THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 49 OF 2016

LESIIT, J

REPUBLIC ……...…….…….....… PROSECUTOR

VERSUS

LEONARD KANARI GITUI…… ACCUSED

JUDGMENT

1. The accused **LEONARD KANARI GITUI** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that:

> **"On the night of the 26th and 27th May, 2016 at Icon Flats Garden Estate of Kasarani Sub-county within Nairobi County murdered CHRISTOPHER MUGANDA ADAGI.**

2. The prosecution called a total of 10 witnesses.

3. In brief the prosecution case is that on the material date at midnight, the accused escorted PW2 to her house after meeting with her from around 7.00pm that night. Upon arrival at PW2's estate, the accused helped PW2 take some items to the 3rd floor where she lived. After escorting her and as the accused went back to his car downstairs, he met the deceased on the corridor leading to PW2's house. A scuffle ensued between them. Soon thereafter, PW1 and 3 heard gun shots. PW1 and 2 heard the deceased utter words to the effect that he has been shot. The deceased died upon arrival at a Medical Centre within Kasarani area.

4. A bullet head, P. Exh. 9 was recovered from the deceased body after post mortem by PW5. A spent cartridge, P. Exh.1 was equally recovered at the scene by PW1 and handed over to PW10. Investigations by the ballistic expert revealed that the two exhibits, P. Exh1 and P.Exh9, were both fired by the Ceska Pistol, P.Exh.8 which is licensed to and registered under the name of the accused person. The said pistol was surrendered to the police by the accused few days after the incident.

5. The accused gave a sworn defence and called two witnesses. He was DW2 in his case. He stated that on the fateful night, he had spent a better part of that evening in a meeting with PW2 at Thika Road Mall. He escorted PW2 to her apartment and on his way from PW2's house, the accused stated that he met a huge man in company of at least three others. The huge man accosted him and started strangling him. The accused said that he struggled with the man and after his knees were hit he fell down and managed to crawl under the man to safety. He stated that he heard gun shots as he went down the stairs towards the gate of the premises. After a few days he presented himself to Kasarani Police Station and was charged with this offence. He testified that he was not armed with a gun on the fateful night even though he was a licensed gun holder. He admitted surrendering his pistol, P. Exh. 8 to the police for their investigations.

6. The defence witnesses were DW1 who was a Clinician in- charge of medical services in Nairobi Remand Prison. He testified that on 11th June, 2016 he treated the accused a week and a half after his incarceration. He said that the accused complained of rapid heartbeats, stiff neck, and sleeplessness and generalized fatigue. He gave him pain killers after confirming that his neck had tissue injury.

7. DW3 was a ballistic expert in private practice engaged by the defence to examine exhibits that were presented for examination to PW9. DW3 stated that amongst the exhibits was a fired bullet (P.Exh.9) which was of 9mm caliber, which had the mark 'T' on its base. DW3 stated that, that marking 'T' could have meant a test bullet and that he presumed that the marking was made by PW9. DW3 stated that there were cases where a bullet enters and exits the body depending with whether it will encounter a hard surface, and that if a bullet remains lodged in the body it meant the bullet was stopped by a hard surface. He said that in such a case the bullet would be dented and there would be damage to the bone including fracturing. DW3 stated that he did not carry out any examination of the exhibits but merely assessed them. He said that he took photos and made a report which he produced as D. Exh.12.

8. The counsels for the accused, the prosecution and the victims filed written submissions. Mr. Opiyo the learned counsel for the accused

filed his submissions which he also served on the prosecution. Mr. Okeyo, the learned prosecution counsel and Mr. Kamunda the learned counsel for the victims filed joint final submissions. That was irregular because the role of a victim's advocate is not to prove the accused guilt, but to assist the court arrive at the truth. The victims' lawyer had no business entangling himself with the prosecution. The prosecution is the agency charged with the duty to prove the accused guilt. What these two counsels should have done is seek directions from the court whether they could be allowed to file joint submissions before filling them. See **Leornard Maina Mwangi v. Republic Milimani Hcccr 57 of 2106**; and **Joseph Lentrix Waswa v. Republic Criminal Appeal No. 132 of 2016**.Having said that I will nevertheless consider their submissions.

9. I have carefully considered the evidence adduced by the prosecution and the defence. I have also considered the submissions made by the parties in this case.

10. The accused faces a charge of **murder** contrary to **section 203** of the **Penal Code**. Under that section murder is defined as follows:

> **" Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

11. The burden lies with the prosecution to prove three ingredients of murder against the accused beyond any reasonable doubt. The prosecution must prove that the accused person, by an unlawful act attacked and inflicted injuries on the deceased. It must also prove that as a result of the injuries inflicted by the accused on him, the deceased died. The prosecution must prove that at the time the accused inflicted the injuries on the deceased he had formed an intention to either cause death or grievous harm to the deceased.

12. Malice aforethought is a very important ingredient for the offence of murder. The circumstances that constitute malice aforethought are defined under **Section 206** of the **Penal Code** thus:

> **"206. Malice aforethought**
>
> **Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**
>
> **(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
>
> **(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
>
> **(c) an intent to commit a felony;**
>
> **(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

13. Having considered the evidence adduced in this case, and the submissions by counsels, I find that there are facts which are not contested.

> **a) There is no dispute that the accused was in the company of PW2 on the evening in question before he dropped PW2 off at her rented house at Icon Flats.**
>
> **b) There is no dispute that the accused and deceased met on the corridor as the accused was leaving PW2's house and that a scuffle ensued between them.**
>
> **c) There is no dispute that the deceased was shot where PW2 resided.**
>
> **d) There is no dispute that the deceased died the same night he suffered a gunshot wound**
>
> **e) There is no dispute that the deceased and PW2 had a romantic relationship and out of which was one issue (child) of their relationship.**

14. The issues for determination are as follows:

> **a) Whether the circumstantial evidence adduced by the prosecution was sufficient to prove that it was the accused who shot the deceased and whether the firearm of the accused was the murder weapon;**
>
> **b) Whether the deceased died out of a gunshot wound;**
>
> **c) Whether the prosecution has established that at the time of the incident the accused actions were actuated by malice aforethought;**
>
> **d) Whether the defence of self and provocation was advanced by the accused, and whether or not it was advanced if such defence can stand.**

15. In regard to the issue **whether the circumstantial evidence adduced by the prosecution was sufficient to prove that it was the accused who shot the deceased.** Mr. Opiyo, the learned counsel for the accused urged in the final submissions that none of the key witnesses saw the accused carrying any fire arm. Counsel urged that PW3's evidence was to the effect that there were three other unidentified persons around the scene at the time of the incident, however no follow ups were made to ascertain their intentions at the scene. Counsel urged that the deceased having had time and opportunity to talk to the people who attended to him first, he did not allude to them that the fatal shot came from the accused.

16. Mr. Okeyo and his counterpart, in their filed submissions urged that the prosecution witnesses who testified confirmed that the deceased died on the night of 26th May, 2016. They urged that PW1 testified that she heard the deceased state "*why are you shooting me*?" Further that PW5 established that the cause of death was a gun shot. Counsels urged that all these facts established that the cause of death had been established. Mr. Okeyo urged that the accused was present at the scene of crime, namely the Icon Flats, on the 3rd floor, where the accused and deceased got into a scuffle. PW2 thereafter saw the deceased bleeding from a gunshot wound and the accused nowhere to be seen. They urged that the chain of events was well linked and that it had placed the shooting of the deceased squarely on the accused.

17. There was no direct evidence in this case. The prosecution is therefore relying exclusively on circumstantial evidence. Regarding the principles of circumstantial evidence, the oldest case in point is **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135**, where the Court held:

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."**

18. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **ABANGA alias ONYANGO V. REP C. A. NO.32 of 1990(UR)** where the learned Justices of the Court of Appeal stated thus:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> **(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
>
> **(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; and**
>
> **(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

19. The evidence of the eye witnesses to the account leading to the incident was given by three witnesses, PW1, PW2 and PW3. PW1 was the house help to PW2. She testified that on 26th May 2016, at mid-night she received a phone call from her boss asking her to open the gate leading to the apartments where she lived. PW1 opened the gate and headed back to the house leaving PW2 at the gate. PW1 testified that a few minutes later while in her bedroom she heard PW2 enter the house but she did not proceed beyond the sitting room. Fifteen minutes later while still in her bedroom PW1 heard a gunshot and then someone screaming, from a distance of about two meters from the house, and saying, *"Why have you shot me?"* PW1 testified that she recognized the voice of the one who uttered those words as that of the deceased in this case. She knew the deceased as a friend of PW2 who also frequented the house to visit PW2.

20. PW1 testified that when she got out of her bedroom, she found the main door open and PW2 seated on a chair near the door holding her phone, facing outside while talking to herself.PW1 noticed the deceased lying on the floor outside the door to the house, facing up and having an injury on the left side of his abdomen. PW1 testified said that she was shocked by all this. She said that the deceased asked and that she gave him water which he sipped. She also went and picked a pillow from the sitting room and placed it down under the deceased head.

21. PW1 testified that after a short while, PW3 along with the watchman came and organized to take the deceased to hospital.PW1 stated that when they left, she collected from the corridor leading to PW2 house, the shoes belonging to the deceased, his car keys and house keys. She also collected a small piece of metal which she identified as P. Exh1, a spent cartridge case.

22. PW2 on her part testified that the deceased was her boyfriend and father to her child. She said that she was aware that the deceased had another family; hence the deceased would visit her house two or three times in a week, mainly on weekends. She explained in her evidence that the deceased had no definite day or time for him to visit her. PW2 also stated that she knew the accused and that he was helping her with business ideas, and that the accused had never visited her house prior to the date of the incident.

23. PW2 testified that on 26th May 2016 they had scheduled a meeting with the accused at Thika Road Mall at a restaurant called Persia. They were to meet at 7pm, which they did and where they were until 12:45am when the accused offered to drop her at her house using his car. When they arrived there, the accused offered to escort her to her house and also help her carry some things she had to the house.PW2 testified that she invited the accused to her house and they headed to the balcony for about 8 to 10 minutes. She said that she then led the accused out of the house between 1:15 to 1:35am.

24. PW2 stated that she was still at the door to her house as the accused walked down the corridor, when she saw the deceased emerge. PW2 said that she saw the deceased look at the accused, grab the accused with bare hands and lift him up without letting go of him. PW2 said that on seeing that, she ran back to the house and locked the door. While inside the house PW2 said that she could hear commotion of pushing and pulling outside. She later opened the door when she heard the deceased shouting outside, **"***Why have you shot me?" and, "I have been shot"***.**

25. When PW2 opened the door, she said that she saw blood stains on the shirt of the deceased. The accused was nowhere to be seen. PW2 later got assistance from PW3 and the Caretaker and they took the deceased to Neema Hospital in Kasarani, where the deceased was pronounced dead on arrival.

26. From the evidence of PW2, it is clear that the accused was accosted by the deceased as he walked down her corridor towards the stairs. PW2 had a clear view of the corridor which she maintained was well lit by the strong bulb emanating from her sitting room. PW2 testified that she saw and recognized the deceased as he approached her house. She said that when she saw him lift the accused off the ground, she knew there would be trouble and so she retreated back to her house and locked the door. It was after that that PW2 heard the deceased saying that he had been shot. Apparently she did not hear the gunshot. PW1 heard the gunshot and the deceased saying that he had been shot. By the time PW1 came out of the bedroom, the deceased was lying on the floor outside the open door to PW2's house in great pain. PW1 was also clear that there was no one else there.

27. There was evidence from PW3 who was a night watchman stationed outside the gate of a building adjacent to the one where the incident occurred. He testified that he saw PW2 and a short and small man who was a stranger to him. That is the accused in this case. He said that he knew PW2 before as a tenant in the adjacent building. He also knew the deceased because he frequently visited PW2 between midnight and 3am on most nights. According to PW3 after PW2 and the stranger entered the apartment and went to 2nd floor where PW2 lived he heard three gunshots ten minutes later. It was followed by a man crying. He said he went up-stairs to find the deceased in pain on the floor outside PW2's house and PW1 and 2 nearby. (PW3 was mistaken, PW2 lived on 3rd and not 2nd floor).

28. It is not very clear from PW3's evidence, however he said that he saw three men leave the apartment building where the incident occurred in haste without talking. This was after the three blasts had sounded. He also said that the three men had entered the building after PW2 and the stranger she was with. PW3 did not talk of having seen the deceased, whom he knew very well enter the premises that night.

29. The accused defence was that he was attacked by a huge man who held him by the neck and started strangling him. He said that he noticed there were other people behind the huge man. He said he was hit on the knees and that when he fell down, he was able to crawl under the man and to escape. He said that he could hear a lot of commotion behind him and finally at least three gun-shots. The accused also stated that he met PW3 at the gate as he left and told him that upstairs it was not safe.

30. The issue is who fired the gunshot that hit the deceased on his abdomen? However before we get to that there is one related issue, whether the evidence of PW3 contradicts that of PW2 regarding the number of people at the scene of the firing. PW2 said she that saw only her boyfriend walking towards her house. When he saw the accused walking out with PW2, she said that the deceased confronted the accused and lifted him up by the collars of his shirt. PW2 did not see anyone in the company of the deceased.

31. PW3 said that he saw three men enter the building and soon thereafter he saw them leaving in a hurry without talking. He did not see where the three men went to in the apartment nor where they came from. Considering that the apartment was not the one he was manning and considering further that the apartment had at least three floors of houses, the three men could have gone in any of the houses in the apartment.

32. I find that PW3's evidence is inconclusive as to whether the three men who left soon after the gun-shots had been to PW2's floor. There is absolutely no evidence to clearly show where the three men may have come from, or their connection to this case. At least PW2 did not see such people and she was the nearest to the accused and the deceased.

33. As for accused defence that the deceased was in company of at least three others, I am unable to find that evidence true. His own explanation of how he escaped the attack from four hefty men, as he described them, is not plausible. He said he crawled under the deceased and escaped after he fell down from the deceased grip when his knees were hit with an object. He did not claim that anyone else was involved in the attack against him.

34. DW1, the Clinician who treated the accused about 18 days after this incident said that the accused complained of stiff neck and neck pain, rapid heart-beat and generalized fatigue. He said that he treated him with pain killers. DW1's evidence is in tandem with the evidence of PW2 that the deceased held the accused by his collar. It is also in tandem with the evidence of the accused that he was held by the neck. The evidence of the findings of the Clinician DW1, after he examined the accused also confirms that the accused had soft tissue injury to his neck, which is in tandem with the evidence of PW2. DW1 was clear that the accused had no injury to his knees and that he made no complaint about an injury to the knee. What that means is that the story of his knees being hit was not true. That also confirms PW2's evidence that the deceased was alone during the confrontation. That puts to doubt accused testimony that the deceased was accompanied by at least three men.

35. The evidence of PW3 shed light as to why the deceased was at the building on the material night. PW3 said that he knew the deceased as one who visited PW2 frequently. His hours of visit according to PW3 were between midnight and 3am. PW3 clearly said that when he visited PW2, the deceased stayed for at least two hours and from midnight. The incident took place around 1:30am. That night visit was not unusual, as it was in line with his custom of visiting PW2. The look on the deceased face when he saw PW2 in company of the accused as PW2 described, was of surprise. He does not appear as if he expected to find another man with PW2. PW2's description of accused reaction on seeing the deceased is also telling. PW2 said that he stopped walking the moment he saw the deceased emerge from the end of the corridor walking towards PW2's house. Bearing in mind PW2's evidence that her house was the only house on that corridor, it was obvious to the accused where the deceased was going.

36. Given the reactions of these two men on PW2's corridor on the night in question I doubt that PW2's evidence that she was in constant communication with the deceased, keeping him abreast with her night escapade with the accused was true. I think that she was economical with the truth.

37. Having considered this evidence, I find that the prosecution evidence placed the accused at the scene of the shooting. I find that the prosecution proved beyond doubt that the accused was alone with the deceased when the attack occurred.

38. There is other evidence against the accused which is from the results of examination of the accused pistol, P. Exh. 8, the bullet head recovered from the body of the deceased, P. Exh. 9, the cartridge recovered at the scene of shooting by PW1 and PW10, P. Exh. 1 by the ballistic expert, PW9. PW9 testified that after his examination, he found that the bullet retrieved from the body of the deceased P. Exh 9 and the spent cartridge P. Exh. 1 were both fired from the Ceska pistol P.Exh.8 owned by the accused. This evidence establishes that although none of the prosecution witnesses actually saw the accused point the gun, take aim and fire a shot at the deceased, it is clear that only the accused and no one else who could have fired the shot at the deceased.

39. As to **whether it was the accused firearm that was the murder weapon,** PW1 testified that she heard a gunshot and the deceased cry out that he had been shot. As observed earlier in this judgment, PW1 and PW2 did not see the accused point the gun, take aim and fire a shot in the direction of the deceased. However, PW2 stated that it was only the accused and the deceased who were outside the house before she heard a gunshot and upon checking, she saw the deceased bleeding from a gunshot wound and the accused nowhere to be seen.

40. PW10 testified that he went to the scene the day after the incident, where he recovered a spent cartridge case P. Exh. 1 from PW1. PW10 testified that the accused surrendered his ceska pistol number A869115 P. Exh.8. After post-mortem a fired bullet P. Exh9 was recovered from the deceased body. The bullet head was handed over to PW8 by PW5. PW8 gave it to PW10 who sent it and all other exhibits to the Government Ballistics Analyst for examination.

41. PW9 a ballistic officer testified in respect of the examination and analysis conducted on the exhibits mentioned above. PW9 said that he examined the spent cartridge case P. Exh1, under a microscope and found it had an identifiable firing markings and bridge face marking. PW9 said that he compared the cartridge cases in conjunction with each of the test fired cartridges fired in P. Exh. 8 and found sufficient matching firing pin markings and bridges markings. He compared the markings on P.Exh. 9 against the test fired cartridges fired from the pistol P. Exh8 and found riflowing striation markings. He said that from these findings, he formed the opinion that P. Exh1, a spent cartridge case recovered from the scene by PW1, and P.Exh.9 a bullet head recovered from the deceased body were fired from the Ceska pistol serial number A869-115 P.Exh.8.

42. DW3 was a ballistic expert called by the defence. He stated that he had garnered 3 years of experience in the ballistic field. He testified that he assessed the fire arm P.Exh8, the test cartridges and test bullets P.Exh10 and the fired cartridge case P.Exh1. He testified that he did not have a chance to test fire the exhibits but he only assessed them as they were.

43. DW3 stated that other than the Ceska pistol model, there were other several existing pistols which can fire a 9mm caliber ammunition. DW3 stated that amongst the exhibits he examined was a fired bullet which was of 9mm caliber, it had markings on its base. DW3 stated that, that marking could have resulted from a test bullet and he presumed that the marking was made by PW9. DW3 stated that there were cases where bullets enter and exit the body depending with whether it will encounter a hard surface, and that if a bullet remains lodged in the body it means the bullet was stopped by a hard surface. The bullet would be dented and there would be damage to the bone including fracturing. DW3 testified that though he did not get a chance of test firing the exhibits, from his experience the bullet head P.Exh.9, was not retrieved from a bone and he went ahead and stated that the markings on the bullet head were made by the ballistic expert PW9. DW3 finally stated that he took photos and made a report which he produced as D. Exh.12.

44. I find the assertions by DW3 suggesting that the bullet head could not have been in the body unless stopped by a bone and that it was not retrieved from a bone and finally that it bore test markings most likely by PW9 unfounded and unsubstantiated accusations. No suggestion was put to PW5 that he did not recover any bullet head from the body of the deceased. No suggestions were made to PW9 that he messed up the exhibits and confused which were recovered from which location. DW3's evidence was mere speculation and allegation. Besides, DW3 was clear that he did not carry out any examinations of the exhibits in question but merely assessed them. His evidence is in the circumstances not helpful.

45. The fact that DW3 had an experience of 3 years as compared to PW9 who had 20 years of experience does not help the situation. Considering the experience of PW9 and the fact that he had an opportunity to test fire five bullets and used them for comparative analysis to reach his conclusions on the fired bullet P. Exh. 9, his testimony was based on facts. The testimony of DW3 was based on speculation and is not credible.

46. I also considered that PW1 recovered P.Exh. 1 from the scene immediately after the incident happened and that she kept it safe not knowing what it was, until she gave it to PW10. I also find that P. Exh. 9, the fired bullet head recovered from the deceased body was traced back to its source which was the accused firearm. The likelihood of interference with P. Exh. 9 has been dispelled by PW5's evidence.

47. Mr. Opiyo suggested that the prosecution did not bring chemical proof that the bullet head was retrieved from the body of the deceased. He also suggested that there was need for the CT scans taken of the deceased to be produced in evidence to show where the bullet head was lodged inside the body of the deceased. Proof of the retrieval could be made by direct evidence which is what PW5 and PW10 did. It is spurious to require other evidence to supplement the direct evidence of the professional witnesses. There is nothing to suggest that the two witnesses planted evidence or were unreliable. I find that the defence submission on this point is based on speculation without any legal or other basis.

48. The upshot of the above is that I find that the prosecution has proved that P. Exh. 8, a Ceska Pistol issued to and licensed under the accused name was the weapon which fired the bullet, P. Exh. 9, which hit the deceased on his lower abdomen leading to his death. I find therefore that the pistol P. Exh. 8 was the murder weapon in this case.

49. That evidence places upon the accused a statutory burden to discharge a rebuttable presumption that the accused was the one who shot the deceased or knew who shot him. This presumption is created under **sections 111(1)** and **119** of the **Evidence Act**. These sections stipulate as follows:

> **111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is**

charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

Section 119 provides:

"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

50. The accused in his sworn defence does not deny being at the scene at the time of the incident, or having been involved in a scuffle with the deceased. The accused said he did not fire any shot. He also denied that he was carrying any gun on the material night. He stated that there were other men with the deceased and that after he left the deceased is when he heard three gunshots. The accused admitted that he was a licensed fire-arm holder and that he surrendered his gun to the police a few days after the incident.

51. I have considered the accused defence. I am aware that an accused person bears no burden of proving that his defence is true. All he needs do is create a doubt in the prosecution case, and where the prosecution case would be found weak such doubt would be resolved to his benefit. See **LEONARD ASENATH VS REP (1957) EA 206** which adopted with approval an English decision, **REP VS JOHNSON 46 CR. APP. R. 55[1961] 3ALL E.R. 969** and **UGANDA v. SEBYALA & OTHERS [1969] EA 204.**

52. I find that the accused denial that he was not armed and that he did not fire any shot that night is a lie. The prosecution has proved that P.Exh1 the spent cartridge recovered from the scene and the bullet head P. Exh. 9 recovered from the deceased body were fired from the accused Ceska Pistol P. Exh. 8, belonging to the accused. The prosecution has proved, and the accused also admitted that he surrendered the pistol to the police few days after this incident. He had the gun all along until the day he surrendered it to the police. The only conclusion which can be made from this evidence is that he was carrying his gun (P. Exh. 8) that night and that he shot the deceased with it. The accused defence therefore fails to rebut the statutory presumption created under **sections 111(1)** and **119** of the **Evidence Act**.

53. I find that the prosecution has proved that the bullet fired at the deceased came from the pistol owned by the accused. He surrendered the firearm to the police after this incident. He had it all along. The only reasonable conclusion to make is that he is the one who fired it at the deceased.

54. As to **whether the deceased died out of a gunshot wound** Mr. Opiyo urged that there was only one autopsy report produced in court despite the fact that the autopsy on the deceased body was carried out twice on two different dates. Counsel urged that the bullet head which was allegedly recovered from the deceased body was devoid of any chemical substance or blood samples, and neither was any laboratory examination carried out to proof it was removed from the body of the deceased. Mr. Opiyo urged that the ballistic expert who examined the firearm, ammunition, spent cartridge and bullet head in this case could not establish when the firearm, P. Exh. 8 was last fired. Counsel urged that the caliber of ammunition the said weapon uses is not exclusively used by that gun. Counsel urged that the accused regretted the incident but that did not make him culpable. Counsel further urged that the accused and the deceased never knew each other before the fateful day. Mr. Opiyo submitted that PW2's evidence was to the effect that she saw the deceased hold the accused by the neck and a struggle ensued.

55. PW5 the pathologist stated that on 28th May 2016 at Montezuma funeral home, he performed an autopsy on the body of the deceased. PW5 testified that the body of the deceased was very pale signifying that he had lost substantial amount of blood. PW5 stated that the deceased had an entry gunshot wound on the lower abdomen, which was 1cm in diameter, and a collar of abrasion. PW5 stated that there was no exit wound, meaning that the bullet was still inside the body of the deceased. He stated that he noted a bullet wound on the lumbar spine, on the lower abdomen.

56. PW5 testified that he tried to retrieve the bullet but it was impossible as he could not see it. He then requested for a CT scan on the body of the deceased to aid in locating the bullet. He therefore postponed the post mortem examination until the CT scan was done.

57. With the guide of CT scan results, PW5 said that he repeated the autopsy and was able to retrieve a bullet from the pelvic bone on the right side of the body of the deceased. PW5 said that he handed over the bullet to the PW8 the police officer present at the post mortem. PW5 testified that after the post mortem examination, he formed the opinion that the cause of death of the deceased was due to bleeding as a result of a single abdominal gun shot. PW5 produced the post mortem report as P.Exh.2.

58. The defence raised an issue as to whether the accused was present for the postmortem and the fact that PW5 did not produce the CT scans as exhibits and two post mortem reports since he performed two post mortems. PW5 stated clearly that while performing the post mortem he tried to retrieve the bullet head from the body as he saw the entry wound but no exit wound, but it was impossible due to the location. He said that hence he stitched the body back and opted to have CT scan done to enable him see the location of the bullet. PW5 stated that during the second post mortem the Investigating Officer brought the first post mortem report back which he used to make the addendum with the same people present.

59. As to whether the accused was supposed to be present during the post mortem, the post mortem procedure is purely a family affair and also a part of police investigations as to the cause of death of a deceased person. There is no requirement that an accused person should be present during post mortem. The absence of the accused is not an issue. Furthermore, we were not told that the accused made a request,

whether directly or through counsel to be present during post mortem.

60. PW5 Dr. Oduor Johansen who performed autopsy on the body of the deceased gave an expert medical opinion evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased died due to bleeding as a result of a single abdominal gun shot.

61. **As to whether the prosecution has established that at the time of the incident the accused actions were actuated by malice aforethought.** Counsel for the defence, Mr. Opiyo urged that if the court did not accept the accused defence, then the court should consider together all the facts of the case, and the fact that the incident occurred in the wee hours of the night, and find that the accused immediate instinct was to defend himself which he did.

62. Prosecution counsel Mr.Okeyo urged that the attack that culminated into a scuffle between the accused and deceased was not a random or spontaneous attack. They urged that the accused had no right to take the law into his hands and that he acted unlawfully when he pulled out his Ceska Pistol and shot the deceased. They further urged that from the definition of malice aforethought under **section 206(b)** and **206(c)**, malice is not only from intentional acts, but also comprises reckless acts with indifference of the consequence of such acts.

63. Malice aforethought is provided for under **Section 206** of the **Penal Code**. It may be established by way of evidence when any of the following circumstances exist:

> ***"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.***
>
> ***(b) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.***
>
> ***(c) An intention to commit a felony; and***
>
> ***(d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it."***

64. Malice aforethought can also be inferred from the manner of the killing as held in the case of ***Abanga alias Onyango v Republic Court of Appeal Cr. Case No. 32 of 1990***:

> **(e) "The deceased in this case was stabbed severally with a sharp object apparently the knife recovered by PW6. The knife once used for a commission of the offence like grievous harm or murder is a lethal weapon. It is clear from the postmortem report that the accused targeted the head, neck anteriorly and posteriorly. The medical doctor described the interior stab wounds in the following manner:**
>
> **(f) 3 stab wounds anteriorly on the face, right chest, 2 stab wounds measuring 5cm and 4cm in length, a through and through stab wound though the next anteriorly measuring 15 cm running from left to right. Four stab wounds to the head and neck, the largest being a 10 cm through and through wound to the nape of the neck being left to right on the neck. A 6 cm stab wound between the shoulder blades. A 4 cm stab wound over the left scapula and 5 cm stab wound over right scapula.**
>
> **(g) On the right shoulder a 5 cm and 7 cm deep stab would on the dorsten of the right hand and 3 cm long stab wound.**
>
> **(h) There is no dispute that the assailant herein had an opportunity and time to inflict the extensive injuries. He was not a person in a hurry. The vulnerable parts of the body were targeted."**

65. In addition to inference from the circumstances of the evidence of how the killing was executed, the existence of malice aforethought is not a question of opinion by the court but one which the prosecution must prove beyond reasonable doubt by law of evidence. As outlined under **Section 206** of the **Penal Code** the inference on malice aforethought can either be express or implied depending on the circumstances specific to each case.

66. From the evidence adduced in this case, it is evident that the accused and deceased were strangers to one another. The shooting of the deceased by the accused was sudden and unplanned. It was brought about by the deceased suddenly pouncing on the accused and lifting him up. I find that the apprehension that PW2 had already created in the mind of the accused regarding insecurity in that area and fact it was prone to frequent attacks must have made the accused approach any stranger he met with reservations.

67. The fact that the deceased pounced on the accused and lifted him up did not aid the situation. A person would reasonably be expected to react in such circumstances where a total stranger lifted one up to the air, especially where, as all the witnesses stated, the one lifting is much mightier and heavier than one lifted. I find that having reacted in those circumstances, there was no pre-meditation on the part of the accused.

68. As to whether the defence of self and provocation was advanced by the accused, and whether or not it was advanced if such defence can stand. Mr. Opiyo has urged the court to consider self defence if I do not accept accused defence. The prosecution has trashed that such defence is available to the accused who never pleaded it.

69. The accused did not plead provocation; however, I will consider whether that defence is available to the accused. Provocation is set out under **Section 207** of the **Penal Code** which provides that:

"When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter."

70. **Section 208 (1)** of the **Penal Code** defines the term provocation as follows:

"The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

71. The real point in this case turns on whether or not legal provocation as defined under **section 208 (1)** of the **Penal Code** was disclosed to trigger the actions taken by the accused.

72. I have considered the evidence adduced in this case. I find that provocation does not arise. There was no relationship between PW2 and the accused as to justify a finding of provocation. Besides, provocation can only arise where a person in a special relationship with the accused is under attack or insult. Even if there was an objective ground for provocation to arise, the same could only have occurred if it was PW2 and not the accused who was under attack. That defence does not lie in the circumstances of the case.

73. The second defence is that of self-defence. The question to be asked in this case is whether the accused believed on reasonable grounds that it was necessary in the facts and circumstances of the case to do what he did to the deceased. Under **section 17** of the **Penal Code**:

"Subject to any express provisions in this code or any other law in operation in Kenya criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

74. **Those principles have been clearly elucidated in the persuasive authorities in Palmer v Republic [1971] AC 814 and in Republic v Mcinnes 55 Cr. Appeal 551 where the Privy Council and the Court of Appeal respectively stated as follows:**

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."

75. The court in a similar situation discussed the doctrine of self-defence in ***Mokwa v Republic [1976-80] 1KLR 1337*** the Court of Appeal held that:

"Self-defence is an absolute defence even on a charge of murder unless; in the circumstances of the case the accused applies excessive force."

76. Mr. Opiyo counsel for the accused submitted that if the court finds the accused guilty of having shot the deceased, then it should find that he acted in self defence and consequently acquit him. The defence counsel was introducing the self defence at the final submissions stage. The Learned Prosecution Counsel on his part contended that self defence is not available to the accused on grounds that he used excessive force in the circumstances of the case. The prosecution urged that the attack on the accused was disproportionate to the attack against the deceased person. They urged that it was excessive and as such was indicative of the intention to cause serious grievous harm.

77. As stated herein above, the question to be answered in considering self-defence is whether the force used by the accused was reasonable and necessary in the circumstances. *In* ***Robert Kinuthia Mungai V Republic (1982-88) 1KAR 611*** **,** *the Court delivered itself as;*

"…….we think in view of the earlier East African cases we have considered, and the more recent English decision in R v Shannon Crim. LR 438 1980, that, the interpretation of the judgment of the Privy Council in Palmer V Republic is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered"

"It is a doctrine recognized in East Africa that excessive use of force in the defence of the person or property, whether defence of the self-defence is upheld, a conviction or not there is an element of provocation present, may be sufficient for the Court to regard the offence not as murder but as manslaughter. ..."

78. As I have discussed elsewhere in this judgment, the deceased was unarmed at the time of this incident. He used his bare hands to confront the accused. The accused was a licensed fire-arm holder and was conversant with the rules of the use of firearms. Clearly firearms are not

used in settling petty squabbles or personal scores. It should also not be used on persons who are unarmed as the deceased was on the material day. Yes the deceased was confrontational on the night in question but not without cause as the accused was in the company of his girlfriend at wee hours. I do not think that the accused's life was in imminent danger as to justify shooting the deceased.

79. The accused was not in imminent danger, neither did he state so in his defence. The choice to fire and shoot at the deceased was not just excessive use of force but an excessive use of firearm. The medical evidence as to the cause of death is a testimony to the fact that accused targeted a sensitive and vulnerable part of the body, herein the lower abdomen.

80. Upon scrutinizing the evidence in the entire case, I find that although the accused was entitled to retaliate, his deliberate act to use a gun to shoot the deceased on a vulnerable part of the body, cannot be said to be reasonable act of self-defence. It was not a justifiable use of force for him to aim and shoot the deceased as he did. The force used by the accused in my considered view exceeds reasonable force, is not excusable and cannot lead to an acquittal as suggested by the defence. I therefore find that under the circumstances of this case, the accused acts of retaliation were out of proportion.

81. The charge of murder under **section 203** of the **Penal Code** requires all of the key integral elements and more specifically that of malice aforethought to be proved beyond reasonable doubt. The established facts from the evidence are not consistent with the existence of malice aforethought. That therefore discharges the accused of the offence of murder contrary to **section 203** of the **Penal Code**.

82. I find that the prosecution has proved the offence of **Manslaughter** contrary to **Section 202** of the **Penal Code** beyond reasonable doubt. I therefore substitute the charge of murder to that of manslaughter as against the accused person under **section 179** of **Criminal Procedure Code**.

83. As a result, I find the accused guilty of manslaughter contrary to **section 202** of the **Penal Code** as punishable under **section 205** of the **Penal Code** and do hereby convict him accordingly under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST, 2019

LESIIT, J

JUDGE