REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 4 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ISMAIL HUSSEIN IBRAHIM..... ACCUSED

JUDGEMENT

Ismael Hussein Ibrahim hereinafter referred as the accused person is facing a charge of murder contrary to Section 203 as read with Section 204 of the penal code. In brief he was stated to have murdered **Benson Baraza** on the night of 20th and 21st August 2015 at **Destiny Bar**, located at **Elpase Ngong** in **Kajiado North Sub-County.**

The accused pleaded not guilty to the charge compelling the prosecution to summon witnesses to discharge the burden of proof beyond reasonable doubt. Accused was represented at the trial by Mr. Njoroge Advocate, while the prosecution was being conducted by the senior prosecution counsel Mr. Akula. The case for the prosecution is set out in detail by the twenty-one witnesses summoned by the state.

The summary of the evidence as captured by the witnesses is set out herein under as follows: **PW1 Carolyne Makau** a waiter at Destiny Bar testified and recounted the events of that night on 20th to 21st August 2015 as she went about discharging her duties from 5.00 pm. In her testimony among the customers who patronized Destiney Bar that material day was the accused person **PW2, Caroline Wambui Njuguna, PW3 Paul Gichuki Gichuki Wanguya**, **PW4 Elijah Kingori Karaba** and **PW5 David Maina Mwangi**. In her explanation all other customers except the accused person were being served with alcoholic drinks.

According to PW1 testimony as the night progressed there was some creating disturbance in the bar involving some of the customers. Angered by the noise it was felt that the victim be ordered out of the bar. PW1 further stated that she went to open the door, only to notice someone directly at the door step whom she could not positively identify because electricity light was not working. She however describes the person as having some Rasta on his head. In PW1 evidence the man did not appear to be of good intentions. She therefore quickly closed the door and retreated back to the bar explaining to the accused and the customers about the situation outside. Later it was time to close the bar when she notified the customers to wind-up in readiness for the 11.30 p.m. time which there will be no more sales. However, PW1 further testified that before they closed the bar. **PW10 Jane Nduku** indicated she wanted to leave for her house. According to PW1 evidence as PW10 opened the door to exit the bar she heard screams followed with gunshots. She estimated this incident to have occurred on or about 1.00 a.m. what followed was everyone in the bar to seek safe haven within the premises. There after according to PW1 police officers from Ngong Police Station came to the premises to launch investigation on the incident.

PW2 Caroline Wambui Njuguna also a waiter at a nearby Ideal Bar next to Destiny told the court that she had been invited by PW4 –Elijah Kingori to join him for a drink at Destiny Bar. According to PW2 she honored the invitation and at about 10.20 pm she left her place of work for Destiny Bar. In the course of the social evening PW2 alluded to a kind of scuffle which erupted involving her, a lady by the name Ann and PW4 – Elijah Kingori. It was in reference to allegations from Ann that PW2 seemed to know pw4 who also happened to be a friend to her. According to PW2, this did not please the owner of the bare PW10 who directed Ann to leave other customers alone by exiting the premises. That is how pw1 left the counter to go and open the door for Ann to leave the bar. PW2 further alleged that PW1 came back in a rush alleging that she had seen someone with Rasta walking towards the bar. It is as this time she heard the accused person calming down the customers fears that he will call for police assistance, but none of them came immediately. On that same night PW2 stated that PW10 Jane Nduku decided to leave the bar to go and see her children. What followed according to PW2 was a gunshot and each one of them seeking safety for their lives. It is only in the morning as the police came PW2 testified that she saw a dead person outside the bar.

In cross examination by Mr. Njoroge for the accused PW1 and PW2 recounted the chronology of events on the material night. The salient features of their testimonies being the earlier opening of the door by PW1 for Ann to leave the bar. Secondly, the fact that PW1 came face to face with a person with Rasta on his head causing her retreat back to the bar terribly scared of her safety and the customers. Thirdly, that the accused person attempts to telephone the police station to send police officer to their rescue. PW1 and PW2 further confirmed that the police never came to the premises until later at 5.00 p.m. PW1 and PW2 also stated that they heard gunshots but could not describe the source at that particular moment.

PW3 Paul Gichuki testified as one of the customers at Destiny bar on the fateful night. According to PW3 in the course of his social evening in company of PW2, PW4 and another lady there was creating disturbance incident. This necessitated PW10 to order for the culprit to be thrown out of the bar. Further PW3 told the court that in obedience to the instructions by PW10, the door of the bar was opened by PW1 to enable Ann exit the bar. While opening the door PW1 came back and gave information that there is somebody outside whom she was very suspicious because of his appearance. As the customers continued to discuss the incident and feeling scared due to the assessment given by PW1. PW10 went out to open the door again after lapse of many hours, what transpired according to PW3 was a struggle at the door between PW10 and the man from outside restraining PW10 not to close it. As the pull and push continued PW3 heard distress screams from PW10 with an order ***Laleni Chini*** followed with gunshot. He was later to wake up in the following day when some police officers visited the scene. PW3 stated that as they left Destiny bar he saw a dead person at the door step of the bar.

In cross examination by the defence counsel Mr. Njoroge PW3 stated that on all that confusion he saw the accused place a call to the police station. PW3 further testified that each one of them was in fear following the presence of a stranger spotted outside the bar. He also confirmed hearing gunshots but did not who was fired at the premises.

PW4 Elijah Kingori testified and confirmed that he was one of the customers at Destiny bar in the night of 20th August, 2015 and 21st August, 2015. PW4 remembered that while in the bar he heard a gunshot which caused him to take through the rear door and jumped over the fence to the other side of the property.

PW5 David Maina also a customer at Destiny bar testified that as they continued having their drinks PW1 informed them that there were robbers outside the bar. However, PW5 told the court that PW10 assured them that with the presence of the accused person there is nothing to fear. At later stage PW5 was to hear gunshots and all he did was to look for a place to hide until the police from Ngong police station arrived. On being cross examined by Mr. Njoroge for the accused PW5 confirmed that the gunshots he heard were from outside the bar. Prior to the gunshots incident PW5 stated before court that pw1 had opened the door only to come back and report that there were robbers outside.

PW6 PC was **Poly Kanana** testified on her role of participating in identifying the body of the deceased to the pathologist while in company of pw8 Benson Sakura on 24th August 2015.

PW7 PC Emmanuel Ekai testified as the Gazetted Scenes of Crime Officer who documented the scene by taking various aspects of the scene. The photographs and the certificate were admitted in evidence as exhibit 1(a) and (b) respectively.

PW9 Sgt Josph Mwangi testified as the armorer in charge of rifles and ammunition at Ngong Administration police camp. He gave evidence regarding the identity of the pistol Ceska serial NO. 89919 loaded with a magazine of 15 rounds of ammunition issued to the accused person on 12th August, 2015. PW9 further confirmed that the said firearm and magazine of 15 rounds of ammunition remain unreturned to the Armory. He positively identified the accused person as the one whom he issued with the Ceska Pistol and the 15 rounds of ammunition. In support of this evidence PW9 produced Arms Movement Register as exhibit 4.

PW10 Jane Nduku testified as the owner of Destiny Bar and the events relating to the night of 20th and 21st August, 2015. According to PW10 she had been called in by pw1 to go and quell a disturbance arising from some of his customers. In the bar PW10 also stated that he saw the accused seated having his drink and at the same time chewing miraa. It was while at the bar she witnessed a confrontation between PW2, PW4 and another lady not before court. This caused PW1 to open the door so that the lady who was causing the disturbance be ejected out of the bar. It is at this juncture PW10 stated that PW1 came back in a hurry that there are some suspicious people outside the bar. According to PW10 on or about 12.00 a.m. she decided also to leave the bar for her house. However before taking that step she called her watchman who secures the facility to check for any suspicious persons outside the premises. The watchman apparently assured PW10 that all was well and she can come out of the bar. It is at this juncture PW10 gave evidence that on opening the door she heard suspicious movements of human beings. On her part in order to array any fears she checked and saw two people. That is when she considered retreating by closing the door.

PW10 pointed out that a person held the door handle from outside making it impossible for her to close it. What followed was an order for them ***Laleni Chini*** which they all obeyed. While on the ground PW10 gave evidence that she heard gunshots. After staying for a while she woke up and left for her house. From these events the police were informed about the incident at Destiny bar. PW10 stated that she was to join them to confirm what had caused all that disturbance. When all these events were unfolding PW10 testified that the accused was with them inside the bar.

On cross examination by Mr. Njoroge for the accused, PW10 reiterated that the one of the two people she saw that night was armed with a long firearm. Further to this PW10 also stated where the two stood there was no light for any positive identification to take place. She however noted that the person in front was wearing a muffin which covered his head. PW10 further testified that when she rose up from the ground she saw the accused call somebody who was not among those in the bar. All along PW10 confirmed to this court they thought the suspicious people who had the first encounter with PW1 were robbers. She believed that they were after committing a robbery at her bar. Pw 10 stated that she was later to be called by the police to record a statement

PW11 CPL. Muthengi gave evidence as to how on the material day of 20th August, 2015, they booked themselves out of Ngong Police Station for patrol duties within the township. According to PW11 the patrol team comprised of the deceased CPL Barasa as the team leader, PC Maranga who testified as PW18, PC Thomas Mwamba referred as PW19, PW13 PC Jonathan Kamau. According to PW11 they all moved to execute the patrol assignment while armed with firearms duly issued by the armourer. In addition, PW11 testified that they all managed to dress in police uniform which description he gave as Jungle Jacket, Hood, Blue trouser, save that CPL Barasa, the deceased on top of all these had a heavy jacket and a muffin on his head. In his evidence PW11 told this court that the patrol on foot proceeded with combing through various locations within the town. PW10 however described the events between 1.00 and 1.30 a.m. as the ones which led to the death of the deceased. This specific time involved a patrol between veterinary areas and Elpaso. As they continued with their duties PW11 told the court that their attention was drawn to some commotion and disturbance at Destiny bar. He describes the impression made as of some people involved in a fight.

In the testimony of PW11 they were convinced that the people inside the bare were under treat as to their safety therefore needed to be rescued. PW11 further stated that they reached a decision that they approach the near side of the bar to confirm the source of the noise and commotion. While at the door PW11explains that he could only hear the people inside conversing in Kikuyu language which he is not well versed with. According to PW11 they took positions next to the entrance of the bar door lining up in a queue being led by CPL Barasa who knocked to draw the attention of the occupants. In a short while PW11 gave further evidence that he heard gunshots and they all scattered to various locations for safety. That he was later to trace PW18 at carry one petrol station and the deceased was lying dead at the entrance door to the bar.

According to PW11 the incident set in motion the police action of visiting the scene and commencing investigations to establish culpability. In PW11 testimony this involved arrival at the scene by a team of police officers led by Sgt Ngumbao, documentation, evaluation of the scene and collecting the body of the deceased.

In cross examination by Mr. Njoroge for the accused PW11 denied that any of the persons inside the bar mad any attempt to venture outside of Destiny bar that particular night. He further confirmed that they were on official patrol duties lawfully armed with firearms and in full uniform. Further PW11 also stated that the approach taken of lining up in a line at the scene was meant to ensure their safety and also to verify the nature of the commotion inside the bar. When the court visited the scene PW11 managed to demonstrate their positioning and physical environment of the murder scene.

PW12 Philemon Mboya Awino was summoned by the prosecution as the county commander of Administration Police within Kajiado County. According to PW12 he had firm instructions from his superiors to visit the scene of the murder where the accused person was a suspect and prepare a brief for further action. It was PW12 testimony that he did visit the scene and collected information which formed the basis of the indictment of the accused person.

PW13 PC Jonathan Kamau testified that on the day of the incident he was on patrol duties with PW11, PW18 and PW19 within Ngong area Township. His evidence is therefore substantially in line with that of PW11 in supporting the allegations that the accused person was the one who inflicted the fatal injuries against the deceased. The other highlights of PW13 testimony is in connection to the series of events which occurred after the deceased was shot at Destiny Bar. This essentially was about the report made to the Officer Commanding Station visiting the scene collecting the body of the deceased and escorting it to the mortuary. PW13 as one of the key actors of this incident recorded a statement which formed the basis of his evidence.

PW14 IP Godfrey Gachoya attached to Kajiado Administration police testified as to his role of receiving the subject Ceska Pistol and a magazine with 13 rounds of ammunition. During the same period he also handed over the exhibits together with the accused to DCI Kajiado for further investigation.

PW15 Senior Sargent Ngumbao testified as in- charge armoury at Ngong police station. According to PW15 evidence on 20th August, 2015 he issued the deceased with a Ceska Pistol and a Magazine with 13 rounds of ammunitions. In the same requisition PW11 CPL Muthengi was issued with a Yeriko firearm with 15 rounds of ammunitions, PC Nyongesa was issued with an AK 47 with 30 rounds of ammunitions, **CPL Mwamba PW19** with an AK 47 with 30 rounds of aminations and **PW18 PC Maraga Nyakiramba** 30 rounds of ammunitions. In support of this PW15 produced an arms movement register as exhibit 8 containing specific entries from No. 116 – 138 of the primary register confirming that the above police officer where issued with respective firearms and ammunitions.

PW16 IP Reuben Bett a trained firearm examiner gave evidence in respect of the Ceska Pistol F9919, 13 rounds of ammunition and the cartridges recovered at the scene upon request from the investigating officer pw 21. PW16 gave evidence on behalf his fellow ballistic examiner one Alex Chirchir who was not readily not available during the course of this trial. The witness having satisfied the criteria under Section 77 of the Evidence Act was allowed to adduce evidence on the issue to do with firearm and ammunitions subject matter of this trial. In his testimony PW16 confirmed that the on an examination carried by Alex Chirchir the ceska pistol and round of ammunition were found to be in good working condition and capable of being fired. PW16 further concluded from the report that the cartridges revealed sufficient matching striations, Breech face, Ejector and firing pin markings which enabled him to form the opinion that the fired bullet and the two expended cartridge cases were fired in the ceska pistol F9919.

PW 17 CPL Hassan Dima testified as the superior officer to the accused person. In his evidence PW17 gave an explanation regarding the conversation he had with the accused on a shoot-out that occurred at Destiney bar on the night of 20th and 21st, August 2015. According to PW17 he mobilized other police offices from the camp to visit the scene and gather more information on the incident. PW17 further stated that he saw the victim of the shootout CPL Barasa leaning next to a wall leading to the entrance of the bar. PW17 testified that he decided to bring the matter to the attention of his superiors. According to pw 17 what followed was the arrest of the accused person.

PW18 PC Maranga Nyakiramba testified as one of the officers on patrol in company of CPL Muthengi PW11, PW13 PC Jonathan Kamau and PW 19 PC Thomas Mwamba. In his testimony he alluded to the events of the material night which was substantially similar with that of PW11, PW13 and PW19. The gist of his evidence is that he was one of the victim of the gunshots besides CPL Barasa the deceased. PW18 deposed in his evidence that when he was shot at in the same night he sought refuge and safety at Carry One Petrol Station which is a few meters from the scene. PW18 highlighted that though armed with an AK 47 he never got a chance to use his firearm on the material day. According to PW18 he was later to be rescued by other police officers who escorted him to the hospital to seek medical treatment.

PW19 PC Thomas Mwamba testified and admitted being part of the team assigned patrol duties on the night of 20th and 21st August, 2015 together with PW11, PW13 and PW18. He further told the court that after arriving at Destiny Bar they planned with his fellow police officers to approach the premises as they were hearing some kind of disturbance. PW19 testified that as they planned to approach the premises they were shot at from the inside. PW19 further alluded to the knock at the door by CPL Barasa the deceased to draw the attention of the occupants to open for them. What followed in PW19 evidence was a gunshot forcing him to take cover. He was later to confirm that PW18 was injured while CPL Barasa sustained fatal injuries.

PW20 CPL Titus Munialo a police detective attached to DCI Kajiado initially conducted investigations of this offence against the accused.

He further testified as having arrested the accused and taking possession of the relevant exhibits being the Ceska Pistol and 13 rounds of ammunition which were admitted as exhibit 5 (a) and (b). by PW21.

PW21 S/SGT James Mwaura who testified as the lead investigator made reference to the various roles he played to put together a water tight case against the accused person. In support of his testimony he placed before court exhibits which included: a post mortem report, one bullet head, two spent cartridges, test-fired bullet heads, ten live rounds of ammunition, armed movement register, one magazine, one ceska pistol F9919, sketch map, exhibit memo form, and mental assessment examination report as evidence for the prosecution against the accused person.

At the close of the prosecution case the accused person was placed on his defence. He admitted that during the period in question he was attached as a police driver at Ngong Administration Police Camp. The accused initial evidence was mainly on how he spent the early hours of the day on 20th August 2015 before he proceeded to Destiny Bar on or about 8.30 p.m. In the bar the accused had an early meeting with his uncle Abdi Galgalo but the rest of the time he spent chewing miraa and having some soft drinks while seated at a corner of the bar facing directly the entrance of the bar.

According to the accused he continued being in the bar until 11.00 p.m. when PW1 notified them of closing time there were therefore required to wind up their social evening. In the accused testimony he referred to an incident of a creating disturbance that involved PW2, another lady identified in this proceedings as Ann and PW4. In his evidence the management resolved to have Ann leave the bar and this prompted PW1 to open the door so that she could leave the premises. In his further evidence as PW1opened the door she alleged to have noticed a strange person directly at the entrance who appeared armed and also wearing Rasta. In a rush the accused stated that PW1 retreated back to the bar and cautioned them that there was a suspicious person outside whom in her assessment was up to no good intentions. This however did not solicit any serious reaction from any of the customers or the accused person. In addition the accused told the court that each one of them continued to have their drinks as normal as they waited the closing time. The accused makes reference in his defence to the second incident involving PW10 Jane Nduku who had made a decision that despite the earlier fears by PW1 on the suspicious person seen outside she wanted to leave for her house at about 12.00 a.m. As he noticed PW10 and the other customers struggling on the issue of their safety he decided to telephone Chief Inspector Ngambo of Ngong Police Station to seek police assistance. He however told this court that he was referred to convey any help to CPL Hassan Dima who testified as PW17. According to the accused evidence though cautioning PW10 not to leave, she nevertheless opened the door and that is when she retreated back screaming that they were under attack. That at the same time accused alludes to have heard someone cocking a firearm followed with an order of ***Laleni Chini***. It is at that juncture that he took out his gun and shot towards the direction of the entrance to the bar. He denied the offence of murder as alleged by the prosecution witnesses.

Submissions by Mr. Njoroge on behalf of the accused:

Mr. Njoroge submitted that in the facts of this case the accused person should be availed the defence of self and defence of other person or property. Mr. Njoroge further submitted that the act by the accused to take out his pistol and shoot outside has a correlation with the scope of preventing an attack to self and other customers and also to protect PW10 property. Mr. Njoroge contended that in the circumstances of this case the accused used what can be said to be reasonable force. Mr. Njoroge invited the court to appraise the chronology of events as stated by PW11, PW13, PW18 and PW19 who signed out for patrol duties within Ngong Township. Mr. Njoroge took issue with the police officers conduct to wit PW11, PW13, PW18 and PW19 as they approached the scene on the fateful night. Mr. Njoroge made reference to the first incident while PW1 Carolyne retreated from the door on noticing a man with Rasta in possession with long item pointed towards the entrance. Secondly, Mr. Njoroge recited the incident involving PW10, Jane Nduku who wanted to leave the bar at about 12.30 to 1.00 a.m. it was Mr. Njoroge's contention that there was a presumption that it was this same people seen by PW1 who were still at the entrance of the bar.

Mr. Njoroge further contended and submitted that from the facts of this case and the evidence, there was no malice aforethought in the commission of the crime. There is not even a suggestion that the appellant possessed any motive or intention to commit the murder against his fellow police officer. In Mr. Njoroge's arguments the accused did take part in the shooting when PW1 nor when pw10 opened the door and raised the alarm that they were under attack from people seen armed and outside the bar. Mr. Njoroge gave several incidents which could have caused the accused to use force at that particular night.

Mr. Njoroge further retorted that the alleged inconsistences and contradictious from the extracts of PW11, PW13 PW18 and PW19 are of such a nature that it leaves doubt to the prosecution case which should be resolved in favour of the accused person. In so far as the testimony of PW13 was PW18 and PW19 Mr. Njoroge buttressed his submissions by referring to judicial proceedings in Criminal case No. 1583 of 2015 at Kibera Court. The gist of inconsistences by the same witness who were also summoned to this trial argued Mr. Njoroge are substantially at variance and yet they refer to the same incident.

Mr. Njoroge further submitted that the prosecution evidence did not establish mensrea or the intention to cause death or grievous harm against the deceased. Secondly, Mr. Njoroge submitted that the alleged self defence and defence to property of a third party was not controverted by the prosecution. Thus Mr. Njoroge urged this court to extend the protection of the law under Section 17 of the penal code to the accused person. Learned counsel in support of his submissions cited and placed reliance on the following cases, ***Mungai v Republic 1984 eKLR Beckford v Republic ALL ER 1987, Ahmed Mohamed Omar & 3 Others v Republic Cr. Appeal No. 414 of 2012, 2014 eKLR.***

Mr. Njoroge while armed with these principles submitted on the elements of the lawful act and malice aforethought as having not been proved beyond reasonable doubt. Mr. Njoroge therefore urged this court to acquit the accused person of the offence of murder contrary to section 203 of the penal code.

Mr. Akula submissions on behalf of the state

Replying to Mr. Njoroge submissions Mr. Akula for the state submitted that the prosecution has discharged the burden of proof beyond reasonable doubt. Mr. Akula argued and submitted that the evidence by PW1- PW21 is watertight and places the accused person at the scene of the crime. Mr. Akula contended and pointed out that the Ceska pistol in possession of the accused was confirmed by the ballistic expert to

have been in good working condition and capable of firing. On the evidence of PW11, PW13 and PW19 Mr. Akula submitted that the police officers though armed with firearms never discharged or fired at the patrons or the accused. Mr. Akula submitted that there is no evidence that there was any imminent danger to self or property to necessitate the accused to have used his firearm. Further Mr. Akula pointed to this court that this attack was focused and aimed at the deceased to conclusively hold the accused culpable. Mr. Akula relying on the following cited cases: ***Republic v Andrew Omwenga 2009 eKLR, Anthony Njue-Njeri v Republic 2006 eKLR., James Masomo Mbatha v Republic 2015 eKLR, Republic v Godrey Ngotho Mutiso 2008 eKLR***, urged that the court finds the charge murder against the accused to have been proved beyond reasonable doubt to enable a verdict of guilty and a conviction to be entered accordingly.

Analysis and Determination

This was quite an exceptional trial in the sense of the facts of the case and how the incident occurred and life was lost. Besides establishing whether the prosecution discharged the burden of proof beyond reasonable doubt this case requires the court to analyze the meaning between the elements of malice aforethought with that of self- defence.

At this stage it is incumbent upon this court to evaluate the evidence in its entirety and determine whether it measured up to the standard of proof of beyond reasonable doubt.

Standard of Proof

> In Kenya the doctrine on Criminal justice is that an accused person under Article 50 (2) (a) of the constitution has the presumption of innocence in his favour guaranteed in the bill of rights unless the contrary is proved by the state beyond reasonable doubt. That burden of proof is well settled that it's the state that bears the responsibility at all times. The well-established jurisprudence on this doctrine that the deceased guilt rests on the prosecution to proof the charge beyond reasonable doubt can be traced way back to the cases of **Woolmington Versus DPP 1935 A C 462 and also Miller Versus Minister of Pensions 1942 A C**. Whereas in the latter case Lord Denning stated on this phrase of beyond reasonable doubt as follows: ***"It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***
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> Further in the superior court within the common law jurisdiction Lord **Oputa of the Supreme Court of Nigeria in the case of Bakare Versus State 1985 2NWLR** adopted the statement as follows at page 465: ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".***

To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of **United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring)** the court stated:

> ***"The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."***

Therefore, whether one is referring to the English Criminal Law or the American Criminal Justice System the prosecution has the duty to proof all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to proof his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution. It is not in dispute that our Criminal Law jurisprudence is based on this definition as articulated by the above decisions.

The relevant question to be answered in this case is whether the evidence from the twenty-one (21) witnesses is sufficient to establish the guilty of the accused person beyond reasonable doubt. It is also a general principal of law that an accused person to a crime may not be solely be convicted in his confession unless on an unequivocal plea of guilty. The reasonable doubt standard is part of the component of our criminal justice system in both subordinate and superior courts. Though the analogy is not exact to the right to presumption of innocence of every accused person under Article 50 2(a) of the constitution does manifest the doctrine of a finding of guilty beyond reasonable doubt. In an effort to buttress the beyond reasonable doubt formulae the article entrenches thematic rights as a solid anchorage in the adjudicative process of the court.

If one perceives a trial as a battle field between the state and the accused in criminal cases under Article 50 of the constitution the thematic methodical provisions of the respective rights under the umbrella of the right to a fair hearing is to insulate the standard of proof beyond reasonable doubt.

What therefore the prosecution must discharge by the phrase beyond reasonable doubt as stated in the three decisions is evidence which satisfies the court on the truth of the facts in dispute exclusion of any reasonable suspicion. On the other hand, the doctrine is not measured on absolute mathematical precision.

This is the standard of proof I will hold the prosecution to as emphasized in section 107 (1) of the "***Evidence Act that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of facts, which one asserts must prove those facts exist***".

The accused in this case was charged with the offence of murder contrary to section 203 of the penal code which defines murder as the unlawful killing of a person or persons with malice aforethought.

In the case of **Republic Versus Andrew Omwenga 2009 EKLR** the court held: ***"It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b)That the accused committed the unlawful act which caused the death of the deceased and (c)That the accused had the malice aforethought".***

This court has therefore to analyze the evidence in light of these essential elements required to be proved by the state against the accused person. In this endeavor the above ingredients will be in issue and in making a determination of this case I will deal with each singular ingredient as follows:

(1) Death of the deceased

The death of CPL Barasa on the night of 20/21 – August 2015 is not disputed in this particular case. This is because the prosecution presented evidence of PW6 – PC Polly Kanana, PW8 Ben Chasari Sakura who identified the deceased body to Dr. Ndegwa at Chiromo Mortuary on 24/8/2015. The post mortem report was admitted as exhibit 2 in support of prosecution case. In the said autopsy report Dr. Ndegwa examined and identified the deceased injuries and formed an opinion that the deceased's death was due to a single gun-shot injury to the head. PW7 PC Emmanuel Ekai a scenes of crime officer who documented the scene by way of photographs positively identified the victim to be the deceased CPL Barasa. It is also the evidence of PW11 – CPL Murungi, PW13 PC Kamau, PW18 PC Maranga and PW 19 PC Mwamba that they were in company of the deceased on patrol duties when he was shot and died instantly. The accused person also does not dispute the death of the deceased. Having so found I am satisfied that the cause of death is hereby proved beyond reasonable doubt by way of medical and circumstantial evidence.

(b) The second ingredient is whether the death of the deceased was unlawfully caused:

Under Article 26 (1) of the constitution, ***"Every person has the right to life. It is also stated in subsection (3) that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law."***

It is vital to note that from these provisions not all homicides are unlawful. As the principle in the case of **Republic Versus Guzambizi S/o Wesonga 1948 15EACA 65** articulates Death is excusable by law in circumstances of reasonable defence to self, property, as a result of accident or misadventure or in protection of life or property of a third party.

In proving the cause of death section 213 of the penal code provides acts and circumstances which an inference as to death can be inferred by way of evidence to prove the cause of death. This was the holding in the case of **Republic Versus Smith 1959 2ALLER 193** where the court held interalia that: ***"If the victim's death is traceable to the injury inflicted by the accused it will avail him nothing to show that the deceased's death might have been prevented by proper care or treatment".*** That is why in our courts it is firmly established that proof of death and cause is by way of medical or circumstantial evidence. (***See Benson Ngunyi Ndundu Versus Republic CACRA No. 171 of 1984).***

According to PW11 – CPL Muthengi, PW13 PC Kamau, PW18 PC Maranga and PW19 PC Mwamba on the night of 20th to 21st August 2015 in company of the deceased they had all been assigned patrol duties within Ngong Township. In each of their testimony the witnesses who happen to be police officers attached to Ngong police station stated that Destiny Bar was one of the premises they visited during the patrol duties. It was at that particular moment on or about 12.30 to 1.00 a.m. they attempted to access the bar when a bullet was discharged killing the deceased and at the same time injuring PW18 PC Maranga.

From the post mortem report by Dr. Ndegwa it is clear that the deceased suffered a single gunshot wound to the head and the cause of death attributed to severe intracranial cerebral injury. The ballistic expert report availed by IP Reuben Bett identified a ceska pistol serial No. 9919 as having been in good general and mechanical condition and capable of being used as a firearm under the Firearms Act. After conducting test firing examination exercise with the ceska pistol and samples picked at random from the thirteen rounds of ammunition. PW16 confirmed that both of them were in good working condition. He further stated that he examined by way of comparative miscropic examination of the exhibits ammunitions marked C and D1, D2 in conjunction with the three bullets and cartridges fired in exhibit A – Ceska pistol it revealed sufficient matching striations. From the foregoing circumstances PW16 formulated the opinion that the one fired bullet in caliber 9mm and the two expended cartridges cases were fired in the ceska pistol to S/No. F9919.

I have weighed the evidence by the prosecution witnesses and I am satisfied that the deceased died through an unlawful act capable of causing physical injury leading to his death. That to me by itself was an inherently dangerous act fraught with a risk of serious harm to some other person.

(a) With regard to the third element the prosecution has a duty to prove malice aforethought on the part of the accused.

What is malice aforethought? Malice aforethought describes the mensrea or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter. In our laws Section 206 of the penal code provides for circumstances which if manifested in any particular case malice aforethought is deemed to be established: **(a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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 fight or escape from custody of any person who has committed or attempted to commit a felony".

It is instructive to observe that in injecting live to these provisions courts have firmly considered the question of malice aforethought in various cases. I am alive to the fact that courts have asserted themselves on this issue but still they exist no coherent principles of precisely applying it in different cases and circumstances. The definition of malice aforethought as currently prescribed in section 206 of the penal code all together is also incoherent. I hold the view that sometimes difficulties arise in applying it particularly on borderline cases. To meet the approach may be parliament has to amend the law and even remove it all together to create a new definition for the offence of murder. However, the law as it stands it is still good law but with a bit of reform it will even be made better.

The formulation of the law in **Rex Versus Tubere S/O Ochen 1945 12EACA 63** laid down the guidelines for trial Judges where the court held that: ***"To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident".***

The English Courts while grappling with the same issue stated as follows in the case of ***Cunliffe v Goodman 1950 1 ALL ER* 724 Asquith L.J** in regard to the definition of intention in homicide offences: "***An intention, to my mind, connotes a state of affairs which the party intending does more than merely contemplate, it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition"***

This to me seems to be the right approach when it comes to manifestation of malice aforethought as defined under section 206 (a) and (b) of the penal code. Where the circumstances of the case demonstrate that in carrying out the unlawful act the accused acted with full knowledge that the act was highly capable of causing death or grievous harm malice aforethought should be inferred. In reference to ***R. v Moloney*** case two questions arise to be answered in the concept of intention and malice aforethought.

(a) Was death or very serious injury a natural consequences of the defendant voluntary act?

(b) Did the defendant foresee that the consequence of being a natural consequence of his act?

An offence like murder can be established by evidence tendered by the prosecution either directly or indirectly from which a reasonable tribunal or court can draw the inference that murder has been committed with malice aforethought. As was said in the case of Boughey case cited by the Australian Court while interpreting the provisions of Sections 302(1) and (2) of the Queensland state code which seem to have similar provisions with our section 203 of the penal code the court dealt with the question of intention and knowledge on the part of the defendant and held as follows: "***The jury must be persuaded on the criminal onus in the context of a murder trial, that the established circumstances were such that the particular accused, with the knowledge and capacity which he or she actually possessed, ought to have thought about the likely consequences of his or her action. They must also be persuaded, again on that onus and in the context of such a trial, that if the particular accused had stopped to think to the extent that he had to have the result would as a matter of fact have been that he or she would have known or appreciated that the relevant act or acts were likely to cause death."***

If this threshold view is correct then similarly and substantially in our jurisdiction and the circumstances as defined in section 206 of our code malice aforethought can be deemed to be manifested in a situation presented by the principles of this case.

In recent cases decided by our courts certain key principles have been clearly articulated to describe what it takes for an offender be held culpable for the offence of murder. In the cases of ***Ernest Asami Bwire Abang Alias Onyango Versus republic Ndumbe CACKA No. 32 of 1990 Karani and three others Versus Republic 1991 KLR 622, Republic Versus Godfrey Ngotho Mutiso 2008 ELR James Masomo Mbacha Versus republic 2015 eKLR*** the courts have sufficiently inferred malice aforethought from the nature and type of weapon used and really multiple severe bodily injuries to the victim.

It is well settled in law that the state duty under section 206 of the penal code is to prove one or a combination of the existence of the above circumstances to infer malice aforethought **(Republic Versus Daniel Onyango Omoyo [2015] eKLR).**

I note that the state must prove intent to kill or cause grievous harm contrary to section 206(a) and (b) of the penal code and in addition malice aforethought to obtain a conviction for the offence of murder.

It's the task of this court to establish whether the prosecution discharged the burden of proof beyond reasonable doubt on this ingredient. At the center of it is whether the evidence displayed by the prosecution witnesses is either direct or indirect intent for this court to conclude that the accused had malice aforethought.

On this ingredient the inquiry is to establish whether the accused purpose in pulling the trigger was to kill or cause grievous bodily harm to the deceased. In answer to this question I borrow a leaf from the passage by **Lord Zeups in Republic Versus Moloney 1986 3ALLER** who observed as follows:

> ***"The issue for the jury was a short and simple one. If they were for sure that at the moment of pulling the trigger which discharged the live cartridge, the appellant realized that the gun was pointing straight at his step father's head. They were bound to convict him of murder. If on the other hand they thought it ought to be true that in the appellant's drunken condition and in the further of this ridiculous challenge, it never entered the appellant's head when he pulled the trigger that the gun was pointing at his step-father; he should be acquitted of murder and convicted of manslaughter ".***

These are the principles that will be applicable in this case. Mr. Njoroge for the accused submitted that entire evidence led by the prosecution fell short of the threshold to prove intention to kill or cause grievous harm by the accused. In the context of Mr. Njoroge submissions the testimonies of PW1 Carol, PW4 Elijah Kingori and PW10 – Jane Nduda indicate that on the fateful night there were intruders outside the premises who did not positively identify themselves.

According to Mr. Njoroge the second attempt of these intruders was at 12.30am when PW10 the owner of the bar wanted to leave the bar for her house. Learned counsel referring to her testimony contended that it was at that moment PW10 opened the door and coming face to face with the strange men outside followed with screams that triggered the sequence of events. This was followed with an order – in Swahili *laleni chini* accompanied with corking of the gun. From the testimony of PW10 counsel argued that the deceased struggled with the door which PW10 had opened to get out to followed with an order of *laleni chini* and cocking of the gun avails the accused the defence of self and defence of others.

Mr. Akula for the state submitted that the actions by the accused can only be deemed to be falling within the scope of malice aforethought. Mr. Akula invited the court to the state evidence on firing of the gun which directly hit the deceased on the head to demonstrate intention to unlawfully cause death.

In my view, applying the guiding principles in the cited authorities on malice aforethought and the provisions of section 206 of the penal code the prosecution must discharge the burden of proof that the accused unlawful act was done with the sole intention to kill the deceased or to inflict grievous harm.

I have reviewed the prosecution evidence on this ingredient and it reveals the following: PW1 Carol was the first one to notice some people outside the bar at on or about 11.00pm. her information to PW10 and the customers included the accused did not yield any retaliation. The second incident was about 12am involving PW10 who on exiting the bar was confronted by this armed strange person who could not be easily identifiable. It is on record that the accused allegedly telephoned PW17 CPL Hassan Dima to send some police officers to the rescue to verify the kind of people camping outside the bar. This request however was not acted upon by PW17.

According to PW1, PW2, PW3, PW4, PW5 and PW10 evidence in their evidence they were customers at Destiny Bar between 8pm-12.30pm. the witnesses confirmed that from PW1 testimony they did believe that from 11.00pm there were robbers outside the bar. However, they did not give much thought to it until 12.00am when PW10 raised an alarm and an order of *laleni chini.* PW9 confirmed that he had lawfully issued the ceska pistol F9919 with 15 rounds of ammunition to the accused who is attached to Administration police camp at Ngong. The prosecution failed to adduce evidence that the accused was purposely present at the scene and his unlawful act before, during and after the commission of the offence is sufficient to infer malice aforethought. In particular, its accepted from the evidence of PW1 and PW10 that these alleged persons had approached the premises of Destiny Bar since 11.00pm.

In analyzing the evidence in totality, submissions by counsels, I am satisfied that prosecution has failed to prove malice aforethought on the part of the accused beyond reasonable doubt. Based on the assessment of the evidence and the case cited the offence of murder contrary to section 203 of the penal code. I think the accused fired the gun while exercising his legal right as a police officer to prevent the commission of a felony at Destiny Bar and the means he used was that one of a weapon which was in his possession at the time of the incident. The best he could be guilty f would be the offence of manslaughter contrary to section 202 of the penal code.

I think the view I take of this case and from the observations made from the totality of the evidence fits in the proposition and formulation of the principle in the case of the People **A. G. Versus DWYER 1972 IR 416** provides good authority as illustrated in the following decision. **"When the evidence discloses a question of self defence and where it is sought by the prosecution to show that the accused used excessive force, that is to say more than will be regarded as objectively reasonable, the prosecution must establish that the accused knew that he was using more force that he was reasonably necessary. Therefore, it follows, if the accused honestly believed that the force that he did use was necessarily, then he is not guilty of murder. The onus of course is upon the prosecution to prove beyond reasonable doubt that he knew that the force was excessive or that he did not believe that it was necessary. If the prosecution does not do so it has failed to establish the necessary malice."**

The central precise question in the present case is whether self-defense and defence of third party or protection of felony would be availed to the accused person?

The pertinent issues to be settled would whether anyone in the accused position will perceive the same danger and act the same way as the accused? Was there imminent great danger following the events that have been described by both the prosecution and the accused person's defence. After perceiving danger did the accused use excessive force to avert the danger.

The law on self defence Section 17 of the penal code provides that "***Subject to any express provisions in this code or any other hand 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."***

In applying section 17 of this code to the facts of this case can the accused be said to have acted in defence of self or another person or in protection of property on the night of 20th and 21st August 2015. The test in our law as enacted in section 17 of the penal code and interpreted in various court decisions is both objective on one hand and subjective on the other hand. In essence, section 17 does not prevent an accused person from relying on self defence where he believes that someone approaching him is armed with a dangerous weapon, but it turns out that in reality he did not have any such kind of weapon, but in that mistaken believe if he acts in self defence he can rely on the doctrine.

I take cognizance of the facts in this case that the deceased and his colleagues PW11, PW13, PW18 and PW19 were stated to be on duty when the shoot-out took place on the night of 20th and 21st August 2015. The witnesses who survived the incident were each able to give a graphic detail on the events of that particular night. It is obvious that their patrol duties while armed with firearms was to be in conformity with the provisions in section 61 of the National Police Service which provides:

> ***"They should perform their functions or exercise their power to through non-violence means. However, a police officer can use firearms according to the rules on the use of firearms contacted in the schedule six of the Act. Part B of the sixth schedule contains of guidelines on the use of firearms for two main purposes.***
>
> **(a) To save or protect the life of the officer or another person.**
>
> **(b) And to defend themselves or another person against impending threat of life or serious injury when an officer intends to use a firearm, they should identity themselves and give clear warning of their intention to use the firearms. They should also provide sufficient time for the accused to observe the warning except where doing so would place the officer or other person at risk of death or serious harm or if it would clearly in appropriate or pointless in the circumstances."**

In the instant case I am alive to the fact that PW11, PW13, PW18 PW19 and the deceased never used their firearms. However, there is credible evidence from PW1 and PW10 that from the onset by the nature of their clothing and on what he had in his possession there was strong suspicion of them being armed. According to the testimony of PW1 and PW10 in their contact with the suspicious persons they did not provide sufficient caution or warning that they were police officers on duty.

It is now convenient to turn into the various cases within which the principles on self defence and in relation to the necessity of the use of force as stated in section 17 of the penal code. The celebrated landmark case by the **Privy Council Palmer v. Republic 1971 1 ALL ER** lays the foundation of our jurisprudence in this respect as can be seen from this passage:

> ***"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but he may only do, what is reasonably necessary. If there has been an attack so that the defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety, the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that will be most potent evidence that only reasonable defensive action has been taken. But everything will depend on the on the particular facts and circumstances it may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serous and dangerous others may not be".***

The quote from the **Learned Authors Card, Cross, Jones 2008 Criminal Law Oxford University Press 18 Edition page 283** stated that "***If the accused acts under a mistaken belief that there was conduct amounting to provocation, he is justified on the facts as he believed there to be regardless of whether his mistake was reasonable or not"***

According to the Privy Council, in the case of **Shaw V Republic 1952 HCA CLR 356** both issues are answered on the basis not only on the circumstances as the accused believed them to be but also the danger as he believed it to be. This is even if his belief as to be those facts was a mistaken one and if so even if his mistake was reasonable one.

The English Court also in the case of ***Beck Ford v Republic 1987 3 ALL ER*** stated as below:

> "***A man who is attacked in circumstances where he reasonably believes his life to be in danger or that is in danger of serious bodily harm may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assassinate he is not guilty of any crime even if the killing is intentional."***

The above common law principles have been applied locally in several decisions as supported in cases of: ***Ahmed Muhammud Omar & 5 Others v. Republic Cr. Appeal No. 414 of 2014*** where the court held: "***That test for self defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed them to be"*** The use of force used in self defence ought to be proportional to the imminent danger and harm it could cause on a person. As was stated by the court in ***Jane Koitee Jackson v. Republic 2014 CR. Appeal No. 146 of 2009,*** where self defence has a limitation it must be shown that there was no malice on the part of the accused in committing the acts causing death or bodily harm. The appellate court considered the gravity of the injuries occasioned to the complainant and held that acts done in self defence should not be vicious. Another consideration in the use of force in self defence is that, at the time of response to danger the accused person had not critically assessed the effect of the force used in protecting himself from danger provided that the accused does not exhibit malicious intent, it is presumed that the grievous consequences of his /her acts were secondary. The Court in ***Republic v. Joseph Kibet 2010 eKLR*** took their position by stating that "***The issue of what the force used must result is not material" (See the dictum in Robert Kinuthia Mungai V Republic 1982-88 KLR 611)***

Now back to the facts of the case. Did the accused have any reason to perceive any danger. Bearing in mind all the circumstances that existed proven by the evidence, the prevailing conditions that the accused found himself, was he justified to use a firearm, I would adopt the test laid down in the case of ***"Republic V. Joseph Chege Njora 2007 EKLR*** where the court of Appeal said:

"***A killing of a person and excusable where the accused action which causes the death was in the source of overtaking a felonious attack and no more force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger parcel arising from a sudden and serious attack by his victim it must also be shown that reasonable force was used to avert or forestall the attack"***

There are several reasons underlying this jurisprudential approach as can be assessed from the following elements of self defence in our law:

(a)That the accused must have had reasonable ground to believe that there was apparent imminent or immediate danger of death or immediate danger of death or serious bodily harm from his attacker,

(b) The accused must have in fact a reasonable belief that his life is in danger or a third person or his property or other person's property,

(c) He must not be the person who triggered the conflict or the assault,

(d) The use of force must have been reasonable and not excessive

From the above decisions the following evidential issues are relevant which the prosecution has the burden to negate that the accused in using force had no honest and reasonable belief that he was under threat of bodily injury from his attackers. That though the attack was imminent he had an opportunity to retreat. Further, the use of force was disproportionate to the imminent or immediate danger from the assailant. That the use of reasonable force was not for the sole objective to protect self and some other person. What were the threats that operated on the accused's mind before he pulled the trigger? In the case of **Walsh Versus Republic 1991 A Criminal R 423-424** he directed the jury on what to take into account on this respect to include: ***"The surrounding circumstances (place, darkness, relative size of the attackers), the defendant, prior knowledge about the deceased, that he was a man with some military experience, the defendant's personal experiences, which make him more susceptible to fear the consequences and more likely to perceive a necessity for immediate and drastic action."***

I must briefly deal with the shootout by the accused. From the testimony of PW1 and PW10 the accused person who worked as an Administration Police Officer was well-known to them as an officer working with the security agency. The view of the knowledge accused associated with the owner of the bar, employees and customers at Destiny Bar. The murder weapon in possession of the accused person on the fateful night was allegedly issued to him in the normal course of business.

PW1 stated that he notified the customers including the accused person that they finish up their drinks as the bar would close at 11.30pm. It is also on record that a quarrel had occurred earlier between PW2, another lady not before court, and PW4. This necessitated PW1 to open the door and force out one Ann from the bar. That was the moment he came into contact with a suspicious person whom he described as wearing Rasta and in a possession of a long item. She formed in her mind that he was armed with dangerous weapons most probably a firearm. PW1 on retreat to the bar only informed the customers including the accused of the apparent security and safety risk outside the bar. It is on record from PW1, PW2, PW3, PW4 and PW5 that the accused made an attempt to reach out to the OCS for help who in turn directed him to speak to the officer on duty who testified as PW17.

There is further evidence from **PW17 Hassein Dima** that indeed the accused reported the incident and sought help but was not able to make immediate arrangements. The second time at about 12.00 a.m. PW10 decides to leave the bar for her house. Before stepping out she calls her watchman to check the security outside and in response he assures PW10 all is well. According to pw10 she steps out of the bar only to be confronted by a person who was armed with some weapon like a rifle. This caused fear in her and immediately retreats back to the bar.

Further to PW10 evidence fearing for her life she screamed uttering words that they were under attack and this was followed by an order of ***laleni chini.*** PW10 and other customers sought for safety within the premises as gun shots rent the air from a source not clear to them.

Going by the above series of events, anybody in the position of the accused would reasonably have perceived danger to himself and in a possibility of a commission of a felony and probable of bodily injury to PW1, PW2, PW3 PW4, PW5 and PW10. The reasonableness of the accused fear may have arisen from the initial information given by PW1 and the second situation when PW10 screamed that they were under attack and the accused heard movements of people accompanied with corking of a firearm. In my view, when PW10 retreated back screaming raising an alarm as to their safety and order of ***laleni chini*** was in fact a real and imminent danger.

It is not in dispute from the testimony by PW11, PW13, PW18 and PW19 that they approached the entrance of Destiny Bar and kept vigil for a while before they made a move to knock in order to gain entry. It is not clear from their testimony why it took them so long from the moment PW1 seems to have noticed their presence outside the bar at around 11.00pm and the second incident involving PW10 on or about to 12.30am.

I hold on the facts of this case that the veracity and credibility of their testimony was put into question by this court. Upon visiting the scene and appraising the surrounding circumstances of this offence. I took issue with the assertion by PW11, PW13, PW18 and PW19 that their justification for not taking any instant action to approach the bar in a timely manner was due to the fact that they were apprehensive that the customers were under attack from some criminals. Where however, there is nothing to suggest that there was a robbery nevertheless, there is no hesitation in accepting the evidence from PW1, PW2, PW3, PW4 and PW10 the people identified outside the bar could not be by any figment of imagination be police officers. In dealing with this issue one has to trace the evidence of PW1 when she first opened the door at around 11pm and the second act by PW10 when she made attempt to open the same door at around 12.30 – 1.00am.

It may be appropriate to appreciate the salient features of this case following the scene visit by this court which in my view comprised the following: It was observed that the entrance verandah to the bar had nor bulb or electricity light connection. The premises where Destiney Bar is located consists of many other shops constructed on both sides but separated by an access road. The immediate neighbouring shops

and the adjacent opposite premises had a source of light which could illuminate dimly to the scene. The clear road of access commences at the junction leading to Veterinary Lab Institute. Further, it was observed that while one is at the door step of Destiney Bar it is possible to take a wider view of the inside room and be able to capture fairly the facilities and the availability of any persons.

During the trial, the key prosecution witness PW11 gave evidence to the effect that on arrival at the scene the occupants of Destiney Bar put off their security lights. As the prosecution also rested on the evidence of PW1, PW2, PW3, PW4, PW5 and PW10 it was in their material evidence that immediately after PW1 retreated into the Bar they continued having their drinks with the inside lights on.

I was able to consider the extent to which the testimony of each of these witnesses was either consistent or inconsistent with each other given the fact that they were the very people at the scene of the crime. In appraising the demeanor and credibility I took into account both verbal and non-verbal indicia of their truthfulness and in addition, their collateral recollection of the events on the night of 20 th/21st August 2015. There is compelling evidence that the version by PW1, PW2, PW3, PW4, PW5 and PW10 is more plausible and truthful by the answers given in both examination and cross-examination.

What is troubling about the state position is the role played by PW11, PW13, PW18, PW19 and the deceased while on patrol duties. The nature of the scene was such that a positive interaction could have taken place between them and the people inside the bar. The verifiable facts from the other prosecution witnesses PW1, PW2, PW3, PW4, PW5 and PW10 the incident being alluded to by PW11, PW13, PW18 and PW19 was a mere disturbance of customers who had taken one too many.

I Cannot therefore forget to state that the incident of 20th/21st/8/2015 which led to the murder of the deceased was instigated by the reckless conduct of PW11, PW13, PW18, PW19 and the deceased.

In re-evaluating the evidence as a whole as outlined above, the circumstances are that the accused person has brought himself within the provisions of Section 119 of the Evidence Act. Under this section 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 a particular case.

It is my view that the testimonies of PW1, PW2, PW3, PW4, PW5 and PW10 actually corroborates in material specifics the testimony of the accused person. It is instructive to note that the visits to the scene by this court in the course of the trial provided some light as to the sequence of events from 11.00pm – 12.30-1.00am.

In the premises one can safely hold that the conduct of the accused person was a reasonable response to the circumstances as he perceived them. As stated in the case of **Republic V Graham 1982 ALLER 806**. The court succinctly expressed itself as follows in a matter similar to the facts of this case:
"Was the defendant or may he have been impelled to act as he did because as a result of what he reasonably believed (the threat maker) had said or done, had he good cause to fear that if he did not do so act (the threat maker) would injure him or cause him actual serious physical harm. If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the same characteristics of the defendant, would not have responded to whatever he reasonably believed (threat maker) said or did by taking part in (the crime)."

This was the position taken by the court of appeal in the case of **Republic V Owino 1996 2 CR. Appeal Page 128-134**, where the court stated that: **"A person may use such force as is objectively reasonable in the circumstances as he subjectively believes them to be".** It is also made clear by the court in **Beckford V Republic (SUPRA)** that: ***"A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot, circumstances may justify a pre-emptive strike"***

However, in view of the provisions of Article 26 of the constitution which protects and preserves right to life the law expects a greater measure of self-control in situations where the stake of a human life is concerned. The same law also accepts and supports use of reasonable force within the limits of self defence to protect self, property or that other person who is in imminent or immediate danger.

I consider PW1, PW2, PW3, PW4 PW5, PW10 and the accused to belong to category of people whose rights and interest were under threat to justify the invocation of self defence by the accused person. This distinction is appropriately captured by the dictum in the case of **Mugwena & Another V Minister of Safety and Security 2006 (4) SA 150 SCA** – where the court stated:

> ***"Self-defence which is treated in our law as a species of private defence is recognized by all legal systems. Given the inestimable value that attaches to human life, there are strict limits to the taking of life and the law insists upon these limits being adhered to. Self defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and traditionally under circumstances in which no less severe alternative is readily available to the potential victim…"***

In applying this test regard would be given to the purpose for which the accused acted against the alleged intruders. To me force used to repel the attack was necessary in the appropriate circumstances of this case to protect right to life. The duty and the opportunity to retreat was not an option available to the accused person.

In other words, I bear in mind the imminent violence, the location, the earlier persistence of the assailant, the reasonable believe that they were armed with firearms, the relative strength of the attackers, the intensity of the light outside the bar for a positive identification to take place and the seriousness of the evil to be prevented by the accused person.

In my opinion the prosecution failed to discharge the burden of proof on the requisite intention and the culpability of the accused person that in pulling the trigger he shot to kill the deceased or cause grievous harm.

I agree with the defence that the conduct of the prosecution witnesses PW11, PW13, PW18, PW19 and the deceased stayed at the scene between 11pm and 12.30am without ever making their presence known that they were police officers on patrol duties. These prosecution witnesses who signed out for patrol duties did strategically placed themselves outside Destiney bar for more than one hour on the basis that there was a crime about to be committed inside the premises. The questions I pause which beg for an answer comprise of the following; Why did PW11, PW13, PW18 and PW19 and the deceased not identify themselves in real time to the patrons or the bar owner of their presence? Did their action amount to holding the customers inside the bar hostage? Why did they cause fear by ordering the people to lie down and cocking their guns on or about 12.30 -1.00am without notifying PW10 that they were police officers on duty?

From the above set of facts, I find that the prosecution has not discharged the burden of negating self-defense. There is plausible evidence that the use of force was reasonable in the circumstances of this case in defence of self, property or third party going by the dictum and the principles discussed elsewhere in this judgement I am satisfied that the prosecution has not discharged the burden of proof that defence of self cannot be availed to the accused person.

By virtue of the application of the doctrine of self defence to the facts of this case the offence of manslaughter and the killing of the deceased is not sustainable in law. It is therefore my finding that the accused person should not be held criminally responsible for that death of the deceased. Though the act prima facie was both unlawful and dangerous. The evidence has set out the circumstances in which the killing is justified and or excused. In my considered opinion, I take the view though the accused act was illegal and improper the prosecution evidence failed to establish that there was intention to do any harm or cause the death of the deceased. I agree with the defence that it is the duty of a man in the accused's position to take all reasonable steps including use of reasonable force to protect self and others under imminent or immediate danger. It must be without more be stated that the prosecution failed to negate the defence of self raised by the accused person. If this view was not accepted by this court, the surrounding circumstances and facts of this case would fall within the ingredients of the offence of manslaughter contrary to section 202 of the Penal Code. In other words, the accused could have been found guilty and convicted of manslaughter and not murder contrary to section 203 as earlier charged.

Accordingly, I enter a verdict of not guilty and do hereby resolve the benefit of doubt in favour of the accused person by acquitting him of what could be the substituted offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. He is at liberty unless otherwise lawfully held.

Dated, delivered and signed in open court this 30th July 2018.

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R. NYAKUNDI

JUDGE

Representation:

- Mr. Njoroge for the accused person
- Mr. Meroka for the DPP – Present
- Accused in person - Present
- Mr. Mateli: Court Assistant