



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO.77 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MOHAMMED SAMANA.....1<sup>ST</sup> ACCUSED**

**KARISA KAHINDI GONA.....2<sup>ND</sup> ACCUSED**

**JAMES LELERUK .....3<sup>RD</sup> ACCUSED**

**JOEL NGARE.....4<sup>TH</sup> ACCUSED**

**JUDGMENT**

Mohammed Samana (the 1<sup>st</sup> Accused), Karisa Kahindi Gona (the 2<sup>nd</sup> Accused), James Leleruk (the 3<sup>rd</sup> Accused) and Joel Ngare (the 4<sup>th</sup> Accused) were charged with three counts of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 26<sup>th</sup> July 2009 at Eldama Ravine – Mogotio junction, the accused persons jointly murdered Adan Abshir Kassim, Mohammed Iman Kassim and Sammy Kiyech. The first three accused persons were the first to be arraigned before this court for trial. They pleaded not guilty to the charge. Later, the 4<sup>th</sup> Accused surrendered himself to the court. He also pleaded not guilty to the charge. The prosecution called a total of twenty-eight (28) witnesses in its bid to establish the case against the accused persons. After the close of the prosecution's case, the accused persons were put to their defence. They gave unsworn statements in their defence. They denied the charges. After the close of both the prosecution's and the defence's respective cases, counsel for the prosecution and the defence's filed written closing submission. This court has considered the said submission in its decision. The court will refer to the said submission at a later part of this judgment.

The trial commenced before Ochieng, J. He heard the first ten (10) prosecution witnesses. This court took over proceedings when Ochieng, J was transferred. The prosecution and the defence agreed that the court takes over proceedings from where it had reached when the case was before Ochieng, J. This court therefore heard eighteen (18) prosecution witnesses. It also heard the respective defences of the accused persons.

The facts of this case according to the prosecution are as follows:

On 26<sup>th</sup> July 2009, PWI Francis Gitau Mwangi, a teacher then teaching at Ndururumo High School in

Nyahururu, decided to visit his friend who was then residing at Pipeline Estate in Nakuru. The friend was PW3 Waweru Muriithi. PW3 had agreed to assist PW1 compile his Masters' thesis. PW3 had notified PW1 that he had already compiled and bound the thesis. PW1 left his home at Lanet area of Nakuru at about 6.00 p.m. He was driving his motor vehicle registration No.KAY 449N Mitsubishi Pajero. The motor vehicle was blue in colour. Accompanying him was his adult son PW2 Morris Mwangi Gitau. PW1 testified that when he reached the home of PW3, he parked the motor vehicle outside his gate. He went inside the house of PW3. He was in the house for about twenty (20) minutes. He paid PW3 a sum of Kshs.4,000/- for the work that he had done on his behalf. As he was leaving the house of PW3, he was escorted by PW3 and his young son. PW2 had already gone ahead of him into the car. It was already dark when PW1 and PW2 sought to leave the home of PW3. While outside the motor vehicle, they were confronted by three (3) men.

According to PW1, PW2 and PW3, the three men were armed with guns. The three witnesses did not describe the type of guns that the three men had. They were not sure if the guns were pistols or rifles. They were however not in doubt that the three men possessed firearms. The three men bundled PW1, PW2 and PW3 into the motor vehicle. They also entered the motor vehicle. One of the men took over the control of the motor vehicle. He drove the motor vehicle towards Nakuru Town. While they were in the motor vehicle, the three men, especially one of them, demanded that they surrender any money that was in their possession. PW3 surrendered the Kshs.4,000/- that he had been paid by PW1. PW1 told the three men that he only Kshs.300/- with him. They also robbed PW1 and PW3 of their mobile phones. He was ordered to surrender his wallet. In the wallet, one of the men found PW1's ATM card. He inquired from PW1 if he had any money in his account. PW1 replied that he had about Kshs.39,000/- in his account at Standard Chartered Bank. The men then drove the vehicle to the Standard Chartered Bank. PW1 was forced to give the PIN Number of his Account. He was threatened with dire consequences if he gave the wrong PIN Number. One of the men handed one bullet each to PW1, PW2 and PW3 with the threat that he would use the said bullets on each of them if he would fail to withdraw money from PW1's Account. According to PW1, the men were able to withdraw the sum of Kshs.10,000/- from his account.

After the withdrawal was made, they were driven towards Pinkam House in Nakuru where they picked another man. They were then driven towards Eldama Ravine Road where they were dumped near Gioto Dumpsite. Their limbs were bound. They were ordered not to move until after thirty (30) minutes. PW1 testified that after their hijackers had left, PW2 retrieved his phone from his underwear. They were able to call their relatives particularly PW13 Maurice Irungu Muiruri who came to their rescue. They were first taken to the Central Police Station, Nakuru before they were released to go home after they had given description of their assailants to the police. PW1, PW2 and PW3 testified that the three men who kidnapped and robbed them spoke to them in Kiswahili and Kikuyu languages. One of the robbers did not speak at all. The three witnesses were not able to identify any of the four (4) men who robbed them. They explained the reason for their failure to identify the robbers. It was because the robbery incident had taken place about 8.30 p.m. They were kept by the robbers for about two (2) hours. They called their relatives to rescue them about 9.45 p.m. Among the persons who rescued them was PW13 Maurice Irungu Muiruri. He took them to Central Police Station where a report of the robbery and kidnapping was made.

Meanwhile, after PW1, PW2 and PW3 had been kidnapped and driven away by the robbers, the wife of PW3 informed the relatives and friends of PW1 who made a report to the police. Among the friends, was PW13 Maurice Irungu Muiruri. He made the report of the robbery and kidnapping to the police. He also took the PW1, PW2 and PW3 to the Police Station after they had been abandoned. According to PW16 PC Bernard Muigai Waweru, then working at the Nakuru Divisional Headquarters Control Room, when he reported to work at about 9.25 p.m. on 26<sup>th</sup> July 2009, he was informed by Corporal Kombo, the Officer he was taking over duties from, that a motor vehicle registration No.KAY 449N had been stolen from Mwariki area of Nakuru. The motor vehicle was blue in colour. At about 10.45 p.m., he received a report that the owner of the motor vehicle and the persons who were kidnapped with him had been abandoned at Gioto area along Nakuru-Eldama Ravine Road.

PW16 testified that the persons who had been kidnapped (including PW1) told the police that although they could not identify the persons who had kidnapped and robbed them of the motor vehicle, they could remember that two of the robbers wore track suits while one of them wore a brown jacket. PW16 gave the

information to the then Nakuru OCPD Mr. Kimeu. The OCPD instructed him to give the information to the mobile patrol units who included Sierra 1 (Speve) Unit, the Flying Squad and the Delta Force. The Speve Unit which consisted of the accused persons informed him that they were in Kiamunyi area along Nakuru - Eldama Ravine Road. After a while, PW16 received information from an officer manning the roadblock along Nakuru - Eldama Ravine Road. The police officer by the name PC Milimu told him that a motor vehicle resembling the one that had been circulated as having been robbed from PW1 had been abandoned near a school called AIC Morop Girls Secondary School at Kambi ya Moto Trading Centre. The accused persons, who were on patrol in unmarked police motor vehicle, received the information in their radio sets. They decided to drive towards the direction where the motor vehicle is said to have been abandoned. They gave this information to PW16 at the Control Room.

Meanwhile, PW8 Mohammed Billow Kassim testified that a day earlier on 25<sup>th</sup> July 2009, two of the deceased persons namely Adan Abshir Kassim and Mohammed Iman Kassim informed him that they were travelling to Tangulbey area of Baringo District to purchase camels for their butchery business. PW8 lived with the two deceased persons. A business partner of the two deceased persons PW9 Alio Nuro Abdurahman testified that they used to run a butchery business by the name Tawakal Butchery in Nakuru town. He testified that although the trade licence issued was in his name, in actual fact, he ran the business in partnership with the two deceased persons. PW8 recalled that on the material day of 25<sup>th</sup> July 2009, the deceased persons borrowed from him the sum of Kshs. 200,000/-. They borrowed the amount to enable them purchase camels for their butchery business. PW8 testified that it was not unusual for the two to borrow money from him. He also recalled that in other times due to exigencies of business, he used to borrow money from the deceased persons. PW8 testified that he lent the money to the deceased persons. He recalled that the deceased persons travelled to Tangulbey on the said 25<sup>th</sup> July 2009.

That the two deceased persons travelled to Tangulbey is not in doubt. PW10 Hussein Somo Hassan testified that he was at the material time a resident of Tangulbey. He recalled that on the 25<sup>th</sup> July 2009, at about 7.00 p.m., the two deceased persons arrived at his home at Tangulbey. He testified that prior to the material date, he knew Adan Abshir Kassim. The said Adan Abshir Kassim had previously purchased livestock from him, including camels. He testified that the two deceased persons sought to purchase from him two camels. After negotiation, he agreed to sell them the two camels at the sum of Kshs.50,000/-. He testified that Adan Abshir had previously paid him a sum of Kshs.20,000/-. On the particular day, he paid him a further sum of Kshs.30,000/-. The two deceased persons slept at PW10's house. On the following day (26<sup>th</sup> July 2009), the deceased persons went to look for a motor vehicle to ferry the two camels back to Mogotio where there was a slaughter house. PW14 Mohammed Isaak testified that he was a madrasa teacher at Tangulbey. He was also a goat trader. He recalled that on 26<sup>th</sup> July 2009 at about 2.00 p.m., he met with the two deceased persons. The two deceased persons were looking for a motor vehicle to ferry the two camels that they had purchased to Mogotio. PW14 agreed with the deceased persons to pool resources so that they could transport the livestock that they had purchased in one motor vehicle. PW14 had twenty-six (26) goats which he wanted to be ferried to Mogotio slaughter house. PW14 and the two deceased persons struck a deal whereby they agreed that they would transport the camels and the goats in one motor vehicle.

PW14 recalled that they hired a mini lorry registration No.KAT 999Q to ferry the livestock from Tangulbey to Mogotio slaughter house. The driver of the mini lorry Dickson Kipchumba Kiptoo testified as PW12. He recalled that on the material day of 26<sup>th</sup> July 2009, he was instructed by his employer, one Musa Cheretei to ferry livestock from Tangulbey to Mogotio. The people who had hired the mini lorry to transport the livestock were PW14 and the two deceased persons. PW12 explained that after loading the livestock onto the mini lorry, they commenced the journey from Tangulbey to Mogotio at about 4.30 p.m. Prior to the livestock being transported to Mogotio, PW14 and the two deceased persons had obtained a permit from PW15 Jonathan Kiptalam Akutamoi. PW15 was at the material time a Revenue Officer employed by the then County Council of Baringo. He testified that on the material day of 26<sup>th</sup> July 2009, he issued a permit for the transportation of two camels and twenty-six (26) goats from Tangulbey to Mogotio. He recalled that PW14 paid for the permit. PW15 produced a counterfoil of the receipt that he had issued to PW14 and the deceased persons as a *Prosecution's Exhibit No. 8* in the case. He testified that PW14 was with two other persons whom he was later told were the two deceased persons. PW12

recalled that in the journey to Nakuru, he was accompanied by PW11 Fred Epayok, his turn boy.

PW11 and PW12 recalled that while travelling to Mogotio they were five (5) people in the motor vehicle i.e. the two of them, the two deceased persons and PW14. PW12 testified that when they reached the Anti-Stock Theft Police roadblock at Loruk, he met with Sammy Kiyech. Sammy Kiyech is the other deceased person in this case. PW12 knew Sammy Kiyech. He requested for a lift to Mogotio. PW12 gave him the lift. Sammy Kiyech explained that he did not have money. That was the reason why he was asking for the lift. PW11 and PW12 testified that the journey from Tangulbey to Mogotio was uneventful save that when they reached a place called Noiwet, they unloaded the two camels from the motor vehicle. They then proceeded to Mogotio where they unloaded the twenty-six (26) goats. PW12 recalled that they reached Mogotio at about 9.00 p.m. The deceased persons requested him to take them to Eldama Ravine – Mogotio junction. Their request was made because the deceased persons desired to travel to Nakuru. At that time of the night, there were no public service vehicles travelling from Mogotio to Nakuru. PW12 declined the request. He however advised the deceased persons to hire a boda boda motorcycle to transport them to the said Eldama Ravine – Mogotio junction.

PW20 Joshua Kiptilon testified that he was a resident of Loruk in Baringo East District. He knew the deceased by the name Sammy Edward Kiyech. The said deceased was his younger brother. He testified that the deceased was at the material time a student at German Training Institute in Nakuru. He recalled that on 26<sup>th</sup> July 2009, he was with the deceased at Loruk. They attended church before the deceased told him that he wanted to travel back to college at Nakuru. He testified that he escorted the deceased to Loruk Trading Centre. He saw the deceased being given a lift by PW12. At 8.00 p.m. the deceased called him and informed him that they had reached Mogotio. They were boarding a motorcycle at the time together with two (2) Somalis. They wanted to be dropped at the Eldama Ravine – Mogotio junction. He requested the deceased to call him once he reached Nakuru. On the following day, he received information that the deceased had been killed at the junction by the police on suspicion that he was a robber. He denied the suggestion put forward by the accused persons that the deceased was a criminal. He reiterated that the deceased was a law abiding citizen who had been killed without any justification.

Meanwhile PW19 Kunow Abdi Hassan recalled that on the material day of 26<sup>th</sup> July 2009, he was at Mogotio waiting for the two deceased persons to arrive from Tangulbey. He was also a business partner of the two deceased persons in the butchery business. He testified that during the entire day, he was in constant communication with the two deceased persons. He communicated with them by mobile phone. The two deceased persons kept him updated on the progress of their journey. He testified that when the deceased persons arrived at Mogotio at about 9.00 p.m., he met with them. They told him that they desired to travel to Nakuru on the same night. PW19 remained at Mogotio because he was the one who was mandated to make arrangements for the slaughter of the two camels.

PW12 testified that upon suggesting to the deceased persons that they should use a boda boda motorcycle to the Eldama Ravine – Mogotio junction, he contacted PW4 Stephen Kiprop Keter, a boda boda rider, to take the deceased persons to the said junction. PW4 recalled that he was approached by the deceased persons at about 10.00 p.m. to take them to the Eldama Ravine – Mogotio junction. Due to security concerns, he sought to confirm the bona fides of the deceased persons with PW12. PW12 was known to him at the time. PW12 confirmed to him that indeed the deceased persons were genuine people who were desirous of travelling to Nakuru. PW4 testified that, after agreeing on the fare with the three deceased persons, he transported them in his motorcycle to Eldama Ravine – Mogotio junction. He testified that the three (3) deceased persons rode on his motorcycle to the said junction. He recalled that he left the three deceased persons at the said junction. The journey from Mogotio to the junction took approximately thirty (30) minutes.

PW5 Wilson Some Koech was at the material time employed as a night watchman at New Sunflower Bar which is near the Eldama Ravine – Mogotio junction. It was his testimony that on the night of 26<sup>th</sup> July 2009 at about 11.00 p.m., he saw three (3) men standing by the road side near the gate of the establishment that he was working at the time. He testified that the gate of the bar had been locked. However, there were two security lights on each pillar of the gate. One of the men approached him. He inquired from him if he could get transport to Nakuru. PW5 told him that it was not possible to get a

public service motor vehicle to ferry them to Nakuru at that time of the night. PW5 saw the man walk towards where two other men were standing by the road side. PW5 went on with his duties near the building that housed the bar. About half an hour later, he had gun shots emanating from the direction of the road. He stated that he was scared and went into hiding. He only emerged from the place that he had taken refuge after the shooting had subsided. He testified that this was about an hour after the shooting had ceased. He went to the road where the shooting had taken place. He saw many people. There were also many police officers. There were many vehicles at the scene. He saw bodies of the three (3) men that had been shot. The three (3) bodies belonged to the deceased persons in this case. He also saw identity cards laid on the road next to the bodies. They were also mobile phones next to the bodies of the deceased persons. He also saw two (2) fake pistols next to the bodies of the deceased persons. It was his further testimony that the distant from the road to the bar was approximately 40 metres. He recalled that the man he had spoken to prior to the shooting incident had features of a Somali and was chewing miraa. The man told him that he had travelled from Mogotio. He could not recall the colour of the clothes that the deceased persons had worn at the material time.

PW16 PC Bernard Muigai Waweru recalled that after he had broadcast the robbery and kidnapping through the police radio, the accused persons responded and informed him that they had gone to the scene to confirm the recovery of the motor vehicle that had been reported stolen from PW1. After a while, PW16 was called by the OCPD and told to request the scenes of crime officers to go to the scene. He was also told to get a breakdown which could be used to tow the recovered motor vehicle back to the police station. Among the first police officers to arrive at the scene was PW17 PC Daniel Suuji. He testified that at the material time he was attached to the Delta Unit under the Nakuru Divisional Police Headquarters. He recalled that after the motor vehicle had been recovered, his unit received instruction to go to the scene. On reaching the scene, he discovered that the accused persons, who were members of the Speve Patrol Unit had killed the deceased persons.

On making inquiries from the accused persons in regard to what had happened, the accused person told him that the persons whom they had killed were robbers. They told him that they had identified the deceased persons from the description of the clothes that they had been given by the Controller. PW17 saw no injuries on the bodies of the accused persons. He recalled that the bodies of the deceased were lying about seventy (70) metres from where the motor vehicle had been recovered. He saw the bodies of the deceased persons. Each body appeared to have sustained multiple gunshot wounds. The accused persons told him that they had recovered toy pistols from the deceased persons. In his assessment, the deceased persons were killed while they were in a standing position. Two of the deceased persons were wearing track suits while one of them was wearing a black jacket. PW17 recalled that the accused persons had told him that they had challenged the deceased persons to identify themselves before one of the deceased persons whipped out a toy pistol. It was at that moment that they shot them. PW17 testified that at the scene where the bodies of the deceased were, he saw several wallets and several identity cards.

PW18 Rogan Ondiek Ojiekio testified that he was called by the Controller from the Police Control Room at about 12.30 a.m. on 27<sup>th</sup> July 2009. He was told to go to the scene where the motor vehicle had been recovered. It was his testimony that the motor vehicle which had been stolen had been recovered near Kambi ya Moto trading centre. He drove his tow truck to the scene. He found many police officers at the scene. He was instructed by the then OCPD Mr. Kimeu to tow away the motor vehicle. He recalled that the motor vehicle was registration No. KAY 449N. It was a Mitsubish Pajero and it was blue in colour. He testified that the distance from where he found the police officers and where the motor vehicle was found abandoned was between sixty (60) and seventy (70) metres. He towed the motor vehicle to Central Police Station, Nakuru. He was later paid by PW1 for his services. He told the court that he did not see the bodies of the deceased persons at the scene.

PW21 CIP Sambu Wafula, then attached to the Provincial CID Scenes of Crime Office at Nakuru testified that on 28<sup>th</sup> July 2009 at about 11.00 a.m. he was requested by the then Nakuru DCIO, Salat Abdi to accompany him to the scene where the deceased were shot. Before going to the scene, PW21 visited Mwariki area of Nakuru where it was alleged that PW1 had been carjacked. He took photographs of the said scene. The photographs were produced in evidence. He later travelled to Kambi ya Moto where he took several photographs at the scene. He also took photographs of the motor vehicle which had been

hijacked. He visited the mortuary and took the photographs of the bodies of the deceased. The bundles of photographs that he took at the scene were produced in evidence.

PW21 testified that on the night that the deceased persons were shot, a Scene of Crime Officer by the name PC David Irungu visited the scene and took the photographs of the bodies of the deceased at the scene. Among the photographs that the officer took was that of two (2) toy pistols which were lying next to the bodies of the deceased. He also photographed two (2) SIM plates, four (4) mobile phones – Samsung, Nokia 1110, Nokia 5200 and Kshs.10. He photographed one (1) empty cartridge of .762 mm. He also photographed three (3) wallets containing documents and identity card of Francis Gitau Mwangi (PW1). Also photographed was a Sony flask disc, the graduate student identity card of PW1 and a close up view of the police officers conducting a search of the bodies. All these photographs were produced in evidence by the prosecution. PW21 testified that the reason why they visited the scene for the second time was to satisfy themselves as to the veracity of the circumstances that led to the fatal shooting of the deceased persons.

PW22 Corporal Thomas Wafula was at the material time in-charge of the Armoury at the Nakuru Police Station. He recalled that on 24<sup>th</sup> July 2009, he issued an AK 47 rifle Serial No.769484 with thirty (30) rounds of .762 Special ammunition to the 1<sup>st</sup> accused Mohammed Samana. On 26<sup>th</sup> July 2009, he issued the 2<sup>nd</sup> accused PC Karisa Gona with an AK 47 Serial No.765745 together with thirty (30) rounds of .762 Special ammunition. On the same day, he also issued the 3<sup>rd</sup> accused PC James Leleruk with AK 47 rifle Serial No.766822 with thirty (30) rounds of .762 Special ammunition. On 27<sup>th</sup> July 2009, the three (3) police officer returned to the Armoury and told him that they had used several bullets in the course of their duties. The 1<sup>st</sup> accused returned his rifle less ten (10) bullets. The 2<sup>nd</sup> accused returned his less seven (7) bullets while the 3<sup>rd</sup> accused person returned his less eight (8) bullets. PW23 Corporal Festus Musyimi was at the material time in-charge of the Armoury at the Nakuru Police Divisional Headquarters. He testified that on 25<sup>th</sup> July 2009, he issued one Ceska pistol Serial No.F7441 to the 4<sup>th</sup> accused person PC Joel Ngare. On 27<sup>th</sup> July 2009, the 4<sup>th</sup> accused returned the pistol less four (4) rounds of ammunition. He stated that PW4 explained to him that he had used the four (4) rounds of ammunition in the shootout with the robbers.

After investigations commenced, all circumstances leading to the shooting dead of the deceased persons, the four firearms used by the accused persons were taken to CID Headquarters where the same were examined by PW25 SP Lawrence Ndhiwa. He confirmed that the four firearms were indeed firearms within the meaning of **Firearms Act**. They were capable of firing ammunition. The four (4) firearms together with the ammunitions, both spent and unspent, were produced into evidence by the prosecution. PW25 also examined the two (2) toy pistols which were allegedly found in possession of the deceased persons. He formed the opinion that the two (2) pistols were infact imitation pistols which were not capable of firing any ammunition.

After the bodies of the deceased were recovered from the scene, they were taken to Nakuru Municipal Mortuary. Prior to postmortems, the bodies of the deceased persons were identified by PW6 Adan Noor and PW7 Olad Ibrahim Shaban. The body of Sammy Kiyech was identified by PW20 Joshua Kiptilon. Postmortem was performed on the bodies of the deceased persons by PW24 Dr. Daniel Makau Mbithi, the then Government Pathologist based at Nakuru. The first body that he examined was that of Mohammed Kassim Iman. He observed that the deceased was an African male of Somali descent. He was about 25 years old; Was 5 feet 9 inches tall. The body had four (4) entry wounds of bullets and also four (4) exit wounds. The first bullet went through the neck and lodged at the top of the scalp. The bullet was retrieved and given to the investigating officer. The second bullet went through the left axillar region, went through the lungs and exited through the right axillar region. The third bullet entered through the left mid-thigh, went through the left thigh, through the right thigh and exited through the right thigh. The fourth bullet entered through the left leg medial aspect. The doctor formed the opinion that the cause of death of the deceased was severe head and chest injuries due to bullet injury. He produced the postmortem report into evidence.

He also examined the body of Adan Abshir Kassim. On external appearance, he noted that the deceased

was an African male of Somali origin. He was 5 feet 5 inches tall. He had five bullet wounds both entry and exit. The first bullet went through the left shoulder, went through the chest and exited through right lumbar region. The bullet then went through the left lung and the liver. The second bullet went from the right ilium, damaged the left kidney and exited from the left lumbar region. The third bullet entered through the left mid-thigh and exited through the right thigh. The fourth bullet hit the left lateral aspect of the left wrist and exited through the medial aspect – close to the thumb. The fifth bullet went through the right middle finger. He formed the opinion that the cause of death was severe chest and abdominal injuries due to gunshot wounds. He produced the postmortem report into evidence.

The doctor also performed postmortem on the body of Sammy Kiyech. On external appearance, he noted that the deceased was an African male, 5 feet 11 inches of height. The deceased sustained seven (7) bullet injuries. The first bullet entered the left aspect of the posterior head and exited through the left frontal. It blew out the brains. The second bullet went through the right chest next to the nipple – it went through the lungs and existed posteriorly at the back. The third bullet went through the back and through the right lung and exited through the chest. The fourth bullet entered from the back and went through the right lung and came out above the right nipple. The fifth bullet went through the left forearm and exited through the medial aspect. The sixth bullet went through the left elbow from lateral to medial. It caused a fracture of the bone above the joint. The seventh bullet went through the left knee and exited posteriorly. The doctor formed the opinion that the cause of death was severe brain and chest injuries. Three (3) of the bullets that hit the deceased were fired from his rear.

The case was initially investigated by IP Charles Maluki, then based at the CID Office Nakuru. However, there was an outcry by members of the public concerning the circumstances the deceased were killed. Members of the Somali community at Nakuru held demonstrations at Nakuru demanding investigations on the circumstances under which the police killed the deceased persons. The top hierarchy of the police determined that for public to be assuaged, a team of investigators from the CID Headquarters be sent to Nakuru to investigate the case. The investigations which had been commenced by PW26 were taken over by SP Ndombi, who then worked as the Officer In-charge of the Serious Crimes Unit at the CID Headquarters. He was accompanied by PW27 IP Justin Omutiya. PW27 and 28 took over the investigations from PW26 on 28<sup>th</sup> July 2009. By that time, PW26 had already commenced investigations and recorded statements from several witnesses including the victims of the carjacking incident and the accused persons. PW27 and PW28 visited the scene where the shooting incident occurred. They re-interviewed some of the witnesses.

After concluding the investigations, they formed the opinion that indeed the accused persons had used unreasonable and excessive force in shooting and killing the deceased persons. PW28 in particular testified that there was inconsistency in the narrative that was given by the accused persons as compared with the statements recorded by other witnesses who visited the scene after the shooting incident. In particular, what attracted his attention was the fact that the deceased persons had been shot a distance of between seventy (70) and one hundred and twenty (120) metres from where the stolen motor vehicle was abandoned. After interviewing the witnesses who had interacted with the deceased persons immediately prior to their fatal shooting, PW28 was of the view that the deceased persons were not the robbers who the accused persons made them to be. He testified that the toy pistols and the documents belonging to PW1 which were placed next to the bodies of the deceased after they had been shot, was planted by the accused persons with a view to painting the deceased persons as criminals, and in particular robbers who had robbed the subject motor vehicle from PW1.

PW28 explained that the manner in which the motor vehicle was removed from the scene of crime raised suspicion that indeed the accused persons interfered with the scene of crime after they had discovered that they had made a mistake of shooting innocent persons. PW28 testified that the interference with the scene of crime was intended to cover up the fact that the accused persons had shot innocent people. PW28 did not believe the story that he was told by the accused persons regarding the circumstances the deceased persons were killed. He testified that the way in which the scene of crime was handled left a lot to be desired. In particular, he questioned why the accused persons did not dust the recovered motor vehicle for finger prints to ascertain the identity of the persons who robbed the motor vehicle from PW1. He however conceded that the accused persons most probably shot the deceased persons under the mistaken

belief that they were armed robbers. He could not discern malice on their part. He was of the view that the accused persons made a terrible mistake which resulted in the death of innocent people.

When they were put to their defence, the accused persons gave unsworn statements in their defence. The accused persons gave more or less similar accounts on what transpired on the material night. They testified that they were members of the Speve Squad which was established under the Divisional Police, Headquarters Nakuru. Their work essentially entailed quick response to serious crimes such as kidnappings, carjackings and robbery with violence. For their work, the accused persons were assigned an unmarked police motor vehicle. The 4<sup>th</sup> accused person was the driver of the motor vehicle. On the particular night of 26<sup>th</sup> July 2009, the accused persons reported to work at about 6.00 p.m. They commenced their duties patrolling residential estates within Nakuru Municipality. They testified that at about 9.30 p.m., they heard through the police radio that a motor vehicle registration No. KAY 449N had been hijacked with its occupants within Pipeline area. They were told that the motor vehicle was a Mitsubishi Pajero, silver blue in colour. At the time, the accused persons were patrolling along Kanu Street. After a while, they received information from the Controller to the effect that the victims of the robbery had been abandoned at Gito near Kiamunyi area. They were instructed by the Controller to immediately rush to the area to see if they could catch up with the robbers.

The victims of the robbery had by then described the clothes that the robbers were wearing. They said that two (2) of the robbers were wearing track suits while one of them was wearing a jacket and had a black shirt. They were warned that the robbers were armed with guns. They testified that as they were driving towards Kiamunyi, they were informed by the Controller that PC Milimu who was manning the roadblock at Menengai had received information to the effect that the robbed motor vehicle had been sighted near AIC Morop Girls. The motor vehicle had its hazard lights on. The accused persons drove to the area. They saw the motor vehicle. About 50 – 100 metres ahead of the motor vehicle they saw a group of men standing by the roadside. One of them was wearing a track suit. They tried to stop them. They drove past where the men were standing towards the Eldama Ravine – Mogotio junction. They then drove back.

The 4<sup>th</sup> accused was instructed to drive the motor vehicle at a moderate speed. When they reached near Sunflower Inn, they saw the same men by the roadside. The men were trying to stop them. The 4<sup>th</sup> accused made as if to stop. He indicated as if he was going to stop. According to the accused persons, one of the men jumped onto the road while holding a long rifle. The accused persons believed that the man was armed with an AK 47 rifle because the magazine was curved. The other three (3) men approached the car pointing pistols at them. They were shouting in Kiswahili ***“toka sisi ni police”*** meaning ***“get out we are the police”***. The 4<sup>th</sup> accused testified that when the man jumped into the road, he swerved to the right. All the accused persons then jumped out of the motor vehicle. They started firing towards the direction the men were standing. The accused persons testified that the man who had the AK 47 jumped into the bush and disappeared. After the shooting had stopped, they checked if any one of them had been injured. The 2<sup>nd</sup> accused realized that he had bruises on both his arms and knees. He attributed this injury to the fact that he had jumped out of the motor vehicle and landed on the ground. The 4<sup>th</sup> accused was injured on his right hand. He had a cut. His co-accused administered first aid on him. He was later taken to hospital where he was treated and discharged.

The accused persons testified that when they went to the scene, they found the bodies of the three deceased persons. They conducted a quick search on the pockets of the deceased persons. They recovered a wallet containing documents, identity card, voter’s card and Egerton University student identity card. All these items were in the names of Francis Mwangi Gitau (PW1). They also recovered four (4) mobile phones, Nokia and Samsung. They also found a flash disk. This flash disk was later identified to belong to one of the victims of the robbery. They also found two (2) toy pistols with the deceased persons. The accused person testified that they informed the Controller what had transpired. Within a short time, the then OCPD Mr. Kimeu and the Duty Officer IP Ngambo arrived at the scene. Officers from the Flying Squad and the Delta Force arrived at the scene. Scenes of Crime officers also arrived at the scene. They took photographs of the scene. The photographs were produced in evidence by PW21. The items which were recovered at the scene were produced into evidence by PW28.

The accused persons testified that they shot the deceased persons because they were certain that they were the robbers who were robbed the victims of the robbery in the carjacking incident. They testified that they were at the material time carrying on their normal duties as police officers who had been confronted by the robbers. They were emphatic that they had used the force required in the circumstances because the deceased persons were armed and dangerous. They attributed their arrest and subsequent charge on the rivalry between their squad and that of the Flying Squad and the Delta Force. They testified that the members of the two squads operating under the CID office were not happy that their squad had been formed to fight crime in a similar manner that the other two squads were operating. They further testified that the then Commissioner of Police, Hussein Ali succumbed to pressure exerted by members of Somali community in Nakuru. The said members of the Somali community had demonstrated demanding that action be taken against the police officers who had shot “*innocent*” civilians. It was further their case that the decision to charge them was aided by the fact that the then Provincial Commissioner of Rift Valley Province based at Nakuru, a Mr. Noor and the District Criminal Investigation Officer, Nakuru a Mr. Salat were both members of the Somali community. It was their evidence that were it not for the above factors, they would not have been charged with the present offence. They reiterated that they had acted in self defence when they shot the deceased persons. If they had not shot them, they would have been harmed.

This being a criminal case, it is the duty of the prosecution to establish the charge laid against the accused persons of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The prosecution is required to establish the charge to the required standard of proof beyond any reasonable doubt. The burden of establishing the guilt of the accused persons is on the prosecution. It does not at any time shift to the accused. In other words, the accused persons are under no legal obligation to establish their innocence. What they are required to do is to raise reasonable doubt on the prosecution’s case. If such reasonable doubt is raised, the court will have no option but acquit the accused persons of the charge.

In a bid to establish its case, the prosecution came up with a theory which it attempted to establish through the prosecution witnesses. In assessment of this court, the theory that the prosecution put forward was as follows:

The accused persons being persons employed as police officers, while armed with firearms issued to them by the Police Force to protect members of the public, used the said firearms in circumstances that was unwarranted, to shoot the deceased persons, who were innocent members of the public. The prosecution adduced evidence to prove that the deceased persons were innocent civilians who were seeking transport to travel to Nakuru on the material night that they met their death. The other limb of this theory which the prosecution sought to establish was that the accused persons, without any justifiable reason, shot the deceased persons, and after killing them, tampered with the scene of crime to make it appear as if the deceased persons were criminals who had been killed in justifiable circumstances.

As regard the first limb of the theory, the prosecution adduced evidence to the effect that Mohammed Kassim Iman and Adan Abshir Kassim were businessmen who were on the material night, travelling from Mogotio to Nakuru. The prosecution called witnesses who testified that on the day prior to the fateful night, the two deceased persons, who ran a butchery business in Nakuru under the trade name Tawakal Butchery, travelled to Tangulbey to purchase camels which they intended to slaughter for sale in their butchery. PW8 Mohammed Billow Kassim and PW9 Ali Nuro Abdirahman testified that the two deceased persons indeed operated a butchery business in Nakuru. PW9 produced into evidence a trade licence issued by Nakuru Municipal Council which indicated that indeed there existed a butchery business under the name Tawakal Butchery. Although the licence was in the name of PW9, upon evaluating the evidence adduced, especially the fact that PW9 stated that the deceased persons were his business partners, this court was convinced beyond any reasonable doubt that indeed the two deceased persons operated a butchery business in Nakuru. The butchery specialized in selling camel meat.

Evidence was further adduced by the prosecution to the effect that the two deceased persons travelled from Nakuru to Tangulbey in Baringo County on 25<sup>th</sup> July 2009. PW10 Hussein Somo Hassan and PW14 Mohammed Isaak testified that the two deceased persons did indeed spent the night of 25<sup>th</sup> July 2009 at Tangulbey. Adan Abshir Kassim was known to both PW10 and PW14 prior to the material day. Indeed PW10 testified that the two deceased persons purchased two (2) camels from him. The purchase

consideration for the two camels was Kshs.50,000/-. Adan Abshir Kassim had previously deposited with PW10 the sum of Kshs.20,000/-. On the material day, he paid PW10 the balance of Kshs.30,000/-. Although the accused persons, by cross-examination, attempted to discredit the two witnesses, upon evaluating the evidence adduced by the said two witnesses, this court reached the conclusion that the said evidence was cogent, consistent and corroborated each other. PW10 and PW14 had no reason to invent a story that the two deceased persons travelled to Tangulbey on the day prior to the fateful date, and the reason for their travel to the said destination.

Further evidence was adduced by PW11 Fredrick Epayok and PW12 Dickson Kipchumba Kiptoo, the driver and turnboy of the mini lorry registration No. KAT 999Q which had been hired by the two deceased persons and PW14 to ferry the two (2) camels and twenty-six (26) goats from Tangulbey to Mogotio. PW15 Jonathan Kiptalam Akutamoi, the then Revenue Officer of Baringo County Council based at Tangulbey, produced a receipt which showed that indeed the two deceased persons and PW14 paid for a permit to transport the two camels and twenty-six goats from Tangulbey to Mogotio. PW12 testified that they commenced their journey from Tangulbey to Mogotio at about 4.30 p.m. on 20<sup>th</sup> July, 2009. On reaching Loruk trading centre, at the roadblock manned by Anti-stock Theft Police Unit, Sammy Kiyech, the other deceased person, requested him for a lift. The said deceased was known to PW12 prior to the material date. PW12 accepted to give the said deceased a lift.

The two witnesses testified that the journey from Tangulbey to Mogotio was uneventful save that at Noiwet, the two camels were off loaded. The twenty-six (26) goats were off loaded at Mogotio at about 9.30 p.m. PW12 recalled that the deceased persons requested him to drop them at Eldama Ravine – Mogotio junction. He declined. He suggested to the deceased persons to take a boda boda motorcycle instead. According to PW12, the deceased persons took his advice and hired PW4 Stephen Kiprop Keter. He ferried the three deceased persons using his motorcycle. The motorcycle was unregistered but was later registered as KMCF 264G. PW4 testified that he was paid Kshs.500/- to take the three deceased persons from Mogotio to Eldama Ravine –Mogotio junction. Prior to agreeing to take the three deceased persons, PW14 got assurance from PW12 that the deceased persons were good people. Although the defence tried to discredit this evidence, upon evaluating the same, this court formed the opinion that the said evidence was cogent, consistent and corroborated each other in all material respects. It explained in sequential detail how the deceased persons arrived at the scene where they were later shot and killed by the accused persons.

PW20 Joshua Kiptilon, the brother of Sammy Kiyech (deceased) testified that on the material day of 26<sup>th</sup> July 2009, the said deceased bid him farewell at their home at Loruk. This was after they had attended a church service. The said deceased intended to travel to Nakuru where he was a student at the German Training Institute. When the police investigated the case later, it was indeed established that the said deceased was a student at the said college in Nakuru.

PW5 Wilson Some Koech adduced evidence, which in the opinion of this court was critical evidence. PW5's evidence was nearly the only evidence, other than that adduced by the accused persons, that can be described to be eyewitness or contemporaneous account of the events that took place on the material night. PW5 was at the material time employed as a watchman at New Sunflower Bar which is situate at the said Eldama Ravine – Mogotio junction. He testified that at about 11.00 p.m., he was approached by someone of Somali features. The person inquired from him if it was possible for him to get transport to Nakuru. PW5 told the person that at that time of the night, it was not possible to get public transport to Nakuru. PW5 recalled that the person was chewing miraa. PW5 inquired where the person was coming from. The person told him they had travelled from Mogotio. PW5 saw two other men standing by the roadside. After speaking to him, PW5 saw the person go back to where the two persons were standing by the roadside.

After about half-an hour, PW5 testified that he heard gunshot being fired in the direction that the three (3) men were standing. He took cover. The police came to where he was hiding. He did not come out from his place of hiding. After about an hour, he emerged from his place of hiding and went to the road. He saw the bodies of the three deceased persons. He realized that one of the deceased was the person that he had spoken to earlier. Next to his body were two toy pistols. There were also mobile phones and identity

cards next to the bodies. The testimony of PW5 was crucial in regard to the fact that the deceased persons were law abiding citizens who sought help to travel to Nakuru. PW5 had conversation with one of the deceased persons. It was polite conversation.

From PW5's evidence, it was clear that he did not feel threatened. Although the accused persons sought to discredit the veracity of this body of evidence, upon evaluation of the said evidence, this court formed the opinion that the said evidence was cogent, credible and corroborated each other in all material respect. The prosecution was able to establish, to the required of proof beyond any reasonable doubt, that indeed the deceased persons were law abiding citizens who found themselves at the scene where they were shot and killed by the accused persons. The prosecution was able to establish this limb of its theory to the required standard of the law.

As regard the second limb of its theory, the prosecution established to the required standard of proof beyond any reasonable doubt that the accused persons were on duty on the material night as members of the Speve Squad attached to the Nakuru Police Divisional Headquarters. The prosecution established that PW1 Francis Gitau was robbed of his motor vehicle registration No. KAY 449N Mitsubishi Pajero at Pipeline area at about 8.30 p.m. on 26<sup>th</sup> July 2009. PW1, his son PW2 Morris Mwangi Gitau and his friend PW3 Waweru Muriithi were accosted by a gang of three (3) robbers. According to the three witnesses, the gang was armed with pistols and rifles. The robbers subdued them and bundled them into the motor vehicle. They commandeered the motor vehicle to Nakuru town where they managed to withdraw a sum Kshs.10,000/- from PW1's account at Standard Chartered Bank. They then drove to Gioto dumpsite where they abandoned the three. Before abandoning them, they robbed them of the mobile phones, their wallets and cash that were in their possession. PW1, PW2 and PW3 were not able to identify their assailants. The incident took place at night. However, they testified that the robbers spoke in Kiswahili and Kikuyu. They further testified that two of the robbers were wearing track suits while one of them was wearing a jacket with a black shirt.

It was this information that was relayed to the accused persons after PW1, PW2 and PW3 had been rescued. PW16 Bernard Muigai Waweru who was then manning the Police Control Room testified that he received information from a PC Milimu who was then manning the police roadblock at Menengai to the effect that the motor vehicle that had been hijacked from PW1 had been abandoned at Kampi ya Moto Trading Centre near AIC Morop Girls. PW16 relayed this information to the accused persons. The accused persons went to the scene and found the abandoned motor vehicle. According to the accused persons, about 50 – 100 metres from where the motor vehicle was abandoned, they saw four (4) men. The four men attempted to stop them by waving them down. The accused persons became suspicious because one of the men was wearing a track suit. In their mind, they suspected the four (4) men to be the robbers of the motor vehicle. Since they had been informed that the said robbers were armed and dangerous, they drove past where they were standing and then turned around at the Eldama Ravine – Mogotio junction.

The story of the accused persons and that of the prosecution diverge in regard to what happened next. According to the accused persons, when they returned to the scene where they had seen the men, they were frantically waved to stop the vehicle. The 4<sup>th</sup> Accused person, the driver of the unmarked police motor vehicle that the accused persons were travelling in, was instructed by the other accused persons to pretend as if he intended to stop. The accused persons were consistent in their testimony that upon reaching the scene, one of the men jumped on the road holding a gun. The 1<sup>st</sup> accused testified that he thought the gun was an AK 47 because it had a curved magazine. The three other men jumped from the roadside and shouted at them to get out of the motor vehicle because they were police officers. They were carrying what appeared to be pistols. The 4<sup>th</sup> Accused testified that he swerved to the right after which all the accused persons jumped from the motor vehicle and started shooting towards the direction of the men. They managed to gun them down. The man that allegedly had the AK 47 rifle managed to escape into the nearby bush. After the accused persons confirmed that indeed the deceased persons were dead, they did a search on the bodies and managed to recover two (2) toy pistols, and the items that were robbed from PW1, PW2 and PW3. These items included mobile phones, the identity documents and flash disc of PW1. The defence of the accused persons is that they shot the deceased persons to protect themselves from harm and further, that they were in the course of their duty as police officers.

The investigating officer in the case PW28, SP Henry Ndombi discounted this narrative by the accused persons. He testified that the accused persons tampered with the evidence at the scene of crime in a bid to make appear as if the deceased persons were indeed criminals. PW28 pointed to certain inconsistencies at the scene of crime. The first inconsistency was the basis upon which the accused persons determined that indeed the deceased persons may be the suspects in the robbery and carjacking incident. PW28 testified that the motor vehicle was abandoned a distant of between 70 – 120 metres from where the bodies of the deceased persons were found. In his testimony, the accused persons had no basis to shoot people who were standing such distance from the abandoned motor vehicle. Secondly, he testified that it appeared that items had been removed from the motor vehicle and arranged next to the body of the deceased persons in a bid to show that the particular items had been recovered from the clothes that the deceased persons wore. He further testified that the two toy pistols were planted at the scene in a bid to establish that the deceased persons were criminals. Although the accused persons challenged the investigating officer in regard to his analysis of the scene of crime, this court, upon evaluation of the conflicting version of events as narrated by the accused persons and the prosecution was inclined to believe the testimony of PW28. The reason for this belief is the following:

The prosecution established that the deceased persons were at the scene at the time because they were waiting for a motor vehicle to take them to Nakuru. The prosecution established that the deceased persons were elsewhere when the robbery of PW1's motor vehicle took place at about 8.30 p.m. at Pipeline Estate in Nakuru. PW11, PW12 and PW19 Kunow Abdi Hassan testified that the deceased persons had by that time not reached Mogotio. The deceased persons were in the company of PW11, PW12 and PW14 in motor vehicle Registration No. KAT 999Q. The deceased persons arrived at Mogotio at about 9.30 p.m. They met with PW19 and PW4. PW4 took the deceased persons from Mogotio to the Eldama Ravine – Mogotio junction. One of the deceased persons spoke to PW5 at about 11.00 p.m. outside the New Sunflower Bar. The deceased persons could not therefore have robbed PW1 of his motor vehicle. The deceased persons were the only people at the scene. There was no evidence to support the assertion by the accused persons to the effect that there was a fourth man who was armed with an AK 47 rifle and who made good his escape.

As regard the claim by the accused persons that the deceased persons jumped into the road and ordered them to get out of the motor vehicle because they claimed they were police officers, this court is of the view that this is a concocted story by the accused persons when they discovered that they had killed innocent people. That the deceased persons attempted to stop the accused persons as they were driving past them is probable. However, that the deceased persons pointed toy guns at the accused persons is improbable. PW5 testified that he emerged from his place of hiding about an hour after the shooting had ceased. He went to the scene. He saw the bodies of the deceased. He also saw many police officers at the scene. Next to the bodies of the deceased persons, lay items which were allegedly recovered in their possession. It is the finding of this court that in the period of about one hour between the shooting to death of the deceased persons and the arrival of the scenes of crime officers (who photographed the scene), the accused persons removed some of the items from the motor vehicle and arranged them next to the bodies of the deceased persons. They also planted two toy pistols next to the bodies of the deceased persons so as to justify their decision to shoot dead the innocent victims. This court agrees with the investigating officer that the accused persons interfered with the scene with a view to painting the deceased persons as criminals so as to escape liability from the fatal shooting of the deceased persons.

This court therefore holds that the prosecution proved to the required standard of proof beyond any reasonable doubt the second limb of its theory that the accused persons fatally shot the deceased persons and then attempted to cover up their deed. This court has considered whether in the circumstances of this case it can be said that the accused persons were justified in shooting the deceased persons. That the accused persons were on duty is not in doubt. **Section 28** of the then **Police Act** (which was applicable at the time of the incident) provided that:

*“A police officer may use arms against: -*

- a. *Any person in lawful custody and charged with or convicted of a felony, when such person is escaping or attempting to escape;*

- b. *Any person who by force rescues or attempts to rescue another from lawful custody;*
- c. *Any person who by force prevents or attempts to prevent the lawful arrest to himself or any other person:*

*Provided that arms shall not be used:-*

- i. *As authorized in paragraph (a) unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he give warning to such person that he is about to use arms against him and the warning is unheeded.*
- ii. *As authorized in paragraph (b) and (c), unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise prevent the rescue or as the case may be effect arrest.”*

The **Kenya Police Manual of 1980** gives even greater details the circumstance under which a police officer may use force or firearms. In **Chapter 11** thereof, the manual provides, *inter alia*, that:

*“A policeman may have to use his firearm if he cannot by any other means which are available to him carry out his duty of protecting life, suppressing rioters or effecting the arrests, or preventing the rescue of escapees described above, but however well justified a police officer may consider himself to be in resorting to the use of a firearm, the act, whether or not it results in loss of fire or injury, will become the subject of legal investigation. He must, therefore be prepared to prove that he acted with humanity, caution and prudence, and that he was compelled by necessity alone to have recourse to firearms.”*

This section of the **Police Act** and the **Police Manual** was considered by the Court of Appeal in the case of **Antony Njue Njeru –vs- Republic [2006] eKLR** where the court held thus:

*“A killing of a person can only be justified and excusable where the accused action which caused the death was in the course of averting a felonious attack and no greater force that 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 or peril arising from a sudden or serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.”*

In the present case, it was clear that the accused persons did not, firstly, challenge the deceased persons to identify themselves, or secondly, that the accused persons were in imminent danger of grievous harm. PW17 PC Daniel Suuji, then attached to the Delta Unit, testified that when he arrived at the scene he sought to inquire from the accused persons what had happened. The accused persons told him that they had challenged the deceased persons before they shot them. The accused persons avoided stating whether they had complied with this aspect of police procedure before they shot dead the deceased persons. It is the finding of this court that the accused persons shot the deceased persons after forming the view that they were the persons who had robbed PW1. This was especially because one of the deceased persons was wearing a track suit which appeared to the accused persons to be similar to the description given by the Police Controller of the clothes that were alleged to have been worn by the robbers. The accused persons did not bother to challenge the deceased persons before shooting them. The accused persons realized that they had made a mistake by shooting to death innocent people. They compounded their mistake by interfering with the scene so that it may appear that the deceased persons were indeed criminals. In their evidence, the accused persons testified that a man who was with the deceased persons pointed what appeared to be an AK 47 at them while standing on the road. The question that this court asked itself is if the testimony of the accused persons were true, why is that their car was not shot at by such person? None of the accused persons sustained gunshot injuries. It was clear to this court that the accused persons were not in eminent danger at the time they shot dead the deceased persons.

Taking into consideration the totality of the evidence adduced by the prosecution witnesses, and after taking into account the evidence adduced by the accused persons in their defence, this court holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the accused

persons unlawfully caused the death of the deceased persons by shooting them in circumstances that were not justified. *Actus reus* was established to the required standard of proof. The question that remains for this court to determine is whether the prosecution established malice aforethought. Malice aforethought is defined under **Section 206** of the **Penal Code** thus:

*“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-*

- a. *an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b. *knowledge that the act or omission causing death will probably cause the death or a grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. *an intent to commit a felony;*
- d. *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”*

In the present case, this court, after evaluating the entire evidence adduced in this case, formed the view that the prosecution failed to establish malice aforethought. The evidence adduced in this case, clearly establish that the accused persons were in the course of their normal duties, when they shot and killed the deceased persons. The deceased persons killings was an obvious case of mistaken identity. The breach of Police Procedure in regard to the use of force, although proved, cannot constitute malice aforethought in the absence of other evidence. However, the accused persons compounded their act of shooting the deceased persons by interfering with the scene of crime. The accused persons thus perverted the course of justice. This court finds the accused persons guilty of the less but cognate offence of **Manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The accused persons are accordingly convicted.

**DATED AT NAIROBI THIS 16<sup>TH</sup> JUNE, 2014**

**L. KIMARU**

**JUDGE**

