



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 115 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

ERASTUS NGURA ODHIAMBOACCUSED

JUDGMENT

Prosecution case

Erastus Ngura Odhiambo, hereinafter “the accused”, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are framed as follows:

ERASTUS NGURA ODHIAMBO alias B: On the night of 11th/12th December 2014 at Waihura Court, Buruburu Phase Five Extension within Nairobi County murdered **LINDA WANJIKU IRUNGU**.

Fourteen (14) witnesses have testified for the prosecution. After the conclusion of the prosecution case, this court found that a prima facie case had been made out against the accused and placed him on his defense. The accused and one other witness, Dr. Emily Odhiambo Rogena a professor in Human Pathology and a pathologist, testified for the defence.

The prosecution case is that the accused and Linda Wanjiku Irungu, hereinafter “the deceased”, were in a relationship akin to man and wife. Evidence on the nature of their relationship varies. According to the accused the deceased was his wife and he had paid some dowry for her. According to the family of the deceased the accused and the deceased were just friends. What is not disputed however is that the accused and the deceased had a child together, a son whom I shall refer to in this judgment as **B**. The accused had known the deceased for three years as per his evidence. He referred to her as his second wife. His first wife, **L**, also lived in Buruburu but in a different section of that Estate. The deceased lived in House Number 236 in Waihura Court in Buruburu Phase 5 Extension. The deceased lived with her sister Diana Irungu, PW1, baby **B** and two house helps or domestic workers, Monica and Brenda.

The Thursday, 11th of December 2014, was a normal day for the deceased, her family and the accused. It was the day before Jamhuri Day, a national holiday celebrated on the 12th of December every year to commemorate the day Kenya attained Republic status. The plans for that evening were that the accused would be joined by the deceased on that eve of Jamhuri Day for some good time together. After the usual day to day chores, the accused went to wait for the deceased at Shade Hotel K-One Club House in Parklands at about 8.00pm. He had been in communication with the deceased most of that day. The deceased however did not join the accused that evening as planned. According to the accused, when he called the deceased at about 10.00pm to find out if she had left the house to join him for the evening, the deceased told him that she would not be joining him for the evening because she was tired. According to the evidence of the accused, the deceased asked for money from him to buy electricity tokens. He sent her some money for that purpose. Shortly thereafter one of the house helps, Natasha according to the accused, called him about electricity tokens. He informed her that he had sent money to the deceased to buy the same. This is when Natasha mentioned to him that the deceased was not at home and had not been at home the whole day. Attempts by the accused to reach the deceased after this information failed. At about 2.30 – 3.00am the accused went to Buruburu Phase 5 Extension where the deceased lived apparently looking for her.

A summary of the narrative of what happened after the accused arrived at Waihura Court Buruburu Phase 5 Extension that early morning of 12th December 2014 is that the accused intercepted the deceased as the deceased was attempting to leave her residence to go to her parent’s home also located in Buruburu. The reason the deceased was leaving Waihura Court, according to the evidence of Diana, is that she feared what the accused would do on finding her at home. Diana told the court that by the time she went to bed at about 10.00pm on 11th December 2014, the deceased had not arrived home. Diana said she was woken up in the early hours of 12th December 2014 by her sister’s voice as she talked on the phone and her footsteps as she entered the house. Diana learned from the deceased that she had been on the phone talking to the accused that was said to be very angry. Diana advised her sister to go to their parents’ home to avoid the accused. The deceased is said to have hurriedly changed into pajamas, a loose multi-coloured sleeveless long dress, and entered into her car, a Nissan Note. Diana opened the gate of their compound and the deceased drove out towards Gate ‘A’ of Waihura Court. This is when the accused intercepted the deceased’s car. The words used by Diana are that the accused jumped in front of the deceased’s car as she drove towards Gate ‘A’. Diana’s evidence is

that the accused moved towards the driver's side of the deceased's car and pulled the deceased out of the driver's seat. The car, still in motion, moved unattended towards Gate 'A' and crashed into it.

For clarity's sake, Waihura Court has two gates. One gate is located on the Outering Road side. This gate was labeled by the court as Gate 'B' during the scene of crime visit. There is another gate on the opposite side of the Waihura Court labeled as Gate 'A'. House number 236 where the deceased lived is almost in the middle of the two gates and is located on the right hand side as one approaches it from Gate 'B'.

Evidence further shows that a confrontation ensued between the accused and the deceased. Diana said the accused pulled the deceased by her braids uprooting some strands of the braids. Peter Kamami, PW3, the watchman manning Gate 'A', said the accused started beating the deceased. This confrontation or struggle continued for some time and in the course of that struggle a gun was fired. Diana said the accused drew his gun and shot the deceased. Peter said he just heard a sound of a shot of a gun ring out from where the accused and the deceased were struggling and that he saw the deceased fall down. Diana testified that after the deceased fell down the accused continued assaulting her by kicking her. She said she persuaded the accused to take the deceased to hospital and that after some time the accused went for the deceased's car and drove it closer to where the deceased was lying. With the help of Brenda one of the domestic workers Diana tried to lift the deceased to place her in the car but they could not manage. Diana called her father and told him what was happening. After a while the father Jamleck Irungu, PW6, and his two sons Renson Karanja and William Injera (not witnesses) arrived at the scene. They managed to place the deceased in her car. The father, two brothers, Diana, Brenda and the baby entered the same vehicle and all left to take the deceased to hospital. She was taken to Jamaa Hospital in Buruburu but was pronounced dead on arrival. The body was transferred to Kenyatta University Funeral Home where the post mortem was performed the same day 12th December 2014 at 2.00pm by Dr. Charles Muturi, PW2, in the presence of Dr. Okinyi representing the family of the accused. Dr. Okinyi is not a witness. The result of the post mortem examination revealed that the deceased had died due to a single gunshot wound. The police held the accused responsible for the death of the deceased and after the investigations were concluded he was charged with the murder of the deceased.

The defense case

The accused denied committing this offence. In his evidence, he confirmed the evidence by the prosecution that he went to Waihura Court Buruburu Phase 5 Extension in the early hours of 12th December 2014 after the deceased failed to join him at Shade Hotel K-One Club House earlier that night. He told the court that he learned from Natasha that the deceased had not been home the whole day and he decided to go home. Reference to the house help who gave him this information as Natasha is not accurate according to the evidence on record. The house helps as shown by prosecution evidence were Brenda and Monica. According to the evidence of Diana, Natasha is the name of a cousin of who had lived with Diana and the deceased not on 11th /12th December 2014 but during an earlier date when the accused is alleged to have threatened to shoot the deceased after an altercation.

The accused testified that on that evening, 12th December 2014, he stayed out with friends after the deceased failed to join him until about 2.30am -3.00am. He then went home to Waihura Court after learning that the deceased was not at home. At Waihura Court he asked the house help (he does not specify which one) where the deceased was but the house help told him that the deceased had not gone home. He stated that he went away to find out whether the deceased was at his (accused's) club situated in Buruburu but he did not find her at the club. He said that he went back to Waihura Court and found the deceased's car inside the Court. He said that he used Gate 'B' to enter the Court and upon finding no parking space within the Court he drove out through Gate 'A' to park his car at a free parking space outside Gate 'A'. He stated that he re- entered the Court through the pedestrian gate of Gate 'A' and found the deceased reversing her car. He stated that the deceased who was very drunk came out of the car and walked towards him and that he sought to know where she was going but she told him it was none of his business. He stated that they started quarrelling and that the deceased fell down but stood up while supporting herself by holding him. He stated that the deceased reached for his gun as they argued and that they struggled as the accused tried to get the gun off deceased's hands. He stated that he managed to get hold of the gun as the deceased was still holding it and that she touched the trigger and the gun, which was cocked, fired. He stated that the shot was fired to the air. He said that they continued struggling and the deceased fell down. He said he placed the gun down to assist the deceased to stand but he did not manage because the deceased was heavy and weak. He denied shooting the deceased and stated that by the time deceased's father and brothers arrived, he had managed to place the deceased inside her car. He denied blocking the deceased's car as it took the deceased to hospital.

The accused further testified that he drove to Metropolitan hospital thinking that was where the deceased had been taken but found that she was not there. He said he learned through a telephone conversation with deceased's mother that the deceased had been taken to Jamaa Hospital. He said he drove to Jamaa Hospital but when he spotted the deceased's brother he decided not to enter the Hospital for fear of a confrontation. He said he called the OCPD Buruburu Police Station and reported the incident. He said he drove to Buruburu police station and met two police officers at the gate who stopped him and entered his car. He said that he drove with the two police officers back into the police station. He said he was placed in cells and later that morning at about 8.00am he was accompanied by a police officer to his car where the gun was stored and the police officer recovered it. Evidence confirms that one of the two police officers the accused met at the gate is PC Simon Mokaya, PW9, and the police officer who retrieved the gun from the accused's car is CPL George Wambua, PW11.

The evidence of Prof. Rogena, DW2, is in respect of the injuries suffered by the deceased. In brief, Prof. Rogena told the court that she was asked by the defence to examine the post mortem report prepared by Dr. Muturi and Dr. Okinyi and some photographs taken at the time of the post mortem examination and collate the same in respect to the location of the injury suffered by the deceased. Her findings are that the injury was located on the left upper back and not on the right upper back as testified by Dr. Muturi.

Submissions

At the close of the case for the defense, parties made their final submissions and highlighted the same in court. I will capture the summary of the submissions and particularly the salient issues highlighted therein. Ms Mwaniki, the Prosecution Counsel, submitted that the prosecution has proved the case against the accused beyond reasonable doubt. She submitted that there is sufficient credible evidence to prove that the deceased died as a result of a single gunshot wound fired at close range; that the firearm that discharged the fatal shot is a Ceska Pistol Serial Number B207904 belonging to the accused; that the accused has confirmed he had that pistol with him that night and that he later led police to his car from where the said pistol was recovered. She submitted that the pistol was examined by the Firearm Examiner who confirmed that

it is the pistol that discharged the bullet that killed the deceased. She submitted that there is no doubt that the scene of the crime is Waihura Court Buruburu and that it is not fatal to the prosecution case whether there was blood at the scene or not.

Ms Mwaniki submitted that the prosecution has proved beyond reasonable doubt the element of malice aforethought by the evidence of the fatal gunshot wound; that the defense has not cast any doubt on the cause of death; that the evidence of Dr. Emily Rogena, DW2, should be dismissed because she is not competent to address the court on the findings on the post mortem report because she was not present during the examination of the body and that the cause of death is not disputed. She submitted that the identity of the body of the deceased is not in dispute as it was identified to the doctor who examined it. She submitted that the accused shot the deceased intentionally; that he had the time and an opportunity to cool down by going to his home in Buruburu upon finding the deceased not at home.

Ms Mwaniki further submitted that the deceased succumbed to a single close-range gunshot wound to her back and therefore she could not have shot herself; that the killing was pre-meditated and willful; that the accused parked his car outside Waihura Court and walked back into the Court with his gun. She asked the court to dismiss the accused's defense and find that the prosecution has proved this case beyond reasonable doubt.

On the authorities cited and relied on by the defense, Ms Mwaniki agreed with the defense on the case of *Nguku v. Republic [1985] eKLR* on the need for corroboration of the evidence and submitted that the prosecution evidence in this case has been consistent and well corroborated. She agreed with the defense on *Parvin Singh Dhalay v. Republic [1997] eKLR* on the issue that expert opinions are not binding to the courts and that the trial court must consider all the evidence. She submitted that *Kazungu Katana Ngoa v. Republic [2017] eKLR* is not relevant to this case because in that case the murder weapon was not produced while in the case before the court the prosecution has produced the murder weapon, the pistol. She submitted that *Joseph Otieno Juma v. Republic [2011] eKLR* is not relevant to this case because unlike in that case, in the present case all the witnesses have testified. Ms Mwaniki submitted that *Republic v. Naphtaly Kaunjura Arayason [2006] eKLR* is about the identification of the body and that this case is distinguishable with the case before the court since in this case the body was identified.

On the other hand, Mr. Onyango for the accused in his submissions identified three issues for determination in addition to the ingredients of murder, namely:

- (a) Whether the actual scene of the crime has been identified.
- (b) Whether the evidence by the prosecution directly and substantially relate to the deceased, and
- (c) Which weapon killed the deceased?

On the first issue, Mr. Onyango submitted that the actual scene of the crime is not confirmed. The reason for this is that there was no blood found at the alleged scene to support the allegation that the accused shot the deceased who fell on the ground at the scene; that the pathologist testified that blood must ooze after an injury yet there is no evidence of blood either on the deceased or on the ground where the deceased is alleged to have fallen and that there is no evidence of internal bleeding. Mr. Onyango submitted that the accused's defense that he did not shoot the deceased agrees with the evidence that there was no blood found at the scene. Counsel submitted that there was no evidence that the deceased's car hit Gate 'A' causing a dent to the gate; that the strands of hair braids alleged to have been collected at the scene could have belonged to anyone and could have been collected from anywhere. He submitted that the evidence of Diana and that of Peter Kamami contradict each other in that Diana testified that the accused pulled, assaulted and punched the deceased while Peter said the accused just pulled the deceased from the car with no evidence of her falling down.

Mr. Onyango submitted that the evidence by the prosecution does not relate to the deceased. This is because the evidence of the pathologist and PC Simon Mokaya, PW9, is contradictory; that the pathologist testified that the single bullet entered through the right upper back and lodged in the right humorous while PC Mokaya testified that the bullet entered through the upper back and lodged in the chest; that the photographs taken at the mortuary show an entry wound on the upper left back and that there is probability that the prosecution tendered evidence on the wrong body. It was submitted that the post mortem report, Exhibit 1, on the face of it, talks of a person who had been assaulted but not shot; that the evidence on the identification of the body is contradictory in that Dr. Muturi told the court that the body was identified by two people Jamleck Karanja, father of the deceased and Victoria Lulu, PW5, yet Jamleck Karanja told the court that he did not identify the body.

Mr. Onyango took issue with the evidence of the Firearm Examiner that it is insufficient in that the examiner failed to produce microscopic evidence to allow the court to arrive at an independent finding. He referred this court to the case of *Simon Kiptum arap Choge & 3 others v. Republic [1985] eKLR* in respect of this issue and urged the court to reject the evidence of the ballistic expert.

Counsel further took issue with the manner the scene of crime was handled stating that the scene of crime was not preserved and that the spent cartridge alleged to have been collected at the scene was not well preserved creating doubt in this case. He submitted that the report of the Government Analyst is insignificant because there was no record of matching blood to the bullet fragment said to have been extracted from the body of the deceased. On the issue of the ownership of the gun allegedly involved in this case, counsel submitted that this cannot be resolved by this court because it is subject in Chief Magistrates' Criminal Case No. 1808 of 2015 Republic v. Erastus Ngura Odhiambo which is still pending in that court. Counsel urged the court to find that the accused has offered a credible defense and that the defense of the accused has created doubts in the prosecution case. He asked the court to acquit the accused.

In reply to the submissions by the defense Ms. Mwaniki submitted that under Section 77 of the Evidence Act expert reports are deemed to be under the hand of the expert and taken as they are. She submitted that the report of the Ballistic Examiner has not been challenged. She urged the court to find that the findings of that report are unchallenged. She submitted that the cause of the death of the deceased is not in doubt and that the accused has confirmed that his gun discharged a bullet; that he has confirmed that he was taken from the cells at Buruburu Police Station to show the police his pistol kept in his car. Ms. Mwaniki submitted that the gun-shot wound was on the upper back from the evidence of the prosecution and the defense. She urged the court to find that how the deceased's identity and how she died is not in doubt.

Analysis and determination

The offence of murder is created under Section 203 of the Penal Code with the penalty provided under Section 204 of the Penal Code. Murder is committed when **any person who of malice aforethought causes the death of another person by an unlawful act or omission**. The prosecution bears the onus of proving the crime of murder. The standard of proof to be met is proof beyond reasonable doubt. The ingredients of murder that must be proved beyond reasonable doubt before a conviction can be entered against the accused are found under Section 203 of the Penal Code. These are (i) proof of the fact of the death of the deceased; (ii) proof of the cause of such death of the deceased; (iii) proof that the cause of the death of the deceased is as a result of an unlawful act or omission by the accused; and (iv) proof of malice aforethought.

Malice aforethought is defined under Section 206 of the Penal Code in the following terms:

Malice aforethought shall be deemed to be established by evidence proving any one 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 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.

To my mind the three issues raised by the defense, namely: the issues surrounding the actual scene of the crime; the issue as to whether the evidence by the prosecution directly and substantially relate to the deceased and the issue as to which weapon caused the death of the deceased, form part of the ingredients of murder. They specifically relate to the ingredient of the fact of death of the deceased and the cause of that death and to some extent the involvement of the accused in causing that death.

To address the first issue raised by the defence in respect to the scene of the crime, I have considered all the relevant evidence on record respecting that issue. The information filed in court shows that this offence was committed at Waihura Court, Buruburu Phase Five Extension. At the behest of the prosecution vide their application to court which was allowed, this court visited the scene of crime on 14th December 2015 in the presence of all the parties. The court entered through a gate which was later labeled as Gate 'B' situated on one end of Waihura Court on the Outering Road side. Diana pointed to House No. 236 inside Waihura Court as the house where she lived with her sister the deceased, the baby and two house helps. From my observations while at the scene, which observations are captured in the additional notes I made during the scene visit, House No. 236 is situated almost at the centre of Waihura Court on the right hand side when one is walking into the Waihura Court through Gate 'B'. Diana pointed the house to the court and the gate to the compound of that house. She led the court towards Gate 'A' which is situated on the opposite side to Gate 'B' and on the right hand when standing at the gate of House No. 236. She said that Gate 'A' was the gate being manned by Peter Kamami Mwangi on the night of 11th/12th December 2014. Diana showed the court the pedestrian gate of Gate 'A' which she identified as the gate used by the accused to enter the Waihura Court. The court walked towards Gate 'A' guided by Diana who pointed to the court the position where the deceased's car was, which was near Gate 'A'. She showed the court the right side of the road in Waihura Court, the right side when facing Gate 'A' which she identified as the position at which the accused pulled the deceased from the car. Diana said that at the time the deceased was being pulled out of the car, she (Diana) was standing on the right side of the car, the driver's side. Diana showed the court the spot where she said the deceased's car hit Gate 'A' and caused a dent. I noted that the place on the gate pointed at by Diana had a dent. Diana led the court to a position almost opposite House No. 236 where she identified as the position where the accused stood about 4 metres from where the deceased fell. She explained that the accused pulled the deceased from the car and dragged her to the position she pointed at.

With this detailed demonstration of the scene and from my own observation, this court, and I believe the parties, understood the scene of the crime to mean Waihura Court and more specifically the place between the gate of House No. 236, the place opposite House No. 236 and Gate 'A'. This is the location identified as the scene of crime and where the court visited. Indeed I harbour no doubt in my mind that given confirmation by the accused that he went to look for the deceased at Waihura Court and an altercation occurred between the two of them that the scene of this crime has been positively identified to this court. I have taken into consideration the reason the defense is disputing the actual scene of the crime. It is true from the evidence on record that there is no description of any blood stains at the scene. However, while this is not stated, I have no doubt in my mind that the scene of the crime is confirmed as captured in the detailed evidence of Diana both in court and at the scene. It is also confirmed by the evidence of Peter who was manning Gate 'A' that night and also confirmed by the accused. Diana was able to point at specific areas of the scene when this court visited. I have noted that the accused through his defense counsel did not dispute, either by way of cross examination or by raising an objection, the areas identified by Diana as the scene of crime when the court visited the scene or at all in the course of this trial and that this issue only came up during submissions.

It is true from the evidence that Dr. Muturi on cross examination by the defense counsel told the court that the nature of the human body is that there must be blood oozing from the body after a piercing or a puncture. This was his opinion. He also said that the amount of blood shed would depend on the position the person was lying. The doctor is on record in examination in chief telling the court that he found a blood-stained sleeveless striped and coloured dress and 2.5 litres haemothorax on the right side chest cavity. This is indicative to me that there was internal bleeding and that in the course of moving the deceased from the scene to the hospital she must have bled.

After my careful examination and analysis of all the evidence surrounding what happened at the scene it is my finding that a shooting did occur and that the deceased was injured as a result of that shooting. There is sufficient and clear evidence that after the shooting the deceased

fell down and was not able to talk. She was also heard telling the accused that he had shot her. The deceased was not able to stand and had to be placed inside her car and taken to hospital. The accused is on record telling the court that the deceased was injured, weak and lying on the ground and had to be lifted into the car. The fact that there were no stains of blood at the scene of the shooting to my understanding does not mean that there was no shooting. I find that lack of blood stains at the scene of the shooting is not fatal to the prosecution taking into account all the evidence surrounding what happened that night. It is my view that, the evidence that there were no blood stains at the scene immediately after the shooting should not be considered in isolation. All the evidence must be examined and analyzed in totality to determine whether the deceased met her death as a result of a gunshot wound inflicted by the accused person with the necessary malice aforethought, lack of bloodstains at the scene notwithstanding. I am satisfied, going by the available evidence, that the scene of the crime has been properly identified to this court and I hereby make a finding to that effect.

I have considered *Kisumu Criminal Appeal No. 106 of 1983 Geoffrey Nguku v. Republic* that was cited by the defense. In that case the Court stated that corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. I agree with the Court in that case. In my view, however, this case does not assist the defense case on the issue of identification of the scene given my findings in this judgment.

The second issue I will consider is in respect of the weapon involved in the shooting of the deceased. Evidence from both the prosecution and the defense sides show that a shooting did occur on the wee hours of 12th December 2014 at Waihura Court. Diana describes what happened after the accused pulled the deceased from the car. She narrated that there was a struggle between the deceased and the accused and that the accused drew his gun from his back pocket and shot the deceased. Diana told the court that she heard the deceased tell the accused that he had shot her. Diana who was running away from the accused at the time looked behind and saw the deceased lose stability and fall down after the shooting. Peter the watchman manning Gate 'A' also testified to seeing the accused and the deceased struggle as they went towards their house. He told the court that he heard a gunshot while he was about 50 metres from them and saw the deceased fall down.

Peter Amimo Kuyu, PW12, a residence of Waihura Court in House No. 239 told the court that he was asleep on 12th December 2014 around 4.00am when he heard a commotion outside at Waihura Court. He could hear the sound of a man and a woman. He heard a shooting and the woman went quiet. He said he did not go out of his house. At about 7.30am on the same day he went out to buy a newspaper. In the middle of the road within Waihura Court he saw what looked like a spent cartridge lying about 3 metres from his gate. He decided to pick it to avoid it being picked by children. He handed it over to the day watchman known as Tom and told him to hold it. He testified that later that morning police visited the place and started looking around. Tom handed to them the spent cartridge. Shortly thereafter the police went to confirm from him (Peter Amimo) whether he was the one who had given the cartridge to the watchman. He said that he confirmed the same to the police. PW12 told the court that he cannot tell one spent cartridge from another but he identified Exhibit 13 as similar to the spent cartridge he had recovered from the scene and given to Tom to keep. Tom Wesa Richard, PW13, confirmed that Peter Amimo Kuyu, a resident of Waihura Court House No. 239 gave him a spent cartridge which he said he had collected outside Waihura Court. Tom said the time was about 8.00am on 12th December 2014 and that Peter told him to give the cartridge to the police. The Investigating Officer, CPL Moses Ouma Otieno, PW14, confirmed to the court that he received a spent cartridge from Tom and that he confirmed from Peter Amimo that he (Peter) is the one who had collected it and given it to Tom to give to the police.

That the accused person had a gun on that day is not in dispute. He has admitted that he had a gun which according to him was cocked because he normally cocked it at night for security purposes. He admitted to having the Ceska pistol identified in court as Serial Number B207904 and produced as Ex. 12a. The accused also confirmed to the court that this pistol was fired on that night. However, according to his defense, the pistol was fired into the air after the deceased removed it from the accused's pocket as both the accused and the deceased were struggling. This pistol was recovered by CPL George Wambua Mweu, PW11, from Motor Vehicle Number KAY 352H belonging to the accused. CPL Wambua told the court that he picked the accused from the CID Offices in Buruburu Police Station and that the accused confirmed that he was a firearm holder and that the firearm was inside his car which was parked at the police parking yard at the Buruburu Police Station. In company of the accused, CPL Wambua went to the vehicle and recovered the pistol and 12 rounds of ammunition from the car's compartment.

The pistol Ex. 12(a) and 12 rounds of ammunition (Ex. 18(i) – 18(xii)) were examined by Mr. Alex Mudindi Mwandawiro, PW10. He confirmed that they are a firearm and ammunition as defined under the Firearms Act (Cap. 114). PW10 told the court that he test-fired the pistol (Ex. 12(a)) using three rounds of ammunition picked at random from Ex. 18(i) to 18(xii), the twelve rounds of ammunition handed to him together with the pistol and other exhibits. He confirmed that they were of 9x19 mm calibre and each was designed for use in Ex. 12(a). PW10 examined the magazine Ex. 12(b) and found it complete in all its component parts and suitable for use in Ex. 12(a) and suitable for ammunition Ex. 18(i) to 18(xii). He examined the expended cartridge, Ex. 13, collected at the scene in Waihura Court. He compared it with the three test-fired cartridges. He found matching breach face, ejector and firearm pin similar. His opinion is that the expended cartridge Ex. 13 was fired in Ex. 12(a). He examined the fired bullet, Ex. 11, recovered from the body of the deceased. According to him, Ex. 11 was a component part of 9x19mm ammunition. It was slightly damaged on its tip and along its longitudinal side indicating that it had come into contact with a hard surface during its flight. He compared it with test-fired bullets. He found similar markings. He concluded that it was fired in Ex. 12(a). The summary of the evidence of PW10 is that the bullet extracted from the body of the deceased and the spent cartridge recovered at the scene of the shooting were both fired from Ex. 12(a) the pistol.

Mr. Onyango for the accused took issue with the evidence of PW10 the ballistic expert. He submitted that there were no microscopic photographs produced in evidence to corroborate the evidence of PW10. He cited *Simon Kiptum arap Choge & 3 others v Republic [1985] eKLR* in which the Court of Appeal citing with approval *Davis v Edinburgh Magistrates [1953] SC 34 at 40* where it was stated in reference to the function of experts that:

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

I have appreciated the *Simon Kiptum arap Choge* case. The Court in the same case observed that the standard method of comparing cartridge cases is by producing comparison microscopic photographs. The judges in that case went on to observe that:

“It has come to our notice in reviewing several cases concerning guns, that there is no practice of producing the microphotographs. It ought to be standard practice to do so, in accordance with Davis’ case. It may not be fatal if that is not done, depending on the circumstances, and whether any particular point arises necessitating scrutiny of the comparison by the courts. No such point arose in this case.”

It seems to me the practice not to produce microphotographs has not changed in the prosecution of criminal cases before our courts, at least in the cases I have handled dealing with evidence of ballistic examination. I have taken note that the Court in the case under reference was of the view that depending on the circumstances and whether any particular point arises necessitating scrutiny of the comparison by the courts failure to produce such photographs may not be fatal. I have also given thought to the further observation by the Court in the Simon Kiptum arap Chogo case cited below:

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

The same observation can be made in this case in my view. Mr. Alex Mudindi Mwandawiro told the court that he has performed the duties of firearms examination continuously for 14 years. On cross-examination by Mr. Onyango, he told the court that in ballistic examination there are no margins of error; that cartridges are examined on a microscope called Leica FSC. He explained the procedure he followed in examining the exhibits in this case. In my view, having taken into account the issues raised by the defense in its submissions and noting that there was no objection raised during the trial and that PW10 was cross-examined on the procedures he employed in examining these exhibits, I accept his evidence as accurate, credible and reliable. I find that failure to produce microphotographs in this case is not fatal to the prosecution case.

To settle this issue and basing my findings on the evidence on record, it is my view that the Ceska Pistol SN. B207904, Ex. 12(a), was used to fire the bullet (Ex. 11) extracted from the body of the deceased during the post mortem examination. I further find that the pistol, Ex. 12(a) was used to fire the spent cartridge (Ex. 13) collected at the scene by Peter Amimo Kuyu, PW12 and that the bullet extracted from the body of the deceased (Ex 11) is a component part of the spent cartridge (Ex 13) collected from the scene.

The third issue raised by the defense is whether the evidence before the court directly and substantially relates to the deceased. To my mind this issue arises from the two versions of the evidence on record. According to the prosecution the deceased died as a result of a single gunshot wound on the right upper back. The evidence by the defense on the other hand points to an injury on the left upper back. On this issue Mr. Onyango in his submissions took issue with the evidence of Dr. Muturi that the bullet fragment (Ex. 11) was extracted from the right upper humerus while PC Simon Mokaya told the court that the same bullet fragment was retrieved from the chest. Mr. Onyango submitted that the prosecution witnesses were not referring to the same part of the body. He took issue with the hole found on the dress (Ex. 10) the deceased was wearing in that prosecution witnesses stated that the hole on the dress was found on the right and corresponded with the bullet entry wound on the upper right back. He submitted that the dress was exhibited in court and it showed the hole on the middle of the dress and that this did not correspond with the wound on the deceased’s body. He took issue with the evidence of the doctor to the effect that the body of the deceased was identified to him by Edda Victoria Lulu, PW5, and Jamleck Irungu, PW6. Counsel submitted that Jamleck Irungu the father of the deceased told the court that he did not identify the body of the deceased because he was weak. Counsel seems to question the authenticity of the identification of the body of the deceased bringing to question the true identity of the body examined by Dr. Muturi.

Mr. Onyango further referred to the evidence of Prof. Rogena, DW2, who described the position of the gun-shot wound on the deceased as being positioned on the left upper back. Counsel submitted that DW2 testified that the description of the gunshot wound by Dr. Muturi on the right upper back did not correlate with what is demonstrated on photograph exhibit 5b (v) and that the findings in the post mortem report by Dr. Muturi suggested a major error in description of the location of the injury at post mortem or mix up of reports. Mr. Onyango took issue with the evidence that blood samples were taken from the body of the deceased but were not tested for toxicology to rule out the possibility that the deceased could have died of other causes. Counsel cited Pravin Singh Dhalay v. Republic [1997] eKLR to the effect that evidence of experts is not binding to the court and that such must be considered along with all other available evidence and that it is the duty of the court to decide whether or not to believe the expert and give reasons for its decision (see also Elizabeth Kamene Ndolo v George Matata Ndolo, Civil Appeal No. 128 of 1995). Mr. Onyango further took issue with the evidence of PC Joseph Kipsang, PW8, who testified to having been shown the body of a female adult with an injury on the right upper back yet the photographs he took and produced showed an injury on the left upper back. I agree with the court in the Pravin Singh Dhalay that evidence of experts is not binding to the court and that such opinions should be considered alongside all other available evidence.

The body of the deceased was examined by Dr. Charles Muturi, PW2, on 12th December 2014, the same day at 2.00pm. Dr. Muturi was accompanied by Dr. Okinyi who represented the family of the accused. The following injuries were noted:

- a. Bruise upper arm 7cm by 6cm***
- b. Bruises on the left elbow joint towards the back***
- c. Abrasions on lower left forearm***
- d. Abrasions on the right arm***
- e. Abrasions on mid abdomen***

f. Frothy blood oozing from the mouth

g. The hair appeared to have been plucked from the front hairline

h. Entry gunshot wound on the upper right back 1cm wide

i. 4th and 5th ribs were fractures towards the back right hand side

j. 2.5 litres haemothorax in the right side chest cavity

k. Right lung had collapsed

l. Right mid-lobe was perforated and extensively bruised

m. Fractured right upper humerus with bullet fragment lodged within the bone

It is clear from the evidence of Dr. Muturi and captured on the post mortem report that the gunshot wound was on the right upper back. On cross-examination, the doctor told the court that:

“The bullet entered through the back causing rib fractures, pierced the lung and tracked through soft tissues of the arm and lodged into the upper humerus bone. The chest also involves the back and front. Between the neck and the abdomen, we term it as the chest.”

PC Mokaya who was present during post mortem stated as follows:

“The gunshot wound was at the back upper right. The bullet lodged at the chest. I was present during post mortem. It would be a lie to say bullet was not removed from the chest.”

With the explanation from Dr. Muturi that the part of the body between the neck and the abdomen both at the back and in front is termed as the chest, I find no contradiction between the evidence of Dr. Muturi and that of PC Mokaya.

PC Kipsang described the injury as having been on the right upper back. He took seven (7) photographs of the body on various angles. These photographs were produced as Exhibits 5(a) (i)–5(b) (vii).

Dr. Okinyi was not a witness in this case. Neither the prosecution nor the defence called him to testify. I would have expected the defence specifically to summon Dr. Okinyi to testify given that he had been instructed to attend the post mortem examination by the family of the accused going by uncontested evidence. Be that as it may, Dr. Muturi told the court that the findings on the post mortem report were joint findings between him and Dr. Okinyi who had been instructed to attend the examination by the family of the accused. Dr. Muturi said that Dr. Okinyi co-signed the post mortem report. This court was not given the benefit of the testimony of Dr. Okinyi. He was at the post mortem and his evidence would have been a first-hand account of someone who witnessed the examination. The defense called Prof. Rogena. According to her evidence, copies of the post mortem report and photographs were presented to her by the defense for review and correlation. She did so and prepared a report produced as defence exhibit 1. She found that the photographs showed multiple recent injuries on the skin that correlated with the post mortem report. Her review of the photograph marked Ex. 5(b) (v) according to her demonstrated a circular wound on the left upper back with blood in the base and bruising around it. According to her the wound is located off-centre and inferiorly aligned to the left ear lobe. Her conclusions are that the description of the gunshot wound as described by Dr. Muturi in the post mortem report does not correlate with what is demonstrated on the photograph Ex. 5 (b) (v) and that these findings suggest a major error in description of location of injury at post mortem or mix-up of reports. In respect of other injuries described by Dr. Muturi in the post mortem report, there were no corresponding photographs and therefore Prof. Rogena was not able to review and correlate them.

I have carefully examined the various issues raised by the defence. Although it is true that Jamleck Karanja told the court that he did not identify the body of the deceased to Dr. Muturi and that the doctor told the court that Jamleck and Edda Victoria identified the body to him, I have no doubt that the body of the deceased was identified to the doctor for post mortem. The contradictions arising in this issue do not in my view fatally affect the prosecution case given that the family of the deceased was satisfied that the body examined by Dr. Muturi is that of Linda Wanjiku Irungu. Evidence is clear that the deceased was injured and was taken to hospital where she was pronounced dead. Her body was transferred to Kenyatta University Funeral Home on the same day. Post mortem was conducted by Dr. Muturi in the company of Dr. Okinyi on the same day in the afternoon. I have no doubt that the body that was examined is the body of the deceased in this case. It was dressed in the same dress (pajamas) identified by Diana and exhibited in court. It had a gunshot wound as described by witnesses and Edda Lulu PW5 confirms identifying the body for post mortem. My finding on this matter is that despite the anomaly as to whether Jamleck Karanja was one of the witnesses who identified the body of the deceased to Dr. Muturi, I have no doubt in my mind that the body that was examined was the body of the deceased Linda Wanjiku Irungu and that the same body was positively identified to the doctor as that of the deceased.

Now, turning on the issue of the location of the gunshot wound, I have carefully examined all the evidence. I appreciate that the post mortem report shows that the body of the deceased had a gunshot wound on the right upper back. The evidence in support of this position was adduced by three witnesses as indicated above. PC Kipsang took the photographs of the body of the deceased at the Funeral Home at Kenyatta University. He was specific during his evidence in court that he found the body of a female adult with an injury on the right upper part of the back. PC Kipsang was not cross examined regarding the position of the injury. To my mind this is an indication that the defense had no issues with the evidence of PC Kipsang. His evidence in chief remains unchallenged as far as the location of the injury on the body of the deceased is concerned.

PC Simon Mokaya also referred to the injury on the body of the deceased as being located on the right upper back. He was cross examined by Mr. Onyango on this issue and he maintained that the gunshot wound was at the upper back on the right side. PC Mokaya was recalled to identify the dress worn by the deceased when her body was recovered from the scene. He described the hole on the dress as being on the upper right back. The dress was exhibited in court. From my observation the hole was placed towards the middle of the upper back. This is an issue taken up by the defense. I have considered this issue and it is my view that when the deceased was shot, there was a struggle between the accused and the deceased. In that state of a struggle it is obvious that the deceased was not standing still when she was injured. The evidence of the struggle between the deceased and the accused considered together with all the other evidence portrays a scenario that could have led to the hole on the dress occurring on the position as was noted by this court. In my view, the position of the hole on the dress does not negate the fact that the deceased died as a result of a single gunshot to her upper back.

The third witness to give direct evidence in respect to the position of the gunshot wound is Dr. Muturi. He testified to observing a gunshot wound on the right upper back. He captured these findings on the post mortem report that was produced in court. Dr. Muturi was cross examined. The cross examination did not dwell on the location of the injury on the body of the deceased. The evidence of Dr. Muturi on the location of the injury, just like that of PC Kipsang and PC Mokaya, remains unchallenged by the defense.

The photographs by PC Kipsang and the post mortem report were given to Prof. Rogena by the defense. She was asked to compare the photographs and the findings on the post mortem report and correlate them. I have referred to her findings in this judgment above. Her conclusions are that the descriptions of the gunshot wound by Dr. Muturi in the post mortem report does not correlate with what is demonstrated on photograph marked Ex. 5(b)(v) and that these findings suggest a major error in description of location of injury at postmortem or mix-up of reports. Photograph Ex. 5(b)(v) shows the injury on the left upper back. It is an undisputed fact that Prof. Rogena did not attend the post mortem examination and therefore she did not observe first-hand the location of the injury on the body of the deceased.

It is clear to me, after considering the evidence of PC Mokaya, PC Kipsang and Dr. Muturi and that of Prof Rogena, that there is an apparent contradiction on the description of the location of the injury. This contradiction must be resolved by this court. In so doing, this court has carefully considered the evidence of the three witnesses, who were present during post mortem examination, the findings of Dr. Muturi captured in the post mortem report and the evidence of Prof Rogena. I have noted that there is an obvious error in the location of the injury as portrayed in the photographs as compared with the eye witness account of PC Kipsang, PC Mokaya and Dr. Muturi on the location of the injury. The evidence of the three witnesses is direct evidence of an eye witness. Their evidence is harmonious and corroborative of each other. I take the view that these three witnesses could not have been mistaken on the position of this injury. It appears to me therefore that something went wrong in the course of publishing the photographs taken by PC Kipsang. The possibility that the films of these photographs were flipped in the course of publishing them is not far-fetched. It is my view that the evidence of the three witnesses who saw the body at the time of the post mortem examination is credible evidence. Dr. Muturi's evidence is corroborated by that of PC Kipsang and PC Mokaya. I believe that what these witnesses told the court is the true version of what they observed and I so find.

While I agree with Prof Rogena that the description of the gunshot wound as described by Dr. Muturi in the post mortem report does not correlate with what is demonstrated on the photograph Ex. 5(b)(v) it is my view this anomaly can be explained as shown above in this judgement. As a result, I find no error in the description of the injury by Dr. Muturi in the post mortem report or a mix up of the post mortem reports as stated by Prof Rogena. Relying on the Pravin Singh Dhalay case above, the opinion of Prof Rogena is not binding to this court.

Having settled the issues flagged out by the defense, I now turn to determine whether the prosecution has proved beyond reasonable doubt all the ingredients of murder. The death of Linda Wanjiku Irungu occurred. This court has no doubt about this fact. I have sufficient evidence to prove the occurrence of that death. It was death resulting from a single gunshot. It was unnecessary death. It was an unlawful death. After considering all the evidence on record, I am satisfied and I have no reasonable doubt in my mind that Linda Wanjiku Irungu died on 12th December 2015 as a result of a single gunshot wound to her right upper back. The evidence on record satisfies the legal threshold and I find the fact of an unlawful death of the deceased in this case proved beyond reasonable doubt.

With a view to determining who caused the unlawful death of the deceased, I have considered all the evidence in totality. The prosecution case is that the accused caused the death of the deceased. The defense states that the accused did not cause the death of the deceased. The evidence on record, both from the prosecution and from the accused, places the accused and the deceased at the scene of this crime. The deceased, according to Diana, was in the process of going away from her home to her parents to escape the wrath of the accused. Diana described what happened after the accused arrived and intercepted the deceased. The relevant part of Diana's evidence reads as follows:

“There was a struggle between Linda and Erastus. He was trying to grab her and was hulling insults. He drew out his gun. I saw him draw his gun..... I was a step from him when he drew his gun from the back pocket. I saw him hold the gun. Linda asked him why he had to draw his gun all the time. He cocked the gun. Linda and I ran. Linda was running towards her house and I was running the opposite direction. I heard a gun-shot. I heard Linda say “umenishoot”..... I looked back and saw Linda standing but she appeared unwell. She was losing stability. She fell down.”

Peter's evidence is that the deceased was indeed inside her car when the accused accosted her. Peter describes what happened in the following manner:

“I saw a light and I noticed it was Chiku's vehicle coming out..... Before I opened for her I saw someone entering through the pedestrian gate I realized it was Erastus walking..... He prevented Chiku's car from going. He went in front of the car and held it..... He went to the driver's side. He opened the door and pulled Chiku out. She came out and was standing. They started quarrelling. Erastus started beating Chiku..... Erastus and Chiku were pulling as they went towards their house. Before reaching their gate I heard a gun-shot. I was about 50 metres from where they were. I did not go near the place. I could see them clearly. I saw someone fall down. There was no obstruction from where I was and I could see clearly. I saw Chiku fall down.”

I find no contradiction in the evidence of Diana and Peter in respect to what happened after the accused intercepted the deceased's car as

submitted by the defence. Both witnesses describe the accused assaulting the deceased. Both describe a shooting and the deceased falling down after that shooting. Both describe a quarrel between the accused and the deceased as well as pulling. The two witnesses agree on the salient points in respect to what happened when the accused arrived at the scene.

By his admission, the accused was at the scene. He admitted that he had been looking for the deceased that night after she failed to join him for the evening and after learning that she was not at home. Describing what happened at the scene, the accused testified as follows:

“I found Linda’s car reversing. Linda was driving. I wondered where she was going to. She was driving towards second gate which does not exit. I do not know why she was heading there. She was very drunk. She came out and walked towards me. I was worried thinking there was a problem in the house. I asked her where she was going. She told me it was none of my business. We started quarrelling. She fell down. Diana her sister was inside the vehicle. She came out when Linda fell down. Linda stood up supporting herself by holding me. She reached for my gun as we were arguing. I was struggling to get her hands off the gun. I managed to get hold of the gun as she was still holding it. She touched the trigger and it went off. The gun was cocked. The shot was fired to the air. We continued struggling. She fell down. I put the gun down to assist her to stand up but she was very heavy. She may have blacked out. She was not moving. The body was weak.”

I have given the above evidence careful consideration. There is no dispute that the accused intercepted the deceased to stop her from leaving the Waihura Court. From the description of the evidence above, a confrontation arose between them. I am persuaded by the evidence of Diana and Peter that the accused assaulted the deceased in the course of their quarrel and struggle. Although Peter did not witness the accused shooting the deceased, he saw the struggle and the pulling and heard a gunshot. When he heard the gunshot, he turned and saw the deceased fall down. According to Diana, the accused picked his gun from the pocket and shot the deceased as she was running towards her house. I have compared the evidence of Diana and Peter with that of the accused. The accused admits that the gun that fired at the scene that night belonged to him. What he denies is that he is the one who shot that gun. His defense is that the gun fired after the deceased touched the trigger as they struggled over it. Does the accused’s defense dislodge the prosecution case?

If indeed the gun fired into the air as claimed by the accused, why was the deceased fatally injured as a result of that shooting? Would that bullet fired into the air travel the same path backwards and with the same velocity as when it was fired in order to fatally wound the deceased? There are no answers to the questions I am posing here. My view is that it did not happen as the accused wants this court to believe. Further, if the gun fired in the course of the struggle after the deceased touched the trigger, logically, the deceased would have been shot in the front not at the back as was the case here. Sustaining a gunshot wound in the back indicates that the victim was shot while facing away from the person shooting and in my view this would agree with the evidence of Diana that Linda was fleeing from the accused when she was shot. After considering the circumstances of this case and analyzing all the evidence touching on the shooting, I find the defense of the accused as to what happened untruthful and I hereby reject the same. My finding on this issue is that the accused shot the deceased on that fateful morning of 12th December 2015.

I now turn to the element of malice aforethought. I have detailed the law under Section 206 of the Penal Code on the element of malice aforethought elsewhere in this judgment. The prosecution maintains that the accused shot the deceased intentionally. Determination of this ingredient must take into account the behaviour of the accused that night and more particularly his actions. The accused had a gun. This gun has been exhibited in court and confirmed to be the gun the accused carried with him that night. This court will not delve into the issue as to whether the accused held that gun legally, that being an issue before another court. The mandate of this court is to determine whether that gun was used to cause the unlawful death of the deceased in this case.

The gun in issue was cocked at the time the accused intercepted the deceased and a struggle between them ensued. In my view it would not be wrong to conclude that the accused was not a happy man that night. It is the natural reaction of a human being after what happened that night. He expected to be joined by the deceased for the night. He did not have the company of his partner as he had expected. The deceased had told him that she was tired and would go home to rest. She was not at home resting and was not reachable on phone. The accused cut short his night with his friends and decided to go home and look for the deceased. He was agitated. His agitation can be discerned from the several times he went to Waihura Court. In his defence the accused told the court that he went to Buruburu Phase 5 Extension at about 2.30am-3.00am but found the deceased not at home. He said he went to look for her at his Club in Buruburu. He did not find her. He returned to Phase 5 Extension at about 3.30am-4.00am. He saw the car belonging to the deceased in the compound. He drove outside through Gate ‘A’, parked outside, re-entered the Phase 5 Extension through the pedestrian gate of Gate ‘A’. This evidence is confirmed through the testimony of Peter who was manning Gate ‘A’ that night.

When the accused finally spotted the deceased, she was inside her car preparing to leave Waihura Court. He jumped in front of her car and blocked it. He moved to the driver’s side, opened the door and pulled the deceased out. The car was still in motion. It continued unattended and hit the gate, slightly denting it. A serious quarrel ensued followed by the assault on the deceased and the eventual shooting. The accused has not pleaded provocation or intoxication as defences.

In *Nzuki v. Republic (1993) KLR 171*, the Court of Appeal stated as follows on the issue of malice aforethought:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to

ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.”

Can it be argued that the accused did not know that there was a serious risk that death or grievous bodily harm will ensue from his acts of jumping in front of deceased's car, pulling her from the car when it was still in motion, assaulting her and eventually shooting her? In my view the accused knew his actions exposed the deceased to a serious risk of death or grievous bodily harm. He cannot escape from the probability that he knew the consequences of these actions but still acted as he did anyway. In my view, the circumstances facing the accused that night taken together with his carrying a gun that was cocked makes a deadly combination. The situation was bound to explode and it did explode in the most horrific manner. My conclusion on this issue is that the prosecution has proved beyond reasonable doubt the element of malice aforethought on the part of the accused in this case. Proof of any one of the intentions under Section 206 of the Penal Code is adequate.

I have considered Diana's evidence that the accused attempted to block them as they took Linda to hospital but I find it incredible. I will therefore ignore it. I have also considered the issue raised by the defense that the police failed to handle the gun safely. The accused did not deny that he took police to his car to retrieve the gun from the compartment of the car. At this time, the accused had separated the magazine from the gun. My view on the matter is that failure by the police to produce a record of how the gun was handled is not prejudicial to the prosecution or defense cases. It is not denied that the same gun recovered from the accused's car was fired in the course of that night or early morning.

In conclusion, it is my finding that the prosecution has presented credible, consistent and well corroborated evidence against the accused. I have with great care considered all the evidence from the prosecution and the defense. I have considered all the submissions and the authorities cited by the defense. I have applied those authorities in my determination of this case. I have given the defense careful consideration and I find that it does not create reasonable doubt in my mind. The defense of the accused does not dislodge the prosecution case. I find all the ingredients of murder proved beyond reasonable doubt. Consequently, I find the accused guilty of the offence of murder as charged and convict him accordingly. Orders shall issue accordingly.

I take this opportunity to thank Ms Mwaniki for the prosecution and Mr. Onyango for the defense for valiantly presenting their respective cases. The thoroughness they exhibited throughout the trial in prosecuting and defending their respect cases is commendable. It made my work in preparing this judgment a lot easier. I must also commend them for keeping each other on their toes and making this trial livelier.

Delivered, dated and signed this 26th day of July 2018.

S. N. Mutuku

Judge