicated him falsely because of propaganda and that he had collided with the police to fabricate a story.

Sara Choge corroborated her husband's story. She said that they had normal relations with Tenai and indeed had allowed Tenai to use their milk cooling facilities. On March 30, Choge returned to their farm at around 7.30 pm, having left it that morning. He was not wearing the green polo-neck sweater, a raincoat, or the gumboots subsequently taken possession of by the police. He drank some milk and went to bed. He did not go out that evening. Thus an alibi was raised, and in this connection Mr. Kapila submitted that it was inherently improbable that Choge would go to the scene of the intended abduction of Tenai if the case for prosecution was that he had paid others to do it. Surely, Mr. Kapila said, Choge would remain at a safe distance. He also submitted that Mrs.Choge gave very impressive evidence despite being subjected to a long and searching crossexamination.

The second Appellant made his defence unsworn. He gave an account of how he left the trans-Nzoia District on March 27, to go to Bumala in Busia. From there he went to Mukaya village because his wife had delivered a child. He remained at Mukaya until March 29, when he went to Soroti in Uganda to take photographs of a wedding there. There was evidence from Peter Baraza, his first defence witness, that the Second Appellant's occupation was a photographer at Mr. Elgon Studio. The Second Appellant said he returned to Mukaya via Mbale, on the 30th arriving at between 8 and 9 pm and slept at his brother-in-law's house. He stayed for a funeral ceremony and did not leave Mukaya until April 2, returning to Kitale on the 4th. He agreed that had been with John Kimete on May 3, in the course of which the purchase of a vehicle was discussed, but denied any involvement in the shooting of Tenai, or in the robbery at John Kimete's house. Thus, he also put forward an alibi, but his brotherin- law Alfred Mulani, when called as a defence witness denied that he had seen the Second Appellant at all during 1982.

The Second Appellant denied that Tenai's keys or Esther's watch were found in his house when he was arrested on May 14. After being taken to the Police Station on that day, he gave an account of prolonged ill-treatment and beatings by the Police in particular by I/P Mbogo, C/I Kuria and PC Kitonyi, and of being

repeatedly asked “where is the gun”. He said he knew nothing about any gun. He was taken blindfolded to a forest at Kitale and eventually to that which he described as the forest of section 6 at Kitale. PC Kitonyi dug under a tree and unearthed a paper bag in which were two guns. After further questioning and ill-treatment throughout the next ten days during which time he acknowledged an association with Peter Baraza but denied any with the First or the Third Appellants, and was forced to thumbprint some papers, he was eventually taken before the Kitale Court on May 24. Further interrogation eased and he was examined by Dr. Patel and Dr. Gathua on May 31. They gave evidence on his behalf regarding the injuries they observed. The Second Appellant maintained, therefore that all the incriminating exhibits, including the gun, the touch and the watch had been planted on him by the police. The rest of the evidence on his Appellant’s behalf was given at the trial by Peter Baraza, whom Mr. Musyoka-Annan (who appeared in the appeal for the Third Appellant Only) suggested must have possessed some strength of character, inasmuch as knowing he had given an incriminating statement , and that another witness had been prosecuted for perjury for going back on his statement, he nevertheless came forward to testify for the Second Appellant. It followed that it was unlikely that Peter Baraza would have told lies on his behalf.

Peter Baraza was the subject of considerable controversy in this appeal. The prosecution did not call him as a witness nor were they obliged to do so. As a former accused person it was probably more appropriate that the defence should call him as their witness. In his evidence at the trial Peter Baraza said that he was at the Rock Hotel Night Club in Kitale where he does a flourishing business with a taxi a cream colored Peugeot 404, KE 928 on March 30. He was in the club from 6 pm to 8pm. At 8 pm, a young man called HKM out to report that another vehicle had reversed into his taxi, hence the report to the Police Station, to which we have already referred at 8.30 pm. It was suggested that this report was recorded in the Occurrence book which none of the parties sought to produce. Thus Peter Baraza neatly accounted for his movements during the period which Tenai was shot.

Baraza denied that he knew any of the Accused persons, save for the Second Appellant whom he had known as a photographer in KITALE since 1981. He did not go to Pembeni farm on March 30, or anywhere near the scene of the crime. Thus he totally repudiated his statement of May 21, and adopted the denial in his charge and caution statement of May 22. As regards the former he claimed that some papers were saved at him by the police and that were seventeen signatures on the statement which were similar to his but which were not his. This was the statement which was put forward as part of the case against each of the three Appellants and the first ground in each of the three Memoranda of Appeal and the arguments thereon were devoted to attacking the learned judge’s reliance on it. Mr. Etyang, however, submitted that the Judge did not treat the statement as substantive evidence. He said that it was entitled to consideration by the Judge and Assessors and to be weighed with this evidence in court and the statement of the Second Appellant. Mr. Etyang invited us to look again at the authorities to which Mr. Kapila had referred us in addressing us on this aspect of the case.

The statement in question was produced as an exhibit during Peter Baraza’s examination in chief. His account of how his taxi was hired to take the gang to Moi’s Bridge for Kshs 130 to some extent matches the first written statement of the second appellant, and he confirmed that he had refused the excess money offered to him. The two Nandi tribesmen feature prominently in this statement, and, as we have said, he said he saw Choge with them at Moi’s Bridge before the shooting.

Mr. Kapila’s submissions as regards Peter Baraza’s statement may be stated shortly. As a recorded police statement, not made on oath, not subject to the test of cross examination, exhibit 122 could not take the place of sworn testimony. It could only be used for the limited purpose of contradicting the witness under section163 (1) (c) of the Evidence Act, and thus impeaching his credit. Mr. Kapila compared Baraza with a hostile witness and cited portions of Archbold’s *Criminal Pleading , Evidence*

and Practice(40th edition) at paras 521 and 521a, on this question.

Naturally, Baraza could not have been a hostile witness because that term only applies when the witness is hostile, in the sense of adverse, to the party calling him. Nevertheless, we think that the authorities he cited are relevant to the issue raised here. The report in *R v White* (1922) 17 CAR 60 shows that it is one thing to say that, in view of an earlier statement, the witness is not to be trusted, but quite another to say that the earlier statement, which he now repudiates, is not to be substituted for his testimony in Court. In *R v Harris* (1927) 20 CAR 144, the principal prosecution witness in a prosecution for incest denied at the trial that her father had committed the act alleged. The Lord Chief Justice said:

'If, therefore, it appears that he had formerly said or written the contrary of that which he has sworn (*unless the reason of his having done so is satisfactorily accounted for*), his evidence *should not have much weight with a jury*, and if he has formerly sworn the contrary, the fact (although no objection to his competency: *Teal*, 11 East, 309: 1809), is *almost conclusive against his credibility*; in other words, it was permissible to cross-examine this girl upon the assertions she had previously made, *not for the purpose of substituting those unsworn assertions for her sworn testimony*, but for the purpose of showing that her sworn testimony, in the light of those unsworn assertions, could not be regarded as being of importance.' [Emphasis mine]

The case of *R v Birch* (1924) 18 CAR 26 and *R v Golder* (1961) 45 CAR 5, are to the like effect.Even stronger is the East African case of *R v Gilani* (1945) 12 EACA 87 where the Court of Appeal said:

'It cannot be too strongly emphasized that no previous statement, whether by way of deposition or otherwise, can under any circumstances become substantive evidence at the trial. For the Court to say "I do not believe the evidence given by the witness at the trial but believe his previous statement and convict the accused on that" is to contravene the most vital and elementary rules of evidence. As Scrutton LJ, so pertinently put it in *Hobbs v Tinling,* 1929 2 KB at page 21: "the defendants would however, be entitled to cross examine on such facts to prove that the witness was not a credible person and to employ that proof of unreliability to the evidence he had given in chief. But by destroying evidence you do not not prove its opposite. If by cross-examination to credit you prove that a man's oath cannot be relied on, and he had sworn he did not go to Rome on May 1, you do not, therefore, prove that he did go to Rome on May 1, there is simply no evidence on the subject".

Mr. Etyang, however, sought to persuade us, that the question very much depended on the reason why a witness went back on his previous statement which was material in deciding what weight should be given to it. In *Republic v Harris* for instance, it is suggested that the position as to the former statement might be different where the reason for the witness having retracted it is satisfactorily accounted for.

Harris's case does indeed refer to the reason for retraction, but in the context of the degree of credibility to be accorded to the witness's testimony in court, and not of the purpose of relating the former statement to the status of sworn testimony. Further, in *Republic v Golder* it was said that if the hostile witness says he was threatened the judge may direct the jury that they could act on the subsequent testimony, but that would only affect the previously repudiated statement if the witness admits in court that which he previously said was the truth. It is not the position here, for Baraza consistently maintained in court that he had not made the statement of May 21. It is true, as Mr. Etyang emphasized, that in the statement Baraza said that if he revealed what had happened his whole family would be 'finished'. Consequently, Mr. Etyang argued in effect that the conditions for the admissibility of Peter Baraza's statement were satisfied and that it could be taken into consideration.

We are unable to agree. It would be a most dangerous extension of law of evidence if an unsworn

statement could be treated as equivalent in any sense to sworn testimony. Neither can we agree that the learned judge did not so regard it, for in his summing-up he said at one stage to the assessors:

“There is the evidence of Baraza that two Nandi tribesmen entered the car and joined the group that was at Kitale Lions Club bus stop. This seems to tally with the A2’s statement on the matter. The A2 said lights of KUC 475 were on and Baraza’s statement says much the same thing.”

He refers to the evidence of Peter Baraza in this way more than once, and shortly before this passage he had told them:

“Learned Senior State Counsel drew your attention to a portion of the statement of Baraza. He submitted that there was in the statement a plausible fact as to why Baraza should seek to alter his position. He was referring to the fact that in the statement Baraza said that after the events that we are trying before this Court he was warned by the A3 that if he disclosed anything he and his family would be finished; and you will of course remember that Baraza gave us a full analysis of his family, ie his wife, children, father, mother and his brothers. In the light of this evidence you may feel that perhaps you want to decide that the statement of Baraza is in fact true”.

These, and previous passages to which we need not refer in detail, may well have misled the assessors into thinking that the statement of May 21 could be substituted for Baraza’s sworn testimony, and contained the truth, which, as we have shown, is quite contrary to the authorities and to principle. Having done this the judge then misdirected himself in his judgment as follows:-

“In the light of all the evidence I believe that Baraza’s statement is true and that it is his sworn evidence in this court which is untrue in some material particulars.

I am mindful that the evidential value of Baraza’s statement is watered down by repudiating or retracting it (see Archbold 40 Ed 1979. 52 but having put it against the rest of the evidence I find it consistent with it.”

When Mr. Musyoka-Annan came to address us on this issues he submitted that the reliance which the judge thereby showed he had placed in Baraza’s statement had had the effect of totally vitiating the trial as against his client. In adopting this course, Mr. Musyoka-Annan said, the judge had taken his cue from the learned Principal State Counsel, to whose submission he drew our attention. We observe, however, as he did during Mr. Musyoka-Annan’s argument, that at no time did he, as counsel for the 1st and 3rd appellants during the trial, register any objection to this course.

The third appellant told the Court that Choge had previously given him a piece of land at Kaptumo to work on, with the proviso that he should report “anything bad happening to the sugar cane which was on the land. He would receive occasional remuneration from Choge, but his normal occupation was as a “*fundi*” and a farmer. On March 30, 1982 the third appellant left home at 8 am so as to build a house for one Arap Kosut. He worked until midday and was back at home by 2 pm. He did not go anywhere after that and denied any knowledge of the shooting, as he did in both his inquiry and charge and caution statements to the police made on May 25. He also denied knowing Peter Baraza. The inquiry statement was very similar to that which he said to the court.

The rest of his unsworn statement in Court was an account of his arrest at Eldoret Police Station on May 19, to which he had gone for a different purpose, and of his being taken to Kitale Police Station. There he was taken to the office of Mr. Okoko, who was asking the second appellant if he knew “this person” referring to the third appellant. The second appellant denied knowing him. Soon after he was blindfolded

was taken in the back of a vehicle to where there were some tall trees. He was undressed and beaten on the soles of his feet by the police in an attempt to get him to admit that he was at Choge's home on March 30. The same process was repeated the next day but failed to elicit any such admission from the third appellant. He told the magistrate of this in Court, and the resulting medical examination showed the doctors the soles of his feet, and that one of his toe nails had come out due to a beating with a hippo whip.

This appellant was also examined on May 31, by Doctors Patel and Gathua. Each, when testifying for the second appellant, said they observed a bruise on this appellant's left big toe, two liners bruises, on the left sole of his foot and one on the right, and an irregular, circular, bruise on the later aspect of his left leg. The injuries were not less than one week old and were consistent with this appellant's allegations of beating. As Mr. Musyoka-Annan said, none of these findings were rejected by the judge.

He fully associated himself with Mr. Kibuthu's submissions on behalf of the second appellant, in respect of whom there were medical findings on this aspect of the case, and we think it appropriate, while dealing with it, to refer to a passage in *Aneriko and Another v Uganda*, [1972] EA 193, at page 194 to which Mr. Musyoka-Annan drew our attention, in which this court's predecessor stated:-

"At trials within trials, both appellants denied that they had made the charge and caution statement attributed to them. They claimed that they had been beaten and forced to impress their thumb prints on paper that had already been prepared. Some support for these claims is to be found in medical evidence. Both appellants were found by a doctor to have injuries that were between one and three days old, when they had both been in custody appreciably longer than that.

The judge rejected the evidence of the appellants as to their having been beaten while in prison, and it is quite possible that it was exaggerated. We think, however, that he lost sight of the fact that the burden of proof that the statements were voluntary was on the prosecution and that evidence that the appellants had been subjected to some violence while in custody made the discharge of that burden very much more difficult."

Another matter to which Mr. Musyoka-Annan drew our attention was that the second appellant's statement of May 16, with which we will deal in further details at a later stage, did not name the third appellant, either as one of the two Nandi tribesmen or otherwise. Indeed Mr. Okoko said he had asked the second appellant to give him the names of these men, but that he was not given them. Mr. Okoko did not even know the name of the third appellant until I/P Ndegwa, (who had arrested him outside the Police Station in Eldoret), brought the third appellant to him in Kitale at about 2 pm on May 19. He recorded the second appellant's second written statement at 5.25 pm, on the day, and it must have been then that Mr. Okoko informed him of the name of the third appellant. It was only after that that the second appellant referred to the third appellant in his charge and caution statements (of the May 22), and even then there was some question that certain passages which appeared in the English translation of that statement did not appear in the original. We therefore doubt, even assuming the statements of the second appellant did have any substantial value as against the third appellant under section 32(1) of the Evidence Act. That it could be said that those statements "affected" the third appellant, inasmuch as the name was put into the mouth of the second appellant and not given of his own volition. These remarks, of course, apply with equal force to the oral statement in the forest of May 14, purporting to implicate the third appellant, because it is clear from the context of the two written enquiry statements that the second appellant did not know Kipkirong's name at that time, but merely knew him as the brown Nandi tribesman. Moreover, it was a misdirecting on the fact for the judge to say in his judgment.

Finally A2 says that he identified A3 at Kitale Police Station and "3 unsworn statement in court confirms

this" for the third appellant categorically said that the second appellant denied knowing him, when confronted with him at Kitale Police Station on May 19.

Similarly, there was, Mr. Musyoka-Annan said, a question mark about Birech's evidence, affecting his client (quite apart from the lack of a positive identification in the Hotel) because he indicated that he had never seen either of them before, yet he had mentioned Kipkirong Maiyo's name in his police statement of April 5. Since Birech did not see the third appellants again until May 24, in the dock at the Kitale court, that was the earliest date on which he could have known his name.

And why, Mr. Musyoka-Annan asked, should the 4th accused be relegated to the description "A3 and others" by the judge in his judgment when it was perfectly clear from Birech's evidence that both this appellant and the 4th accused had occupied the same status in Birech's mind as regards their respective identifications. How was that consistent with the conviction of the third appellant and the acquittal of the 4th accused.

Having set out the events leading up to the shooting of Tenai and immediately thereafter, and having summarised the prosecution case against each of the three appellants, their respective defences thereto and the submissions on this appeal, we proceed to examine in more detail the appeals of each of them against their convictions.

As regards the appellant Choge, Mr. Kapila was able to point to a number of misdirections by the learned judge, both to himself and to the assessors, in dealing with the police statements of Peter Baraza and of the second appellant. These formed the subject of the first and second grounds of the first appellant's supplementary memorandum of appeal (which replaced the original joint memorandum of appeal) and we find it convenient to deal with them first.

It is important to get Peter Baraza's statement, with which we have already dealt in outline, in its true perspective. It could, as we have said, be put to him for the purpose, and only for the purpose, of impeaching his credit under section 163(1)(c) of the Evidence Act. The fact that Peter Baraza was formerly an accused person does not give the statement the limited admissibility which section 32(1) of the Evidence Act provides, for that section must be strictly construed, as is made clear in the commentary to its forerunner, section 30 of the Indian Evidence Act (*Sarkar's Law of Evidence* (10th edn) at pp 292 and 293) so that for it to be admissible the accused person must be tried jointly with the confessing criminal. By no stretch of the imagination could Peter Baraza be described as 'a person being tried jointly' with the other appellants 'for the same offence' as that section required. Mr. Etyang made a valiant attempt to support the admission of the statement, if not as evidence, then at least for the purpose of weighing it with the other evidence in the case, in particular the statements of the second appellant, and because it puts both Baraza and the second appellant at the scene of the shooting. This would serve to distinguish it from the situation in, for instance, *White's* case, in which there was not evidence other than that of Gilbert to connect the prisoner with the crime. Moreover, there was no suggestion that the statement was obtained as a result of beating or torture of any kind, for Peter Baraza himself said.

'… I was not beaten, not mishandled, not abused – no attempt was made to make me sign these statements.'

and:

'I was not beaten for the purpose of recording a statement and denied everything they asked me.'

There is all the difference, Mr. Etyang said, between a statement repudiated or retracted because it was obtained, or the signatures to it were obtained, by threats or force used, so that the statement does not represent the truth, and one which does represent the truth, because it is shown circumstantially to coincide with other evidence, including real evidence, and which repudiated because it is the truth, but that the truth cannot be told because of threats by those implicated to destroy the maker's family. Apart from this, Mr. Etyang said, the statement only gives an account of transporting the gang to the scene and of seeing Choge at Moi's Bridge in a black coat, and does not show that Baraza played a central role in the shooting. These are attractive submissions but, we are satisfied, insufficient to render Peter Baraza's statement admissible under any of the provisions in the Evidence Act to which we were referred. Furthermore, while it is true to say that Peter Baraza reiterated in relation to the repudiated statement of May 21 that he was not beaten in any way for the purpose of obtaining it, there can be not doubt that he made similar allegations as the appellants did, that he was physically assaulted and injured while in police custody. He was not examined by Dr Njenga, but it is equally undeniable that Dr. Patel found on Peter Baraza injuries consistent with his having been beaten on his examination on May 31, as the P3 clearly shows.

Before the police statements made, or allegedly made, by the second appellant can in any way be taken into consideration against the first appellant, they must be shown to be admissible under section 26 of the Evidence Act, and the burden of establishing their voluntariness rests throughout on the prosecution – see *R v Mitilande* [1940] 7 EACA 46 and *Aneriko v Uganda*. We shall deal with this aspect at a later stage.

The learned judge, meticulously, held a trial within a trial to determine the admissibility of each statement. As we have observed, he was not so meticulous regarding the necessity of calling medical evidence on all those trials within trials. The position, however, is not so serious as in the case of *Vincent Munyi Boni Karukenya v Republic* (1984) 1 KAR 540 when the learned judge had not only used the evidence of the doctor called during one accused's trial within a trial to determine the admissibility of statements made separately by two other accused persons, but had also failed to ensure that the doctor's evidence was repeated in front of the assessors in direct contravention of the rule laid down in *Kinyori s/o Karuditu v R* (1956) 23 EACA 480 at 482. Moreover, he had proceeded to read to the Assessors all that which had taken place during their absence, instead of letting them hear the evidence for themselves. In *George Karanja Mwangi v Republic* (1984) 1 KAR 567 medical evidence of the utmost materiality was not given at all during the trial within a trial to determine the admissibility of the third appellant's statement. In *Anupchand Shah v Republic* (1983) 2 KAR 27, we had the extraordinary spectacle of the assessors remaining in court during the trial within a trial at the request of defence counsel. Neither was the judge so meticulous in dealing with the presence of police officers during the first medical examination of the second appellant by Dr Njenga, which would obviously inhibit him as regarding any injuries which he might wish to draw to the medical officer's attention. This is the subject of the clear authority of this court in *Anupchand Shah v Republic* 2 KAR 27 at 39-40, and in *Paul Nakwale Ekai v Republic* (1981) 2 KAR 1.

If, and only if, the statement in question is admitted as against the maker does the question of its being taken into consideration against another accused person arise. The ensuing part of this judgment which deals with the relevance of Musamali's statements to the case against Choge is therefore subject to that which we shall say at a later stage when considering their admissibility as against Musamali.

As Mr. Kapila stated, the first requirement under section 32 is that the statement in question must amount to a confession, the definition of which, in sub-section (2) of that section, is narrower, than in section 25, for the purpose of section 26. He made it clear that he was assuming that the second appellant's police statements were properly admitted for the purpose of his argument, though this was,

of course, without prejudice to the submissions of Mr. Kibuthu, on grounds 2 and 3 of his clients' memorandum of appeal, that they were not. Subsection (2) of section 32 states:

'(2) In this section'"confession" means any words or conduct, or combination of words and conduct, which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence. "Offence" includes the abetment of, or an attempt to commit, the offence.'

Mr. Kapila took us through the statement of May 16, 1982, with particular reference to the passage we quoted earlier in this judgment, in an attempt to show that the second appellant was not confessing to the offence of murder. He criticised the judge's description of the statements as confessions, but in this respect we consider the criticism was unjustified.

It is perfectly clear from the statement of May 16 to which the other two were ancillary, that the second appellant, when he was approached by Charles Musosi, agreed to take part in the plot to arrest the old man as proposed by Charles. He was specifically told that two guns would be necessary to complete 'the work'. Why did he agree to take part in the plot" It was because, as he says in his statement of May 22, 'I agreed because of money (Shs 30,000) which I was given', and in the first statement he states that he accepted Kshs 1,600 from Charles on the way back to Kitale. Moreover, the second appellant had a gun which he was in the process of selling, but with which, at the outset of the journey from Kitale House at 7.30 pm on March 30, he had armed himself. So of his own volition he went along with the rest of the group knowing (if the statement is to be believed) that firearms would be necessary to accomplish the purpose envisaged, which, even if not murder at its inception, was clearly an unlawful purpose. While three of the others were trying to subdue Tenai (who had been indicated as the person to be arrested) he used that gun, on his own showing, aiming at a part of the deceased – even if it was only at his foot— but hitting him in the abdomen. He then fired twice more when Francis Okumu arrived.

With all respect to Mr. Kapila, and accepting the narrower definition of confession in section 32(2) as the test, it is difficult to see how the second appellant could have confessed, assuming the statement was admissible and not given under duress) more completely than in that statement, to the offence of murder, bearing in mind the definitions of malice aforethought in section 206 of the Penal Code. Similar considerations apply to the statements of May 19 and 22 which augment that of May 16.

We have examined those statements in detail and we cannot see that they are in any degree exculpatory. If the second appellant was intending to put forward a defence of non-intention, as Mr. Kapila claimed, then he did not do it successfully, for to aim a loaded weapon, and, as he admitted, one which was cocked and ready for firing (as it was when it was found on May 14) at a person whom he and the other members of the group were, at the very least, intending to assault and confine, and to overcome his resistance thereto must in our view amount to a confession of the offence of murder if death resulted, as it did, form the shooting.

There is all the difference between the circumstances as related here by the second appellant (always subject to the admissibility of his statement) and those, for instance in the recent case of *R v Moloney* [1983] 1 All ER 1025 in which the appellant, whilst intoxicated, fired a gun at and killed his stepfather, and in which his defence was 'I did not aim the gun at him.. It was just a lark'. In such a case it would be very likely that a defence of non-intention would succeed, as the House of Lords held it did. They also held that in a crime of specific intent, that intent must be proved and they adopted Lord Goddard's statement to that effect in'*R v Steane* [1947] 2 KB 997 at 1004. In the instant case the intent would be amply established by the deliberate aiming of the gun at Tenai in the course of the attack on him.

To this extent we agree with Mr. Etyang's submissions and there is no need for us to deal in any depth with his submissions on this point. He referred to *Gopa s/o Gidamebanya v R* (1953) 20 EACA 318, in which a similar submission was made on behalf of certain of the appellants who had made extra-judicial statements to a magistrate which were sought to be used against other appellants. The Court of Appeal for Eastern Africa followed the well-known Indian case of *Swami v King-Emperor* [1939] 1 All ER 397 and cited Lord Atkin's definition of a confession (at 405), the first part of which stated:

'No statement that contains self exculpatory matter can amount to a confession if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must admit in terms either the offence, or, at any rate, substantially all the facts which constitute the offence.

An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession – for example, an admission that the accused is the owner of, and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession."

They also cited a valuable passage from the American case of *State v Guie* as to the distinction between an admission and a confession, and continued;

'Thus, although a statement may contain selfexculpatory matter it can still be a confession if the selfexculpatory matter does not negative the offence alleged to be confessed.'

These authorities were, of course, decided under the Indian Evidence Act which was in force in Kenya until December 10, 1963, in which there was no corresponding definition of a confession, so that the statutory definitions in the Kenya Evidence Act have supplanted the previous law on the subject. Nevertheless, we apprehend that, as the definition in subsection (2) is taken almost verbatim from the extract from *Swami v King- Emperor* which we have quoted, the principles that were set out in relation to confessions in *Gopa v R* are still applicable. Therefore, in the instant case, the fact that the second appellant said that before he could aim properly his finger pressed the trigger 'by bad luck', even if intended to be exculpatory, would not, for the reasons we have already stated, negative the offence alleged. Mr. Etyang also cited a passage from the case of *Magayi v Uganda* [1965] EA 667. However, that was a decision on common intent and it was held that the fact that the appellants were acting under orders which were obviously unlawful could not have the effect of relieving them from criminal responsibility. We consider therefore that, as it were, the pre-condition to the taking into account of the statements as against other accused person was satisfied.

Mr. Kapila also commented on the manner of recording the statements, in as much as the cautions, and in one instance, the charge and caution, were in English, whereas the actual statements were taken in Swahili, and their translations put in evidence, suggesting that a printed form was used, with the inference that cautions were not administered. It may be that the police do adopt a common form for the purpose of taking statements but the officers concerned in the taking of these statements. Mr. Okoko and Inspector Munyole, testified that the cautions were administered in each instance, and we see no ground for believing otherwise.

Having reached the conclusion that the statements of the second appellant did amount to confessions, we then have to decide the extent to which, if they are admissible at all, those statements could be taken into account against the first and third appellants. We took the opportunity to state the position in law regarding such material quite recently in the *Karukenya* case, where we set out the following passages from the decisions in *Anyuma s/o Omolo v R* (1953) 20 EACA 218, and *Karaya s/o Njonji v R* (1953) 20 EACA, 324. The first one is (1 KAR 540 at 549):

‘But section 30 of the Indian Evidence Act which corresponds now to section 32(1) of the Evidence Act, Cap 80) merely says that a confession by a co-accused may be “taken into consideration” as against the accused and the substantive question in each case is what weight can properly be given to it. As was said in the case cited above —“A confession by a prisoner A which involves the guilt of prisoner B is of itself, unsupported by other testimony, evidence of the weakest possible kind against B”. It is of course accomplice evidence which needs corroboration and this need is the greater when the maker of the statement has sought to retract it, for as the Court said in *Yasin v King-Emperor* [1901] ALR 28 Cal 689:

“It is obvious that a retracted confession should carry practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who had thus lied on one or more occasions. The very fullest corroboration would be necessary in such a case far more than would be demanded for the sworn testimony of an accomplice on oath.”

It is perhaps scarcely necessary to point out that an extra-judicial confession by one co-accused cannot be corroborated by the similar confession of another accused.’

In the second case the court said (1 KAR 540 at 549):

‘As regards the statements, the mistake the learned judge made was in the use he made of section 30 of the Indian Evidence Act. Every commentary which has ever been written on this much discussed section has emphasised the need for care and restraint in the application of the section. The reason is obvious for the section does reflect a deviation from the English law of evidence, in that it allows, under certain circumstances, a statement by one accused, not taken in the presence of the other accused, or tested by cross-examination to be taken into consideration against that other accused person.

The section has presented much difficulty in India over the years, and we are well aware that there are conflicting decisions. We are quite satisfied, however, from our study of the Indian cases that it is incorrect to regard a confession made by one accused in an extra-judicial statement as a basis for a case against a co-accused, and to hold that with some corroboration it is safe to convict. On the contrary, what is needed is independent evidence from a trustworthy source, which when linked and supported by the confession of the co-accused, removes beyond any reasonable doubt the question of innocence.’ We reiterate that those passages represent the correct principles in the application of the section.

Mr. Kapila also referred us to a passage at page 293 of the Commentary by Sarkar in *The Law of Evidence* (10th edn) in relation to section 30 of the Indian Evidence Act, (the forerunner of our section 32), which we have already mentioned and which shows that the section was also looked on with general disfavour in India. More recently, in *Wilson Kinyua v Republic* [1979] Cr App 70 (which also followed *Anyuma Omolo v R*). Madan JA, in delivering the judgment of the court, said:

‘Under section 32(1) of the Evidence Act the evidential value of a confession by an accused person is that it can only be used as lending assurance to other evidence against the co-accused, evidence which narrowly falls short of the standard of proof for a conviction. It cannot be used as the basis of the prosecution case. *Gopa Gidamebanya* (1953) 20 EACA 318; *Muthigo Mwigai* (1954) 21 EACA 267’

Another authority cited to us, *Gopa s/o Gidamebanya* was also quoted with approval in *Kinyua’s* case.

The learned judge in the instant case cited several of the cases we have just mentioned and in his judgment, directed himself as follows:-

"It has also been held that the only way in which an accused's confession can be taken into consideration against a co-accused is as evidence, and that it would be difficult to conceive of a case in which it would be proper to convict on the unsupported evidence afforded by the confession of a co-accused; regarding the corroborative evidence it has been held that it is not necessary that such evidence should itself be sufficient to support a conviction (*R v Wadingombe bin Mkwanda & Another* (1941) 8 EACA 33) Regarding the evidential value of a confession the Court of Appeal in (Wilson Kinyua & Another vs Re, Cr Appl No. 70/79 – Nyeri) has recently stated tht a confession can only be used as lending value to other evidence against a co-accused; it cannot be used as the basis of the prosecution case —*Gopa Gidamembanya & Others vs R*, (1953) 20 EACA 318 and *Muthigo Mwigai & Others vs Re* (1954) 21 EACA 267) followed."

We have no quarrel with that direction, as it stands. But Mr. Kapila's complaint was that the learned judge had made a synthesis of the statement of Peter Baraza on the one hand and of the statements of the second appellant on the other. The former was wholly inadmissible as against any of the appellants while the latter were only admissible against them for the limited purpose we have stated. We think there is justification in this complaint for in his judgment the judge closely analyses each statement, matching each phrase as it occurs, the one with the other. For example he says;-

"A2 says that Charles came to him at that stage in a Peugeot 404 station wagon and that A2 then got into the vehicle followed by two Nandi tribesmen; Baraza's statement agrees with this as it says that at the bus stage when A2 got in two Nandi tribesmen also got in and on his inquiring about it was told by Charles to on as he would be added money as for passengers."

"Then there is A2's statement that the gang used Peter Baraza's Peugeot 404 station wagon white to go to Moi's Bridge; Peter Baraza in his evidence has stated that he owns such a car and used it as stated; and PW11, PW20 and PW24 all saw a white Peugeot 404 station wagon car around the scene of the shooting of the deceased in near the deceased's car KUC 475; that car had slowed down after passing KUC 475 at Al's gate; Again Peter Baraza in his statement which I believe to be true despite his repudiation of it states that he ferried the gangsters to the scene of the shooting."

This is almost a repetition of a similar passage in the summing up. Next he says:

"A2 says that he knew Baraza and his vehicle and Baraza in his satement says he knew "John" and in his evidence in court says he knew "2 since 1981"

Again

"2 says that the lights of KUC 475 were on when the gangster found it stopped on the road; Baraza's statement agrees."

and:

"2 says that during the attack on the deceased Baraza turned the vehicle and drove back towards Moi's Bridge direction to hide the vehicle but did not go very far; PW11 says that he saw a vehicle approach him slowly switching its lights off and on and Baraza in his statements says he turned round and drove up to the junction of the road at Moiben River bridge and stopped."

Finally the judge said:-

"A2 says he was given some money but that Baraza refused the money he was offered; Baraza in his

statement says much the same thing."

A similar pattern was followed in his direction to the Assessors. For example at one stage the Judge said:

"Gentlemen Assessors that is the statement of Baraza you heard Baraza give evidence in court and that you consider his evidence when I come to it: You will want to look at it again that evidence. You may also like to put both statements against the dying declaration allegedly made by the deceased and then you would also wish to put those statements against the circumstantial evidence appearing on this case. My next order will be the law, but before I go to the law I will want to deal with the evidence of the defence."

Baraza's statement is also matched with the other evidence with the phrases Atie-in and'"fit in" being used. This led to Mr. Kapila's conclusion that the misdirections in relation to Peter Baraza's statement were so inextricably interwoven with his directions concerning the admissible evidence that it was impossible to separate, or even distinguish, the misdirection from the rest, with the result that his client's appeal should succeed on Ground 1 alone. Finally we have the extraordinary passage indicating that because the supposed threat by the third appellant involved Baraza's family, this provided corroboration "of fact that (Baraza) has a family". We consider that this phrase is not only a"*non seqitor*, but indicates that the learned judge was prepared to treat trival details as providing corroboration for that which was inadmissible and therefore incapable of being corroborated.

We have already referred to Mr. Etyang's submissions regarding Peter Baraza's statement in this appeal. In his address to the trial Judge and the Assessors Mr. Etyang invited the Court to take Peter Baraza's statement of May 21, into consideration and told them that it was consistent with the statement of the second appellant. Indeed it was he who suggested to the Court that details which Peter Baraza gave of his family provided corroboration of his retracted statement. The fact that he was inviting the Court to treat the retracted statement as representing the truth is evident from the following extracts from his submissions:

"And A2 was brought there by Peter Baraza: see his evidence his statement is not a confession, from the contents of the statement it is clear Baraza dissociated himself from the evidence. The charge and caution statement; he said he had worked since 2.00 pm but in court he said he had worked from 6.00 pm. When asked which version was correct he said what he told the inspector. The witness in effect admitted he was telling lies to the court. At p 384 he says he made a report at Kitale Police Station at 7.45 pm, compare p 380 line 16 where he says he arrived at the station at 8.30 pm. I asked the court to reject the statement made to PW 54.

"Why would Baraza change his statement" The statement provided the answer he was warned that if he disclosed what happened he and his family would be wiped out. Baraza has a family at risk of being wiped out- page 379"– he gives details of his entire family. I submit that the reason why Peter Baraza has retracted or repudiated his statement in one material particular. The statement taken alongside all the other evidence may be taken into consideration by the court – the effect is that both A2 and Peter Baraza were at the scene. So we now know how A2 went to the scene".

"the witness Baraza also approached with lights of his car. Baraza confirms the lights of the KUC 475 were on. Baraza could not have been driving without his lights on."

In the last passage Mr. Etyang appears to us submitting to the Court that the retracted statement of Peter Baraza regarding the lights of KUC 475 being on at the material time was an accurate statement of

fact. It would thus seem that the errors of the High Court in this respect are at least in part due to the prosecution putting forward as true that which was an obviously inadmissible statement. Moreover it is impossible to estimate the degree of influence this had on the Assessors, in the absence of a clear warning by the Judge to the Assessors (which there should have been) that they should totally disregard Peter Baraza's police statement.

We have already dealt with that statement twice in the judgment, while we were considering its effect simplicitly. We now have to deal with it in view of Mr. Kapila's submissions that the damage was done in this case because that statement was used not only on its own, but in conjunction with the evidence, for the purpose of matching and confirming, or being confirmed by, other statements and evidence.

We are bound to say that the passages in the summing up and in the judgment in relation to Peter Baraza's satement of May 21, to which we have referred, and those which we have not set out but to which Mr. Kapila referred us, are misdirections. Their effect will have to be decided by us in the course of the rest of the judgment. Mr. Kapila cited a passage in the 3rd Edition of *Halsbury's Laws of England*, Volume 10, at paragraph 987 regarding the effect of a misdirection in law. The corresponding passage in the 4th Edition, Volume II, paragraph 651, is to the like effect, and we set it out:-

"In order to avail an appellant, a wrong decision of the court of trial on the question of law must be in a matter of substance. If it relates to the wrongful admission or exclusion of evidence the Court Appeal will consider the probable effect of the minds of the jury of that evidence."

If misdirection as to the law applicable is established, the appeal will be allowed, unless it can be shown by the prosecution that the jury must have convicted had there been a proper direction."

Archbold's Criminal Pleading, Evidence and Practice, 40th Edition at Paragraph 417 is to the same effect.

Thus if there is misdirection on the law the conviction will be quashed unless the prosecution (on whom the burden lies) satisfies the appeal court that the jury (in this case the assessors and the Judge) would necessarily have convicted had there not been the misdirection. More opposite to the present case is this passage occurring at paragraph 652 of Volume II of the 4th Edition.

"A material irregularity may arise in the course of a trial where there has been misdirection or an erroneous decision by the judge on a matter relating to the evidence."

The learned authors go on to state:-

"It is not every irregularity that is a ground for quashing the conviction, but only one which goes to the root of the case."

Mr. Kapila referred us to a further passage from Archbold at paragraph 142 where it is stated that the conviction is liable to be quashed if the judge erroneously points to a part of the evidence as being corroborative when it is not. Mr. Kapila of course, and the other counsel appearing before us adopted his submissions in relation to Peter Baraza, submitted that the misdirections regarding Peter Baraza, whether his statement was viewed alone or in conjunction with other evidence or statement covering the same ground, were fatal to the whole case against the first appellant.

Mr. Etyang in effect invited us to say that, even if we disagreed with his argument, no failure of justice had occurred and we should apply curative provisions of section 382 of the Criminal Procedure Code

(Cap 75) remembering that the proviso thereto provides that in determining this question the court shall have regard to whether the objection 'could and should have been raised at an earlier stage of the proceedings'. In our opinion it was the duty of each counsel for the defence at the trial to have taken vigorous objection to the use of Peter Baraza's statement at all, whether for corroboration or otherwise, and in particular to have objected to Mr. Etyang's submission on the point, so that the damaging material was not let in front of the assessors. In our view the first ground of the second appellant's memorandum of Appeal drafted by Mr. Kibuthu, who did not appear for him at the trial, states very aptly the error that was committed in the High Court, and, for convenience, we set it out here:-

"The learned Judge erred in law in relying on the statements of Peter Baraza the first defence witness of the appellant as evidence against the appellant either by way of corroboration or otherwise."

Reverting to the second appellant's statements, it is again clear from the summing up that, despite the correct direction to which we have recently referred, the Judge did direct the Assessors that these statements amounted to evidence against the first appellant, for he said:-

"It is clear that this section" (Section 32(1)" permits the use of confessions by one accused as evidence on other accused."

There follow passages in the summing-up to the effect that various portions of the second appellant's statements are'"corroborated" by other pieces of evidence. These are more glaring in the judgment and we give the following instances:-

"A2 says that he saw a person resembling A1 and wearing a Polo neck sweater similar to that he had seen A1 wearing at Moi's Bridge emerge from the bush at the scene of the deceased's shooting; this seems to be corroborated by PW11's evidence that he heard the voice of A1 at the scene."

"A2 talks of having seen A1at Moi's Bridge wearing a polo neck sweater which seemed to be greenish; PW 14 had testified that he saw A1 at Kitale Hotel at 11.00 am wearing a sweater which he identified as Exhibit 39; and exhibit 39 has been admitted as belonging to A1."

I appreciate that A1 in his defence painted himself as an extremely wealthy man and said that if he wanted one Million Shillings he would get it from the bank; however the evidence of A2 is that the shooting of the deceased was a Kshs 36,000.00 job and on the previous day A1 arranged for and been paid Kshs 38,100.00 see PW35 A1 and DW 1 for A1."

The judge ended this portion of his judgment with the following words:-

"In the circumstances it is clear that A2's confession are corroborated in all material particulars by independent evidence of the circumstantial evidence.

Immediately following this there occurred the passage to which Mr. Kapila took great exception in his final address, and we set this out also:-

"I have considered the alleged untruths but I do not find them so material as to necessitate the rejection of A2's confessions in view of overwhelmingly material aspects in which they are corroborated by the rest of the evidence as I have demonstrated herein above."

It certainly does seem from the unfortunate passage that the learned Judge is reversing the onus as to the admissibility of these statements, as Mr. Kapila claimed.

We did not understand that Mr. Etyang, in this court at any rate, dissented from the principles which are to be applied regarding the degree of weight retracted statements are to be given against a co-accused person under section 32(1). Whether he did so or not, we are satisfied that in the passages which we have just set out the learned judge adopted a fundamentally wrong approach in treating pieces of evidence as providing corroboration of the second appellant's statement as against another accused person.

This is contrary to authority, as is shown by the following further passages from *Gopa's* case (1953) 20 EACA 318 at 322) which we now set out:

'Returning now to the submission by the appellant's counsel that the learned trial judge misdirected himself in treating the confession as the basis of evidence against a co-accused and thus looking for corroboration, we are abundantly satisfied from the authorities cited above that approach is the wrong one and that a confession can only be used a lending assurance to other evidence against the co-accused evidence which only falls short by a very narrow margin of the standard of proof necessary for a conviction. Our attention has been drawn to'*R v Wadingombe Bin Mkwanda* [1941] 8 EACA 33, in which section 30 of the Indian Evidence Act was considered and on which it does seem that the wrong approach was made in that the court looked for evidence corroborating a confession which implicated a co accused. We note, however, in that case the appellants were unrepresented and so the point was probably not fully argued.'

It might be thought that the penultimate passage which we have just quoted from the judgment was intended to refer only to corroboration of the second appellant's retracted confession per se, but in its context it does appear that the judge is considering those confessions as against the other appellants, for he continued:

'I hold that the confessions of A2 are true after analysing them as about and putting them against the defences which the accused and each of them have put up.

Accused 1's defence is a mere denial coupled with an allegation of fabrication of the case against him by the prosecution witnesses and A2's and A3's defence are those of alibi.' The emphasis is ours.

Having taken the submissions by both sides on the aspect of Peter Baraza's and the second appellant's statements as far as we can at this stage, we now turn to ground 3 of the first appellant's memorandum of appeal, which relates to the dying declarations. Only one of them need concern us as regards the first appellant because all the others implicated the son of Nahashon, who was the fourth accused person before the High Court.

Mr. Kapila dwelt on this aspect of the case at some length when arguing ground 6 of the first appellant's memorandum of appeal. He maintained that it was perfectly clear from the pattern of the submissions and of the summing up that the prosecution were pressing for a finding of guilty in respect of the fourth accused, and that it was only when the assessors unexpectedly found him not guilty that the judge was forced to rationalise that opinion in his judgment. In other words he performed a somersault, as one of our members commented during the hearing of the appeal.

The relevance of Mr. Kapila's submissions on ground 6 in relation to the dying declaration was of course that by his acquittal of the fourth accused the judge rejected, or must be taken to have rejected, the more positive statements of the deceased implicating the fourth accused as unreliable and yet he accepted the remark''Tumeuwawa na gasia hii', while he was pointing at Choge's farm, as part of the evidence

satisfying him of the first appellant's guilt beyond reasonable doubt.

Mr. Etyang submitted that the fourth accused was acquitted, and acquitted wrongly, not because the judge did not believe the evidence of the dying declaration which named the fourth accused, whom he found was 'circumstantially placed to be one of the attackers', but because he was unable to accept that there was sufficient further material to support the dying declarations, despite the evidence regarding the maize bags. The Republic had not appealed against that finding, so as to obtain a declaratory judgment under section 379(5) of the Civil Procedure Code, as it had not been certified that the point involved was of such exceptional public importance as to justify the Attorney General's certificate.

The prosecution tendered the evidence of the dying declarations, including the one "*Tumeuwawa na gasia hii*" under para (a) of section 33 of the Evidence Act which reproduced section 32(1) of the former Indian Evidence Act. Mr. Kapila said it was a misnomer to characterise it as a dying declaration. Both he and Mr. Etyang referred to us passages in the commentary in *Sarkar* on that sub-section, It will suffice to quote three passages from the commentary, starting with the principle of English law extracted from the judgment of Eyre, CB in *R v Woodcock* [1987] 1 Leach 500 at 504 as approved in *R v Perry* [1909] 2 KB 687 at 701:

'The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.'

Secondly, the distinction between English and Indian law, and therefore Kenyan law, as regards the reception of dying declarations is well stated as follows:

'Under the English law, it is essential to the admissibility of dying declarations, first, that the declarant should have been in actual danger of death at the time when they were made; secondly that he should have had a full apprehension of his danger; and lastly, that death should have ensued. These three things must be proved to the satisfaction of the judge, before a dying declaration can be received.

These restrictions do not appear in section 32. It is not required that the maker should be in expectation of imminent death, nor is it restricted to cases of homicide only. It is admissible also in civil cases. Thus under the Act:

(1) A dying declaration is relevant whether the person who made it was or was not, at the time when it was made under expectation of death, that is, it is immaterial whether there existed any expectation of death at the time of the declaration.'

Thirdly, the principle governing the weight to be given to such statements is set out in this passage:

'It is submitted that although the Act has made a great departure from the English law in regard to the conditions of admissibility of dying declarations, the greatest caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth and the principles of English law should be adhered to as far as possible. Nothing short of a settled, hopeless expectation of imminent death in the mind of the declarant, would induce an English judge to admit such evidence. Even a sense of impending death does not always rouse the same feelings in every one and there may be persons who cannot get rid of the passions of

anger or revenge even in the moment of death. Thus in *R v Crockett* 4 C & P 544, the dying declaration was —“that damned man has poisoned me”.

If such are feelings of a person when he is at the moment of death, how unreliable may be the statement of one who is not expecting death. It should also be borne in mind that such statement is not on oath, neither can there be any cross examination. Moreover the statement is generally made at a time when exhaustion and strong physical pain deaden all feelings and confuse the declarant’s intellectual powers.’

This opinion of the learned authors receives support from the following portion of the judgment of the Court of Appeal for Eastern Africa in *Pius Jasanga s/o Akumu v R* (1954) 21 EACA 331 at 333:

‘In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to dying declaration in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (*R v Muyovya bin Msuma* (1939) 6 EACA 128. See also *R v Premananda* (1925) 52 Cal 987.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of *Field on Evidence* has repeatedly been cited with approval:

The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting; and … the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed …The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (*Ramazani bin Mirandu* (1934) 1 EACA 107; *R v Okulu s/o Eloku* (1938) 5 EACA 39; *R v Muyovya bin Msuma* (*supra*).

Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (*R v Ramazan bin Mirandu* (*supra*); *R v Muyovya bin Msuma* (*supra*). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (*ibid*).

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (*R v Eligu s/o Odel and another* (1943) 10 EACA 9; *Re Guruswani*[1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in *R v Eligu s/o Odel and Epongu s/o Ewunyu* (1943) 10 EACA 90).But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (*R v Said Abdulla* (1945) 12 EACA 67; *R v Mgundulwa s/o Jalo* (1946) 13 EACA 169, 171).’

It must also be remembered that the declaration in *Pius Akumu’s* case was made in answer to questions

by a police officer, which lessened its value, and moreover, that the deceased in that case was suffering from''a terrible wound' the effects of which might dim his memory or weaken his intellectual powers. It nevertheless follows that in the present case we must bear in mind the effect of the deceased's wound from two points of view, first its effect on his mental powers, and secondly as to whether he was so gravely injured, as Mr. Etyang submitted, that the statement can fairly be said to have been made when death was, if not imminent, obvious to Tenai that it would occur in the near future.

Before returning to the facts, we will consider briefly three further East African authorities to which we were referred on the subject of dying declarations. Mr. Etyang cited *Migezo Mibina v Uganda* [1965] EA 71; where the decision really turned on the fact that the appellant made no reply when the deceased taxed him with having beaten him, and its was held that unless the appellant had in some way acknowledged the accusation, his silence could amount to scant, if any, corroboration thereof.

As regards the probative force of a dying declaration the court said:

'Although there is no rule of law that to support a conviction there must be corroboration of such statements, it is generally recognised that it is very unsafe to base a conviction solely on them.'

Okethi Okale v Republic [1965] EA 555, which was cited also in relation to other grounds of appeal, expresses the court's view in similar terms (at page 559 with a reference to the fact that the deceased was not at the time of making the declaration (which in that case was about 12 hours after the attack and 16 days before he died) in immediate expectation of death.

Although the court there said that the judge had not approached the evidence with 'that degree of circumspection which the law enjoins', it is clear that it regarded the evidence as admissible. The direction in *Okethi Okale v Republic* was approved by the Kenya Court of Appeal very recently in *Simon Mbelle v Republic* (1984) 1 KAR 578.

In the much earlier case of *R v Eligu s/o Odel* (1943) 10 EACA 90, however, the appeal court gave a somewhat stronger direction when it said:

'Here we repeat what this court said in the case of *R v Muyovya bin Msuma* 6 EACA 128 at 129: "We are not prepared to rule that in no circumstances can a conviction proceed upon evidence consisting of a dying declaration, but on the other hand we are prepared to say that a careful direction should be given by the judge as to the nature of such evidence and the caution with which it should be received" He also directed himself and the assessors as to whether there was any corroboration of the deceased's statement.

Corroboration is desirable, of course, though we do not say that it is always necessary to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and that would be incorrect.'

The attitude of the English courts, however, has recently changed towards such evidence as shown by *R v Turnbull* [1984] LS Gaz, July 25, p2142, which the Court of Appeal said that there was no doubt that if the same events occurred now, the dying woman's statement in *R v Bedingfield* [1879] 14 Cox CC 341 would have been admitted. That case referred to *Ratten v R* [1972] AC 378 which concerned the admission or rejection of words spoken over the telephone by a woman about to be murdered.

In his submissions Mr. Kapila said, justifiably, that apart from that one remark, *'Tumeuwawa na gasia hii'*, the deceased repeatedly failed to tell anyone that the first appellant, Choge, was responsible for his

injury, which subsequently proved fatal, but instead concentrated on that which he was saying on the son of Nahashon (the fourth accused).

We have already referred to this evidence in some detail earlier in this judgment, but we repeat the uncontroverted facts, which must weaken the force of the statement by the deceased, namely that Tenai said, first, that he knew who had shot him, but did not say his name, and, secondly, to his sister, that he had been shot by an enemy whom he did not know.

We agree also that while there was a considerable body of evidence against the fourth accused, in that the Toyota vehicle he had recently purchased from the Exacta agency, KLP 647, was seen at Moi's Bridge and being driven near the scene of the shooting on the fatal evening, and he was arrested with it the next day, in addition to the dying declaration made against him, the judge nevertheless seems to have taken fright at the assessors' opinions and proceeded in an acquittal.

It is apparent that Tenai's condition deteriorated rapidly during the remainder of the evening of March 30, for when the police first reached him he was able to stand though he needed to be helped to the police Land Rover. Before he entered it he made a despairing gesture towards Choge's farm as he said *'Tumeuwawa na gasia hii'*. When he reached the district hospital he was in a serious condition and required treatment. It is clear from Dr Witte's deposition that Tenai must then have known that he might die. It follows, in our opinion, that the statement is admissible as a dying declaration under section 33(a), in view of the commentary from Sarkar which we have set out, and under the plain wording of our section in the Kenya Evidence Act, because it was a statement made by Tenai as to the circumstance which resulted in his death. But, equally, in view of the wording of the commentary and of the effect of the decisions we have set out above, particularly *Pius Jasanga s/o Akumu v R* (1954) 21 EACA 331, the force of the declaration is further lessened by the fact that, even though the deceased expected death, it was not so imminent that the solemnity of the situation obtained at the time the words were said. It is also lessened by the fact that Tenai did not say to anyone other than the two police corporals at the scene that Choge was responsible for his death and it is noteworthy that Tarus, who was with them, did not mention it.

He did not say so at the hospital to SSP Tuwei, when, admittedly, the interview was interrupted by the doctor taking Tenai to the operating theatre, but it could reasonably be supposed that if Tenai mentioned Arap Nahashon to Mr. Tuwei he could equally have referred to Choge. Furthermore, as we have just said, there were his two later remarks to PC Rotich, and to his sister the next day, which referred to the shooting but did not name Choge.

In the circumstances of this case therefore, we consider that the declaration can only be received with caution and that the degree of weight to be attached to it can only be such that it could be added to the other evidence said to incriminate Choge.

It would certainly be unsafe to base a conviction solely on it, particularly in the light of the recorded view of the assessors that the deceased had made a mistake in identifying another of the accused.

The fourth ground related to the evidence of Francis Okumu which we have already summarised. The first part of this ground avers that the shooting of Francis Okumu, during which he claimed that he recognised Choge's voice, was not part of the'*res gestae* and therefore irrelevant and inadmissible. The relevant provision, s 6 of the Evidence Act, identical in terms to its predecessor states:

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and

places."

Mr. Kapila's submissions on this part of ground 4 may be stated thus: that by the time Francis Okumu arrived on the scene of the transaction during which Tenai was shot was over. The crime against him was, as it were, complete. When Okumu came past, reversed to see what was happening, and was shot for his pains, another offence commenced. There was nothing to show that the participants in the second crime were the same as the first and, moreover, the motivating force behind the order to shoot in the second crime was almost certainly different from the first. Consequently, the evidence of Francis Okumu as to what he heard was irrelevant to the charge in question.

An explanation of that which is conveniently, but not always accurately, included in the term '*res gestae'* is to be found in the speech of Lord Wilberforce in'*Ratten v R* [1971] 3 All ER 801 at 806, [1972] AC 378 at 385 as follows:-

'The expression "*res gestae"*, like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways.

1. When a situation of fact (e.g a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening. Thus in *O'Leary v R* [1946] 73 C L R 566, evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J said at p 577:

"Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event."

2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the"*res gestae* or part of the *res gestae*, i.e, are the relevant facts or part of them.

3. A hearsay statement is made either by the victim of an attack or by a bystander-indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to be dependent on whether it was made as part of the *res gestae.* A classical instance of this is the much debated case of *R v Bedingfield* [1879] 14 Cox CC 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with.

In most such cases the question of what is or what is not part of the *res gestae* arises in relation to the reception of hearsay evidence under an exception to the rule excluding it, as was the case *Teper v R* [1952] AC 480, where the admission of a woman's voice shouting at a man leaving the scene of a fire came into question. The woman was not called as a witness and the Privy Council held that the evidence of her statement should have been excluded. In the instant case Mr. Kapila put forward his submissions regarding the'*res gestae* as supporting his contention that the incident concerning Francis Okumu was irrelevant to the charge against Choge.

In *Teper v R* Lord Normand said (at 487):

'How slight a separation of time and place may suffice to make hearsay evidence of the words spoken incompetent is well illustrated by the two cases cited. In *Bedingfield"s* case a woman rushed with her throat cut out of a room in which the injury had been inflicted into another room where she said something to persons who saw her enter. Their evidence about what she said was ruled inadmissible by Cockburn C J in *O'Hara's* case, a civil action, the event was an injury to a passenger brought about by the sudden swerve of the omnibus in which she was travelling. The driver of the omnibus said in his evidence that he was forced to swerve by a pedestrian who hurried across his path.

Hearsay evidence of what was said by a man on the pavement at the scene of the accident as soon as the injured party had been attended to was held to be admissible in corroboration of the driver's evidence. But what was said 12 minutes later, and away from the scene, by the same man was held not part of the *res gestae.*'

Just before, he said:

'This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item of part of real evidence and not merely a reported statement.'

Bearing in mind, then, that we are not immediately concerned with the question of hearsay, but with that of identification, we proceed to analyse the evidence of which Mr. Etyang drew our attention when replying to the first part of ground 4.

The sequence of events was, in this respect at least, reasonably clear from the evidence. The shopkeeper Ambalal Patel who was not challenged on this point said that Tenai and Birech left his shop at 8.00 pm, and which was when, according to Birech, it began to rain. Tenai gave Birech the Kshs 20.00 for his accommodation and then entered his vehicle to drive home along the Cherangani road. The distance to the next door farm, which is that of Choge, from Moi's bridge was stated to be about three and half miles on a non-tarmac road. There was no estimation of the time which it takes to drive that distance, and doubtless a few minutes would have been taken up while Tenai removed the maize seed bags from the road.

Neither was there any real dispute that Francis Okumu left Moi's bridge to travel along the same road at 8.20 pm. There is nothing to show that his journey was interrupted and we think it is reasonable construction to put upon the events that twenty minutes at the most separated the arrival of Tenai and of Okumu at the same place on the road. It is obvious that the attack on Tenai had not by then been completed. We think that the second attack on Okumu was part and parcel of the transaction involving Tenai which was still taking place. We therefore agree with Mr. Etyang that the evidence of Okumu as to what befell him, and, in particular, as to what he saw and heard at that time is both relevant and admissible. His evidence as to the identification by voice of Choge was therefore properly received.

The question for us is, then, with reference to the second and third parts of ground 4 of the first appellant's memorandum of appeal, whether the evidence given by Francis Okumu, that he recognized Choge's voice during the attack on him, could safely be accepted as true, for if this question is answered affirmatively, it would be an almost inevitable inference that if Choge took part in the attack on Okumu, he was also concerned in that on Tenai.

Mr. Kapila submitted that his was unsatisfactory evidence. At best, he said Choge's voice was identified by only five words, and possibly less, under conditions which were difficult, as Okumu had been shot

twice and had received serious injury to his eye. In his police statement Francis Okumu only referred to two of those words namely “Toa Kifunguo” as having been uttered by Choge. However the most telling point Mr. Kapila made regarding Okumu’s evidence in this respect was that when he managed to crowl through to Tenai’s house he did not say that he had recognized Choge’s voice as being at the scene. That was his first opportunity to do so. Had he said so there is very little doubt that both Dinah Tenai and the watchman Kiprono, and the deceased’s relative Samuel Kipkoech Mutai, would have referred to it. The fact that he did not say so at a time when, though in extremis, it might reasonably be expected that Okumu would name his assailant or assailants if he knew him or them, is, again a factor which lessens the force of his evidence, since he was able to describe in some detail how he had come upon the deceased’s car. All this, Mr. Kapila submitted had to be set against the background of the inherent improbability of Choge going to the scene of the shooting if he paid others to do the job for him. Mr. Etyang, however put matters in a different light.

Unfortunately, in a part of his submission, rather than treating the evidence of voice identification, if believed, as substantive evidence in itself he tended to treat it as confirmatory evidence of the truth of the second appellant’s statement and as corroborative thereof. Nevertheless he put forward Francis Okumu’s evidence as showing that the first appellant was at the scene, and also that the second appellant was there, because Okumu’s account corresponded circumstantially to the sequences of events in the second appellant statement. It was because the members of the gang feared possible identification by Okumu that they decided to shoot him and so finish him off. It was illustrative of the pattern of events and how matters developed unexpectedly, forcing the gang to change the original plan, (which was merely to kidnap Tenai) because two things went wrong: first the deceased was strong enough to overpower an attack by three men and secondly Francis Okumu arrived on the scene fortuitously, before they had completed their purpose.

There can be no doubt that evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances, carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In’*Rosemary Njeri v Republic* [1977] Crim App 27, a victim of the offence of grievous harm testified she heard the appellant say ‘break her legs’. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal, in which this court said:

‘Mr. Otieno has submitted that identification by voice is less satisfactory than visual identification. In our view it can be equally safe and free from error, more so if the identification takes place at night. We agree with the two lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded.’

More recently in *Simon Mbelle v Republic*, in which Mr. Etyang was quick to point out that only two words ‘*Ni mimi*’ (‘it is me’) sufficed as regards voice identification, we said (1 KAR 578 at 583):

In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person’s voice (b) that the witness was familiar with it and recognised it and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it. In the instant case we are satisfied, on our own evaluation, as we have indicated, that the reception of the evidence as to the voice identification and the dying declaration was correct and safe.’

In the instant case the learned judge told the assessors they might find that the voice was that of Choge. In his judgment he made an express finding that it was, when he said: ‘A1 is the one whose voice PW 11 heard when he was shot’.

Was he justified in this finding, particularly in view of the fact that he coupled it with other findings in relation to the dubious evidence of Birech, with the caution statements of the second appellant, with the statement of Peter Baraza, which, contrary to the judge's finding, had no evidential value against any of the appellants and with the evidence that Choge was the man in the green polo-necked sweater who was seen at Moi's Bridge and at the scene of the shooting" The judge did not direct himself that it was necessary to approach the evidence of the identification of Choge with some caution in view of Okumu's failure to say that Choge was his assailant at the first opportunity, a matter stressed by Mr. Musyoka-Annan in his submission on behalf of the third appellant at the end of the prosecution case. Moreover although the two police officers, I/P Michael Mbogo and Sgt Gilbert Amolo, testified that Okumu had mentioned Choge to them, Okumu himself was not asked about it, so that the police officers' evidence was to that extent hearsay.

In our judgment, in all the circumstances of the case, it was not safe to say that Okumu's identification of Choge's voice could be accepted as free from all possibility of error in view of the matters we have just mentioned.

We propose to consider next the submissions on Ground 7 of Choge's memorandum of Appeal, which concerned Birech. He said he was stigmatized by Choge as a friend of Tenai where he approached the group in the Kitale Hotel on the morning of March 30, and that Choge threatened that he would perish together. Choge, however, denied that he had seen Birech that day. The significance of the alleged encounter was that Choge was said to have been wearing the green polo-necked sweater which the second appellant said Choge was wearing both at Moi's Bridge and when he saw him at the scene of the shooting. We have already commented on the weakness of that evidence as against Choge. As we said it is not permissible to treat the evidence of Birech as providing corroboration of the second appellant's statement insofar as it implicates Choge. We have considered and examined Mr. Etyang's submissions on this ground, but in our opinion the evidence of Birech, even taken with the other material in this case, was insufficient to enable the Court to be satisfied beyond reasonable doubt that Choge was one of Tenai's Assailants. Undoubtedly the second appellant's statements, the dying declaration and the evidence of voice identification, combined with that of Birech were sufficient to raise a case against Choge. The sum total of those items of evidence cast considerable suspicion on him.

However, it is to be remembered that Peter Baraza's statement was inadmissible, and that those of the second appellant could do no more than lend assurance to an otherwise strong prosecution case. Yet the judge used these two items in his directions to the Assessors and in his judgment as the framework of the case against Choge. He treated the other evidence, consisting of the dying declaration (which was in the circumstances insufficient to form the basis of a conviction), the voice identification and the evidence of Birech as merely corroborative evidence. In these circumstances we cannot say that if the Judge had not adopted this fundamentally wrong approach in directing the Assessors and himself that they would have returned an opinion and a verdict of guilty.

We propose to deal with the remaining grounds of Choge's appeal relatively briefly. Ground 6 refers to the inconsistency in finding that a reasonable doubt existed in respect of Samuel Macharia Mbugwa's guilt and that neither in the summing up, nor, more appropriately, in the judgment, was there any consideration of the effect of that verdict on the prosecution case against Choge. We have already dealt with this aspect of the case at some length. While we understand Mr. Etyang's submissions on this issue, which were the Judge did not reject the dying declaration which named the fourth accused but found the supporting evidence inadequate, it cannot be gainsaid that the effect of the judgment was that the more definite declarations naming the son of Nahason, together with the supporting evidence regarding the vehicle KLP 647, were regarded as being inadequate for a finding of guilt beyond reasonable doubt against him. Yet the much more vague declaration put forward as incriminating Choge,

plus the voice indentification and the incriminating statements by Peter Baraza and second appellant (the one inadmissible and the other of little weight), and the evidence of Birech were held sufficient to establish Choge's guilt. The impression is bound to be left in the mind of this Court that the Assessors rejected the stronger evidence against Mbugwa, in respect of whom they thought there had been a mistake in identification, and but were prepared to find Choge guilty, despite the fact that his was virtually upon the identification of a single witness, about which there was no warning in accordance with the clearly stated authorities of *Abdala bin Wendo v R* (1967) 20 EACA 160 and *Roria v Republic* (1967) EA 583.

The fact that it was a voice identification does not lessen the need for caution where it is by a single witness.

Reverting to ground 5, the question of common intent or their lack of it was not put forward as a major factor in the case. In his reply, Mr. Kapila submitted that there had in any event been a radical departure from the plan to kidnap Tenai as it was originally conceived. It is obvious that those who did take part in the attack on Tenai knew at least that two members of the gang had pistols, and it is equally obvious that all were prepared to overcome any resistance by force if necessary. There was no departure from the common plan as in *Kingoro wa Cakuha and Another v R* (1946) 13 EACA 98 and subject to the issues of identify, we agree with Mr. Etyang's submission that so far as those proved to be present during the attack on Tenai was concerned the direction of the Court of Appeal for Eastern Africa in *Solomon Mungai v Republic* (1965) EA 782, at p 787, applied. Nevertheless, in view of our conclusions regarding the identification of Choge it is unnecessary for us to consider this ground further.

We turn now to ground 8 which avers that the Judge erred in rejecting the alibi of the first appellant. We have already set out Choge's account of his movements on March 30 and that of his wife. As part of his address on this ground Mr. Kapila complained that the Judge showed much tolerance towards the many inconsistencies in the prosecution evidence, but that he dismissed that of the defence witness out of hand. He gave several instances, one of which relates toJim Kiptum Choge, the first appellants son, whose evidence concerned an incident outside the magistrate's court in Nakuru during the preliminary inquiry into this case. In dealing with this matter the judge said to the Assessors:

"Secondly A1 called Choge, his son. I can tell you straightaway that you can ignore that evidence" and proceeded to give as his reason the supposed discrepancy in dates that evidence revealed. Mr. Etyang referred to us the directions of the Judge to the Assessors and to him on the question of alibi, and submitted that they were adequate to indicate that the burden of proof always vests on the prosecution to dislodge it. We do not, however, feel it is necessary to take this ground any further in view of our conclusions on the evidence against Choge. His alibi may not have been true, but by reason of the deficiencies in the prosecution case to which we have referred in detail it was not in our opinion to have been untrue".

The ninth ground concerned the motive behind the crime. In our opinion there was some evidence to suggest that the relationship between Tenai and Choge had initially been good but that it had deteriorated during 1981 as a result of a series of incidents between them. Several police investigations file were put in evidence to rebut Choge's suggestion that complaints had not been investigated by the police. The evidence of the background was thus put forward as establishing that Choge had a motive to kill the deceased, and that he in fact master-minded the plan that was said to have been formulated.

As Mr. Etyang said sub-s(3) of s 9 of the Penal Code does not require the prosecution to prove motive (unless the provision creating the offence so states), but evidence of motive is always provided it is relevant to the facts in issue. In the *Karukenya* case we referred to the following two passages which

give an indication of the value to be attributed to such evidence (1 KAR 540 at 543):

‘Whilst motive and opportunity are important matters to be considered when weighing the prosecution case they cannot in themselves be regarded as corroboration.’ (*R v Keriheimeiza w/o Tankikwawa* [1940] 7 EACA 67)

‘We appreciate of course that evidence of motive and opportunity is not of itself corroboration, but such evidence, in conjunction with other circumstances, may constitute such circumstantial evidence as to furnish some slight corroboration in a case where the degree of criminal complicity to be attributed to the alleged accomplice is very slight indeed. (*R v Wanjerwa* (1944) 11 EACA 93 at 96.)

The evidence of the ill-feeling that was produced at the trial would therefore have been a corroborative factor had the other evidence been satisfactory, but as this was not so, again, we feel that it is unnecessary to take this ground any further.

We come to the final ground argued on Choge’s behalf, which is ground 10-ground 11 having been effectively abandoned as a separate ground, though without prejudice to the other grounds. We think there was some substance in Mr. Kapila’s complaint regarding the burden of proof in view of the unfortunate phrases which the learned judge used in the course of his summing up and judgment. Two instances will suffice. In dealing with the admissibility of the second appellant’s statement (which were of course of part the case against Choge) the judge said:

I found no reasons to hold that the statements were not volunteered and I admitted each one of them into evidence.’

He went on to direct himself in this passage, which we have already set out, as follows:

‘I have considered the alleged untruths but I do not find them so material as to necessitate the rejection of A2’s confessions in view of the overwhelmingly material aspects in which they are corroborated by the rest of the evidence as I have demonstrated herein above.’

Secondly, he said, as regards the evidence of Mr. Tuwei:

‘I am not convinced that PW 60 had any reason to nor that he did fabricate anything against the A1 using PW 68 or PW 15 and PW 70’

These phrases come perilously near to suggesting that the burden lay on the respective appellants to convince the court that the allegations they put forward were true.

We appreciate that in a protracted and difficult case it would be unreasonable to expect the judge to have committed no errors at all and not occasionally to have made some misstatement. As Goddard LJ said in *Mahon v Osborne* [1939] 1 All ER 535 at 566:

Has there ever been, I wonder, a summing-up of a long and difficult case, by even one of the greatest masters of our law, which does not contain some sentence which, taken by itself, is open to criticism" The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side.’

But when there is fundamentally wrong approach to the case by selecting as the main plank, as it were, of the prosecution case first an inadmissible statement and secondly evidence that can only lend

assurance to other evidence, then misstatements and misdirections assume great importance.

We referred earlier to passages in *Halsbury's Laws of England* and in *Archbold* regarding misdirections in law and material irregularities. In our judgment the reception of Peter Baraza's statement, and the weight he attributed to the second appellant's confessions as against Choge, amounted to material irregularities which went to the root of this case.

The first also amounted to a misdirection in law because it is well settled by authority that a previous unsworn statement of a witness can only be used to discredit that witness. We cannot possibly say that in the absence of those material irregularities and of the misdirection in law to which we have just referred the assessors and the judge would necessary have convicted Choge. For these reasons we have no option but to hold that the conviction of Choge is unsafe and unsatisfactory and should therefore not stand.

It is right to say that we have considered whether in his case we should order a retrial on the principles which we stated in *George Karanja Mwangi v Republic* (1984) 1 KAR 567, namely that it is permissible so to order if the appellate court is of the opinion that on a proper consideration of the admissible, or potentially admissible, evidence a conviction might result.

However, in our opinion the matters to which we have adverted were too fundamental to permit of that power being invoked and that it would not be proper in all circumstances of this case to do so. Accordingly, we allow Choge's appeal against his conviction.

We now turn in detail to the appeal of John Wanzila Musamali. The fifth ground was abandoned by Mr. Kibuthu. Who argued the rest of the grounds together.

The memorandum of appeal of this appellant, who is hereafter referred to simply as Musamali, contains nine grounds of appeal. The fifth ground was abandoned by Mr. Kibuthu who argued the rest of the grounds. The sixth ground with which the ensuing part of the judgment is concerned, states as follows:

"The learned Judge misdirected himself in law and in fact in relying on the evidence of the gun and any ammunition produced before him without sufficiently or at all connecting it with the appellant."

Arguing the appeal on this ground, Mr. Kibuthu pointed out, correctly, that the main evidence relevant thereto is that of IP Mbogo (PW 42), CI Kuria (PW 52), PC Kitonyi (PW 56), John Kimeto (PW 32) and SSP Nduguga (PW 33) that IP Mbogo gave evidence after the judge had ruled that the statement of Musamali about the gun is admissible under section 31 of the evidence Act without ascertaining if Musamali made the statements and that according to the evidence of IP Mbogo, CI Kuria and PC Kitonyi, several items, including the torch (the other items are dealt with in another portion of this judgment) were found at the tree in the forest. Mr. Kibuthu submitted that the discovery of the several items is so closely bound with the account of IP Mbogo, CI Kuri and PC Kitonyi that if there was any evidence that any of the items was not found at the scene, then it would case doubt on the account of each of these three witnesses and so adversely affect their credibility.

Mr. Kibuthu then submitted that there were discrepancies in the evidence because some of the items were seen by John Kimeto before May 14, 1982 on which day the items were allegedly found by IP Mbogo, CI Kuria and PC Kitonyi. Mr. Kibuthu referred to some six passages in the relevant evidence and urged that the account of the three witnesses IP Mbogo, CI Kuria and PC Kitonyi taken together with that of John Kimeto made it doubtful if the items were discovered on May 14, 1982 because it could not be said that John Kimeto forgot that date; further that as Musamali had denied that he directed police

officers to where the gun was found the judge should not have examined the conflicting evidence and ought to have explained to the assessors during the summing up the contradictions in the evidence of the four witnesses whose testimony covered the gun and the other articles found at the same time and place.

Mr. Kibuthu queried he prosecutions' claim that the police officers who found the gun did not know where they were going and that they were directed there by Musamali because, argued Mr. Kibuthu, there is evidence that CPL Matolo (Pw 36) had been instructed to be at river base near the tree where the gun was found before the party of police officers walked downhill , crossed the same river and found the gun, the torch and the'*simi*.

Mr. Kibuthu argued that the conflict in the evidence affecting the vital item was difficult to resolve that it is possible that the gun was obtained by police officers earlier, and therefore it could not be connected with Musamali, especially bearing in mind that the matter leading to the discovery of the gun was not recorded and that if Musamali was volunteering that particular information on May 14, 1982, all that would have appeared in his statement made on May 16, 1982. Moreover on the evidence of Dina Tenai (PW 6) and Kerich (PW 22) there was shooting at the deceased's home at about the time the deceased was shot as a result of which there were at least two people with scorpion guns on May 30, 1982. Therefore that the judge should have enquired about the shooting incident at the deceased's home and should have properly directed the assessors before connecting Musamali with the gun. Mr. Kibuthu's final submission on the gun was that it could not be held beyond reasonable doubt that the judge correctly in law connected (notwithstanding his insistence that he did not know where the gun was that police officers had the gun) Musamali with the gun and the ammunition which was produced.

On being reminded by Mr. Etyang that the alibi which Musamali had been displaced by this appellant's witness and that the Respondent Republic intended to reply to contend that the rejection by the judge of the alibi was circumstantial evidence favouring the respondent, Mr. Kibuthu retorted that the alleged displacement of the alibi does not strengthen the case of the prosecution to prove their case as by law required. Even in those circumstances the judge should have considered the whole evidence before finding Musamali guilty, and that it was at the scene of the crime at the material time. Mr. Kibuthu yet reserved his position on the point of the alibi until Mr. Etyang had replied.

Replying to Mr. Kibuthu on this ground, Mr. Etyang stated that Musamali was arrested on February 14, 1982 at his house that before his arrest, empty cartridges had been recovered from the scene of the crime and that during the questioning of Musamali by IP Mbogo and CI Kuria Musamali told the police officers, without use of any force on him that he had a gun.

Later that day Musamali pointed out a place and found a torch and a *simi*, PC Kitonyi dug deeper at the suggestion of Musamali and removed a scorpion automatic pistol which was taken to the ballistics expert, SSP Nduguga (PW 33) and foundation was laid for invoking section 31 of the Evidence Act. Mr. Etyang argued that after police officers were told where the gun was it was reasonably necessary for them to take security measures to ensure their personal security and to prevent escape of the suspect before they went there.

Mr. Etyang contended that there is no evidence that there was no advance party of police officers at the tree near where the gun and the other articles were found and that it does not make sense for police officers to beat Musamali and thereafter take him to the tree in the forest to recover that which they had there planted. On the evidence of SSP Nduguga (PW 33) Mr. Etyang said the expert witness had to refer to sufficient ejector markings and rifting striation to convince himself that the scorpion pistol was used to fire the exhibited cartridge case , and that the ballistics expert made exhaustive explanations of what he

did referred to the decision in *R v Tomu s/o Ngulombe* (1942) 10 EACA and submitted that the evidence on the gun fits neatly into section 31 of the Evidence Act and that following the decision in the *Karukenya* case the conduct of Musamali in leading policemen to the forest and there point out where the gun was additionally admissible circumstantial evidence under section 8 of the Evidence Act, all of which established that Musamali was in possession irresistibly shows that Musamali was at the scene of the crime and that unlike *Kingori v R* (1946) 13 EACA 98, it was presence with participation. That the recovery of a fired cartridge and a live bullet by CPL Mukwana (PW 30) while he guarded the scene and the removal of a bullet from Okumu's left arm by Dr. Njenga (PW 2) which was handed over to Sgt Amolo (PW 57) who in turn handed it to SSP Nduguga (PW 33) could only mean that whoever shot Okumu must have used the scorpion pistol, thus connecting Musamali as the man who shot Okumu at the scene. At this stage Mr. Kapila produced to the court photographs showing cartridge cases here the pin strikes and lines on fired bullets. But Mr. Etyang said the prosecution did not inquire if the police had a rotating machine during 1982.

In reply Mr. Kibuthu reiterated, as regards the gun, that the judge was bound to consider if IP Mbogo (PW 42) was a credible witness and if the account of that witness about the discovery of the gun was true. That was all the more necessary and Mr. Kibuthu because the evidence of the witness on the finding of the torch, the keys and the watch was shown to be unreliable. Finally Mr. Kibuthu submitted that the quantity and quality of the evidence about the discovery of the gun was unsatisfactory and that although the alibi of Musamali was dislodged, the prosecution did not prove beyond reasonable doubt that Musamali was at the scene of the crime.

Having set out the arguments and submissions advanced on behalf of the appellant and the respondent Republic on ground 6, the stage has been set for us to relate the submissions to the evidence and make our own findings on the facts and on the law bearing in mind the following passage explained in'*Shantilal Maneklal Ruwala v R* [1957] EA 570:

'On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court had not seen. On second appeal it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

See also *Digest E A Criminal Case Law* (1957 supplement) p 14.

As we have outlined already, IP Mbogo and his party went to the house of Musamali at 5.30 am on May 13, 1982 on the information. After Musamali was awakened, and his house was searched and keys and a watch were found. The house is very close to the river bank. IP Mbogo cautioned Musamali and interrogated him and was told about the gun. Then led by Musamali, the party left the police station following Milimani road a longer route. After IP Mbogo parked his car, they went downhill crossed the river, walked uphill to the forest and Musamali showed them the tree in the forest area where Musamali asked the Policemen to dig and dig deeper still. C I Kuria's description of the journey to the tree was substantially similar to that of IP Mbogo. C I Kuria added that after the gun was found the whole police

team was happy. PC Kitonyi also said the party was taken through a thick spot and then led to a big tree where he PC Kitonyi started scratching with his own hands and found a torch and after Musamali encouraged him to dig deeper, he found and removed the scorpion automatic pistol. Musamali answered the prosecution's claim about the gun in an unsworn statement, saying the allegation were

"Nothing but lies …….4 that on May 14 1982 he was not awakened by the police but hat they banged the door and found him sleeping. The keys and torch were not found in his house. He was then taken to the forest, tied with rope, blindfolded, and his legs and hands tied, was left and put on top of a tree, beaten by IP Mbogo, CI Kuria, PC Kitonyi and other policemen and asked where the gun was. His brother in law was beaten too.

And so was another who was staying with him.

Musamali said he was alone taken, yet again, to a forest, there blindfolded, told that was the end of his life, tied on a tree, beaten and asked if he killed Tenai. He replied he did not know Tenai. He was then untied, placed near vehicle, saw other policemen tying other people to the same tree, was told by a Mkamba policeman that he was suffering for nothing and that even if he denied it, they knew where the gun was, and that he, "told them if they knew where the gun is please take me there so you can take the gun." And that thereafter the policeman told the others that he had said that they should go where the gun was whereupon he, Musamali was put on a vehicle, taken to a forest of section 6 then to Shimo La Tewa forest, thereheld by his waist across the river where there were other policemen, escorted and pushed into a forest of many trees, ordered to sit and saw PC Kitonyi removing two guns from the paper found underneath the tree. On being asked if he knew anything about the gun, Musamali replied he knew nothing and the he did not know who "might have fabricated the story about the gun so that I can lose my life…" adding that, "the person who told the police must be one who brought the gun near my house……."

It is inconceivable that the party of police officers would have taken the route to the forest, which according to the prosecution evidence and the statement of Musamali was a difficult and meandering route, without direction or prior knowledge of the layout. Nobody would possibly have travelled towards the material tree without a clear and definite purpose.

Musamali lived close to the forest and can be presumed to have known the neighbourhood so well as to be able easily to lead the way. His version of what took place as he was held by his trousers has remarkable similarity to the prosecution tale except for his allegation that he was tortured. The short but difficult journey to the forest was embarked upon after police officers had found the keys to the Mazda vehicle and a watch. The discovery of the two items in Musamali's box and house naturally had a real effect on Musamali. It is significant that Musamali implies in his statement that a person must have told the police officers about the gun.

In those circumstances, Musamali must have rationalized and concluded that police officers had some knowledge about the gun and that it was risky and wholly without merit not to disclose the actual location of the gun.

There was no way, on the evidence, the police party would have got to the tree without being led there. And, but for the suggestion of PC Kitonyi to dig deeper the gun might have been found. The gun was hidden in the ground. Ordinarily that is not quite how to plant something on another. If, as was suggested by Mr. Kibuthu, police officers knew where the gun was hidden, there would have been no necessity for them and Musamali to have taken the roundabout way to get to the tree. The logical quick and secure step to be taken would surely have been for police officers to match Musamali to the tree, there point out

the gun per se instead of invoking section 31 of the Evidence Act. The assertion that the police officers planted the gun on Musamali invites the question, without shifting any burden, if burying of the gun in the ground under a tree in a thick forest albeit close to Musamali's house, would have provided an adequate link which Musamali would have effected within some area or property fully under the control of use of Musamali, not in a forest over which Musamali had no right. There was no advance party of police officer at or near the forest where the gun was found. Corporal Matolo (PW 36) was one of the policeman who raided Shimo la Tewa village on May 14 1982 on the instructions of C I Kuria. The Corporal was in charge of dog handlers and he and his party laid an ambush away from the village. The Corporal could not see CI Kuria or those who accompanied him. It is manifest that the Corporal and his team were engaged on a different exercise which took place near Musamali's house. While CI Kuria, IP Mbogo, other policemen and Musamali were in the forest, PC Kitonyi went across a ditch to the tree. On no fair view of the matter could PC Kitonyi be said to have formed an advance party. If , as is likely, a few of police officer who accompanied Musamali to the forest walked ahead to view the area and ward of any danger, they would be no advance party because there was just one party led by Musamali. The more we consider the defence that the gun was planted, the more hollow it becomes. In the summing up to the assesors, the judge specifically mentioned the prosecution's allegation that Musamali offered to and led police officers to a place near his house where the gun was found. In his judgment, the judge approvingly discussed the evidence on the finding of the gun in the forest and it is clear that this particular piece of real and cogent evidence formed an important part of the evidence which influenced the judge to find Musamali guilty. We have analysed and considered this part of the case and we entertain no doubt that Musamali led the party of police officers to the forest and on to the tree where the gun was dug out. The gun was discovered inconsequence of the information given by Musamali and so the prosecution properly invoked section 31 of the Evidence Act.

SSP Nduguga, a firearms examiner, examined the gun, and found it capable of being fired and complete in all its component parts. The gun had sometime or other been fired.

SSP Nduguga (PW33) received all the five recovered cartridges and examined them microscopically and compared them with three spent cartridges which had all been fired from the gun. The firearms examiner

'found sufficient matching ejection markings to convince me that the pistol … was used to fire the cartridge cases …'

The firearms examiner appears, with all due respect to him, to have exceeded his role as an expert. It was not for him to find sufficient matching ejector markings. That was the duty of the judge aided by the assessors.

The function of the expert witness was succinctly stated by Lord President Cooper in *Davis v Edinburgh Magistrates* [1953] SC 34 at 40 when he said:

'Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.'

(See also *Cross on Evidence* (2nd edn) p 362. The prosecution had called the firearms expert to assist the court and the court did not expect 'an oracular pronouncement by an expert' (*Davis v Edinburgh Magistrates)*.

In automatic weapons, the ejector mark upon a fired cartridge may be compared with the characters of the metal block of the firearm which causes the ejection of the cartridge. – see *Glaister's Medical*

Jurisprudence and Toxicology (13th edn) p 289. Specific identification of individual weapons requires that the cartridge component is marked enough to receive the imprint of microscopic striatures, that the marks present be reproduced in a specimen and that the marks are sufficiently distinctive to be specific – see *Gradwohl's Legal Medicine* (3rd edn) p 214. The standard method of comparing cartridge cases is by producing comparison microscope photographs, and so, as Mr. Kapila observed, for the SSP to be able to compare the spent cartridges he had to have the equipment to magnify and produce photographs of the same type as exhibits A, B and C.

Mr. Etyang could not say whether, in 1982, the Kenya Police had the relevant microphotographic machine, although it is clear that one was in operation the following year as we were shown microphotographs in another case. It has come to our notice in reviewing several cases concerning guns, that there is no practice of producing the microphotographs. It ought to be standard practice to do so, in accordance with Davis' case. It may not be fatal if that is not done, depending on the circumstances, and whether any particular point arises necessitating scrutiny of the comparison by the courts. No such point arose in this case.

The defence took no objection at the trial, and indeed seemed to be unaware of the true position; nor was it raised in the appeal. Be that as it may, the prosecution must prove its case. SSP Nduguga examined the cartridges under a microscope. He explained what he did. The judge accepted his findings. We have scrutinised the evidence. It is very clear that the officer has a very long experience in this particular field and has always been found trustworthy. We have therefore been persuaded to accept his evidence as accurate and reliable and we can find that the gun was used to fire the cartridges.

The fact of the discovery of the gun no longer rests on the statement of Musamali but on the evidence of CI Kuria, IP Mbogo and the other police officers (*R v Tomu* (1943) 10 EACA 54). The next question is whether that evidence is reliable.

Apart from possession of the gun, the torch and the *simi* near the tree in the forest, the appellant was found in possession of the keys of the Mazda, the keys of the locks in the deceased's compound and a watch. Of these things, the keys refer particularly tot his case, while the torch and watch refer to other alleged thefts. In these circumstances the appellant challenges.

(1) the introduction of the torch and watch as inadmissible evidence (ground 4); and

(2) that the possession of the various keys was false and that fact throws doubt on the possession by the appellant of the gun (ground 7).

On the first of these headings, the two other incidents occurred shortly after the incident in question; and before the appellant was apprehended.

It is permissible under s 57 of the Evidence Act (Cap 80) to adduce such evidence in rebuttal or anticipation of the defence of innocence or accident in relation to the possession of other articles. That type of defence might easily have been advanced in the case of the keys, and therefore in the words of the section the evidence is directly relevant to a fact in issue.

That defence, or some other defence, might have been advanced in relation to the gun. It is a question to be weighed carefully, because it is possible that the probative effect of such evidence can be outweighed by the prejudicial effect. Having attempted to make that evaluation for ourselves, we think that the learned judge was entitled to admit that evidence. It tended to prove the appellant was not in innocent possession of any of the articles found in his house, or pointed out by him. But that again

depends upon whether the evidence was intrinsically reliable.

That brings us now to the second point: whether the evidence of the keys was uncertain, to the extent that there is doubt that the police officers had possession of the keys before they were alleged to have been found with the appellant. Consequently, it is said that the prosecution had not ruled out the possibility that these articles had been planted on this appellant by the police, including the gun.

There is no doubt that errors arose as to dates in the case of the watch and torch. There is a good deal of erratic evidence as to how Mrs.Tenai and her employees dealt with the keys of the deceased's cars, how the cars were immediately moved to the police station, how they were returned and when new ignition switches were fitted. There appear to be contradictions in the evidence of Mrs.Tenai and the driver, Wilson. The driver's evidence appears more straightforward. It is Mrs.Tenai's evidence which causes trouble, because the sequence of events related by her is not chronologically, or apparently not chronologically, in order. The other trouble is that the police witnesses were not asked to explain exactly what they did with the vehicles, how they removed them from the site, by what method of propulsion, and in what condition they found them and returned them to the deceased's farm. Did they tow them; did they arrange a temporary starting procedure by connecting wires; did they have some spare keys"

In the case of the watch, the date given when the owner saw the watch being the day before it was alleged to have been with Musamali, is clearly a mistake of carelessness. The rest of the evidence shows without doubt that the owner was shown the watch after the police raided Musamali's home. In the case of the keys of the deceased"s car, it is difficult to unravel all the knots in the evidence. We find we cannot place any weight upon it.

Nevertheless, muddled evidence does not necessarily indicate a fraudulent planting of articles on the accused person and the question is whether the prosecution proved beyond doubt that the evidence of the police officers is reliable. We have reached the conclusion that the witnesses were inaccurate but not fraudulent. The muddle over the date on the watch, identified by its owner, is a clue to this evidence. Of course, there are many ways in which these problems can be avoided and are too wellknown for us to repeat. Having considered all that Mr. Kibuthu very properly submitted and drew to our attention, nevertheless we are satisfied that the inaccurate evidence does not in any way detract from the evidence that the gun was pointed out by the appellant.

The alibi of Musamali was dislodged by DW3, Alfred Mulani, his brother in-law and his own witness, who said he was not seen at all in 1982 and although Musamali had stated he was at Mukaya in Uganda from March 28, 1982 to April 2, 1982 and that he went to his brother-in-law on March 28, 1982. Musamali did not assume any burden to prove this alibi (*Ssentale v Uganda* 1965 [EA 365 AT 369). Nevertheless it cannot be overlooked that Musamali had lied as to his whereabouts at the material time. There was no suggestion that the gun had been stolen, although obviously it had been unlawfully obtained. Musamali is proved to have been in possession of the gun, capable of firing the type of bullet that killed the deceased.

That illegal possession was so proximate in time having regard to the time the crime was committed that in all the circumstances of this case it can safely be presumed that the fatal shot was fired by Musamali using the gun. Compare *R v Bakari* s/o Abdulla (1949) 16 EACA 84.

To sum up, there is no ground on which we can possibly disturb the conviction against Musamali on the basis of the evidence which we have already referred to.

However, it is necessary for us still to consider the submission relating to the confession statements

made by the appellant Musamali. It is said that they were wrongly admitted, without confirming that they were voluntarily made. It was also wrong to disregard the evidence of Dr. Kantilal Patel and Dr. Samuel Gathua, the witnesses in the trial within a trial, and in shifting the burden of proof to the appellant.

Dr. Patel and Dr. Gathua gave evidence in the trial within a trial and as witnesses for the defence in the main trial.

The statements in question were:

1. the verbal statement to Inspector Mbogo (PW 42) on May 14, 1982;
2. the verbal statement to Chief Inspector Kuria (PW 52) on May 14, 1982;
3. the written statement on May 16, 1982 to Senior Assistant Commissioner Okoko;
4. the written statement on May 19, 1982 to Mr. Okoko; and
5. the written statement on May 22, 1982 to IP Munyole.

Dr. Gathua and Dr. Patel gave evidence to the effect that on May 31, 1982 Dr. Gathua examined Musamali in the presence of Dr. Patel, an advocate and a police officer. The doctor found a linear bruise on the left side extending to the buttocks and one bruise on the sole of each foot. It was the complaint of Musamali that these injuries had been received by him between the 13 and 15 May. The doctors found that possible. They could be a week old, a fortnight old, but not more than a month old.

On the other hand, Dr. Njenga had testified in the main trial, that on May 22, 1985 when examining Musamali for age and mental condition, he had not seen any injuries; in particular the linear bruises extending to the buttocks, nor those on the sole of each foot. He was not told of any. But his primary purpose was age and mental condition and he was not asked to find out whether the appellant had any injuries. That is clear in the form requesting this particular examination. There was therefore a considerable conflict of opinion.

Three problems faced the learned Judge:

1. In order to deal with the question whether the confession statements were voluntary, did the opinion of the Dr. Gathua and Dr. Patel, leave reasonable doubt as to whether the appellant had been beaten while he was kept in custody from May 14, 1982 to May 22, 1982.

2. Could the learned judge rely on Dr. Njenga’s evidence without calling him to give evidence in the trial within a trial"

3. Even if the learned judge thought that the confessions were voluntary, as Dr. Gathua and Dr. Patel were called as witnesses in the main trial, it was necessary to leave the question again to the assessors from them to decide what weight to place upon them.

When these problems are fairly considered it becomes apparent that the statements were wrongly admitted.

It is clear that if the evidence of Dr. Gathua and Dr. Patel is reliable, no amount of explaining away their evidence suffices to relieve doubt on the voluntariness of the statements, or any of them. The injuries could reasonably have existed on May 13 and 15, 1982. on the other hand, in order to deal with the conflict between their evidence and that of Dr Njenga, it would have been proper for Dr. Njenga to have been called to give evidence in trial within a trial so that the nature of his examination could be ascertained. It is not self-apparent that an examination for age and mental condition, would necessarily

reveal whether there were injuries on the back of the appellant or under his feet; indeed, such an examination would not necessarily reveal such injuries; especially in the case of an adult male of over 30 years. Therefore, in the circumstances of this case before the learned judge could rely upon Dr. Njenga's evidence, in order to dispute the evidence of the other doctors, Dr. Njenga should have been called. That follows the principle of a trial within a trial, where witnesses in a main trial are called again to give evidence in the trial within a trial, so that if there is objectionable evidence it can be excluded before the assessors hear it. Without calling Dr. Njenga it was surely unsatisfactory to compare Dr. Njenga's untested evidence, and the fact that a complaint was made to him by the appellant, with the evidence of the two doctors who actually saw the injuries.

That covers the first two problems and on the third one can see the situation in a broader context. The defence called the two doctors to give evidence in the main trial, which challenged the voluntariness, and at least the weight to be placed on the statements. It was therefore an issue which the learned judge had to deal with in summing up to the assessors. While it may be that the judge's duty is to rule on the admissibility of evidence at the time when objection is taken to it during the trial, yet, having admitted evidence, it is for the assessors to decide what weight to place on it. It may follow that if the assessors, having considered all the evidence, are not satisfied that the confession statements are voluntary, even though admitted in evidence, they may decide to place no weight upon them.

Unfortunately, the learned judge took the view that having admitted the evidence, there was no need to leave the question of its weight to the assessors. He made no point in summing up that they should consider what weight to place upon the appellant Musamalis's statements, in view of the contradictory medical evidence. Had he done so, it is quite possible that the assessors would not have placed weight upon them. It is not possible for this court to decide what the effect of a proper summing up would have been. It is not possible for this court to decide what the effect of a proper summing up would have been. It is not surprising that the assessors relied on the appellant's statements because they were put before them as evidence; to consider as to their truth in relation to Baraza's statement. As we have said, Baraza's statement was not in any way admissible. Thus, without it, and without a proper direction on Musamali's statement, it cannot possibly be said that the assessors would certainly have relied on them.

There were other questions raised, namely whether these statements were really true or only partially so, and even whether they amounted to confessions. It is difficult at this stage to unravel the truth because of the effects of admitting Baraza's statement in the High Court. It is sufficient for us to say that it seems to us that the open conflict in the medical evidence left considerable doubt whether the confessions were voluntary, and the passage in'*Aneriko v Uganda*, which we have already set out at length, is particularly appropriate to the circumstances here. There, the length of custody was not stated in the report. Here, it was two days before the first written statement, five days before the second and eight days before the third. At the time of examination by Dr. Patel and Dr Gathua the length of custody was no less than 16 days. With the evidence of injuries which both those doctors gave it is clear that on the authority of Aneriko's case these statements should have been rejected, as against Musamali.

Moreover, as this matter was not tested by leaving it to the assessors to assess their weight, we are bound to come to the conclusion that the confession statements of the appellant Musamali could not have been relied upon, except as provided by S 31 of the Evidence Act (Cap 80).

However, as there was, as we have demonstrated, ample other evidence establishing the guilt of Musamali, the rejection of his police statements does not, in our judgment, affect his conviction for this offence. We therefore dismiss his appeal against conviction and the sentence passed upon him.

Finally, we come to the third appellant. We did not require Mr. Musyoka- Annan to address on his case in

reply to the Republic's submissions. The only evidence against him was as said, the statements of his co-accused, Musamali, the first statement of Baraza, the imperfect identification of him at the Kitale Hotel and the bus tickets. The first, for the reasons we have extensively set out, cannot form the basis of a conviction. The second was inadmissible, the third too vague and the fourth inconclusive without more. We therefore allow the third appellant's appeal against his conviction.

Accordingly, we dismiss the appeal of Musamali against his conviction and sentence of death, but we allow the appeals of Choge and Kipkirong, quash their respective convictions for murder and set aside the sentences of death passed upon them.

Dated and delivered at Nairobi this 10th day of July, 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR