



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Case 37 of 2009

REPUBLIC.....PROSECUTOR

V E R S U S

BOAZ AUMA OCHUODHO.....1ST ACCUSED

ERICK MAHINDU RAVUNA.....2ND ACCUSED

J U D G M E N T

The two accused persons are charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that the accused persons *on the 30th day of July 2009 at Gavudunyi village, Gavudunyi sub-location, Gisambai sub-location in Hamisi district of the Western Province jointly murdered WILLIAM GICINGA MUTUA.*

Fourteen witnesses testified for the prosecution. **PW1, MARGARETTTHUIYA KEREGOI** testified that on the 29th of July 2009 at night the deceased called her husband on the phone informing him that her husband's lorry that was being driven by the deceased had been attacked. Her husband who was the owner of the lorry went to report the matter at the Ong'ata Rongai police station. When he returned he told her that the lorry driver had been killed. PW1 went to the deceased's wife (PW7) to inform her but found that she was aware about the incident. On 30th July 2009 PW1 travelled to Vihiga and saw the lorry at a certain home, but the deceased's body had been already taken away.

PW2, DR. JOEL MAKENGE MARWA, testified that he was based at the Hamisi district hospital but had been sent on transfer to Emuhaya district hospital. On 30th July 2009 at about 7.00 a.m. he was preparing to leave for Emuhaya and was to transport his items. He obtained a lorry that was to load his goods. They loaded his goods up to about 6.30 p.m. Part of the goods was timber and he had obtained a permit that allowed transport for the timber during the day. Since it was late the lorry could not travel. The loader was called **GEORGE (PW6)** while the lorry driver was **GICINGA**. The loader slept in PW2's house while the lorry driver decided to sleep in the lorry cabin. Some minutes before midnight PW2 heard gun-shorts. He heard a vehicle being driven off. He went out but could not see the lorry. PW2 went back to his house and woke up the lorry loader so that he could call the driver. The loader tried to call the driver but he could not be reached. They heard gun-shorts and motorbikes. PW2 called the officer in-charge at the hospital and she told him that the APs were involved in the shooting. He went to his house and the loader went to inform him that the owner of the lorry had called to indicate that the driver had been killed. PW2 received a message from the District Commissioner and he went to the scene where he saw the deceased was lying dead. It is the evidence of PW2 that the timber had not been stolen and he had obtained a permit to transport it. His house is located within the hospital compound and it is about 610 meters from the District Commissioner's house. PW2 saw a bullet hole in the windscreen and the driver's door.

MARGARET KANGUA, testified as PW3. She was working at the Hamisi district hospital. On the 30th of July 2009 she was on night duty and reported at 6.00 p.m. She saw a lorry parked. At 10.00 p.m. she was walking within the hospital compound when she saw three people standing at the gate with torches. The three people happened to be police officers and had guns and they approached the lorry. She saw a sergeant who was in civilian clothing and he greeted her. Shortly she heard the police officers shouting “*funga gate, funga gate*” – close the gate. “*jaribu uone*” – try and you will see. The Sergeant ran to the gate and the lorry started hooting and drove towards the gate. PW3 heard shooting and saw bullets directed towards the tyres. The lorry broke the gate. At 4.00 a.m. she called by the District Commissioner only to be informed that the lorry driver had died. It is the evidence of PW3 that the lorry hit the gate and drove off as if it was escaping.

PW4, was **JONATHAN SHIHALE**, who was a watchman at Hamisi district hospital. On 30th of July 2009 he saw the lorry at the hospital compound loaded with timber. The timber was in the hospital yard and had been loaded on the lorry. The lorry driver was sleeping in the cabin of the lorry and at 10.00 p.m. he heard the lorry hooting. PW4 saw police officer had closed the gate. He saw the officers who were in uniform shooting. The lorry drove off. At 4.00 a.m. PW2 informed him that the lorry driver had been killed. The police officers directed their shooting on the tyres of the lorry.

SIMON IRIAINI WALUGHA, testified as PW5. On the 30th of July 2009 he was at his house at midnight. He was woken up by gun-shots. He tried to come out of his house but he was ordered to return in. He stayed in his house until when the District Commissioner and other officers went to the scene. He saw the deceased’s body inside his daughter-in-law’s kitchen in a pool of blood. The lorry had its lights on. The lorry tyres had been shot at and the windscreen had a bullet hole. PW6, was **GEORGE NG’ANG’A**. He was the loader of the lorry registration number KBH 986 J. On 30th of July 2009 they were contracted by PW2 to carry timber to Esebania. They got the permit at 4.00 p.m. and loaded the timber. He slept in the doctor’s house while the driver slept in the lorry. At about 11.30 p.m. PW2 woke him up and he heard gun-shots. They went out and did not find the lorry. He went up to the scene and saw the lorry had entered into a homestead. Three tyres had been shot and there was a bullet hole in the windscreen. According to PW6 the scene was about 4-5 km. from the hospital. The driver was dead inside a kitchen in a pool of blood. PW6, attended the post mortem on 1st August 2009 together with the deceased’s son (PW13).

PW7, is **MARY WANJIRU GICHINGA**, the deceased’s wife. Her husband and PW6 left their home with a lorry on 29th July 2009 for Kakamega. The deceased told her that he was going to carry timber. At about 9.30 p.m. the deceased called her and reported that his life was in danger and she should call the Vihiga police. She called the owner of the lorry and informed him. PW7 called her husband again and a police officer picked the deceased’s phone and told her “*tumemaliza*” – we have finished him. She went to report at the Rongai police station. The next day she went to Hamisi up to the scene but the deceased’s body had been taken away.

PW8, **APC ALICE ASILI** was based at the Hamisi District Headquarters and was in charge of the armory. On the 27th of July 2010 she issued a rifle number J52002 to **APC SAMUEL NYAUSI** at 12.00 p.m. She then handed over the records to **SGT. JOSEPH MUTSWENJE** (deceased). **APC SAMUEL NYAUSI** later handed over the rifle to **APC BOAZ OUMA** – the 1st accused. The rifle was not returned to the armory after the incident. **APC SAMUEL NYASUSI** was guarding the District Commissioner’s residence. She produced the armory movement register. **PW9**, **APC GEORGE MUSYOKI** was also based at the Hamisi district. He was asleep on the 30th of July 2010 when his colleagues woke him up. They went to the hospital together with Sgt. Mutswenje, Eric Ravuma – the 2nd accused and Keya Nyundo up to the hospital. Sgt. Mutswenje remained at the gate and the three went up to the lorry. Keya Nyundo knocked at left side window and the driver woke up and started the lorry. Keya Nyundo ran and closed the hospital gate but the driver hit the gate and drove off. Sgt. Mutswenje ordered the 2nd accused to shoot at the tyres of the lorry. The 2nd accused shot twice on the tyres but the lorry did not stop. Sgt Mutswenje told them to get motorcycles and follow the lorry. The 2nd accused and himself boarded one motorcycle. This was about 10 minutes after the lorry had taken off. The motorcyclist was called

ALEX. Boaz Ouma, the 1st accused took another motorcycle and was ahead. They saw the lorry which diverted off the main road. PW9 heard a number of gunshots and when they reached the scene they saw the 1st accused and the driver of the lorry who was dead. Keya Nyundo and Sgt. Mutswenje had been left behind looking for a motorcycle. It is PW9's evidence that Sgt. Mutswenje is the one who gave orders for the lorry to be shot at. It was suspected that the lorry was carrying stolen timber and they were instructed to take the lorry to the AP Camp. PW9 arrived at the scene together with the 2nd accused.

ALEX KHEITSI KIBAYIRO, was **PW10**. His evidence is that he is a motorcycle operator. On the 30th of July 2010 he was woken up by **APC GEORGE** at about 9.30 p.m. He was informed that George was chasing a motor vehicle and they wanted him to trace the vehicle that had gone towards Majengo centre area. He carried George and Ravuna (2nd accused) on his motorcycle. They saw the lorry ahead of them and there was another motorcycle following the lorry ahead of him. He heard gun shots and when he reached the lorry he found that it had hit a house. The lights of the lorry were on and the driver's door was open. He found a motorcycle operator by the name **AURA** and **BOAZ** the 1st accused at the scene. Boaz had a gun and also the 2nd accused had a gun. George had a leather whip. When they reached the scene the driver had already been shot.

PW11 is IP AP JOHNSTONE NYAMWANGA. He testified that on 30th of July 2009 he was called by the Hamisi District Commissioner **MR. GEORGE OTIENO** on phone and was informed that there was a lorry at the hospital which had timber. He was instructed to send Sgt. Mutswenje to take the lorry to the DC's office. He instructed the sergeant and his officers to carry out the work. After about 10 minutes he heard shooting at the hospital. He then had a vehicle being driven. PW11 called the DC and the two started following the road to Majengo. They reached the scene and saw the lorry driver had been shot dead. On that day the 1st accused had been assigned duties at the DC's residence and was instructed to chase the lorry. It was Sergeant Mutswenje who instructed the officers to chase the lorry.

JOHNSTONE MUSYOKI MWONGELA (PW12) is a Ballistic Expert and was based at the CID Ballistic section. He examined two G3 Rifles namely KE-AP-J52002 and KE-AP-J52910. He also examined 17 rounds of ammunition, two magazines, one bullet jacket and six fired cartridges. The 17 rounds of ammunition were of 7.62 mm x by 5.1 mm. caliber. The ammunition is the one used by the G3 Rifles. His examination found that five of the six fired cartridges were fired from G3 Rifle No. KE-AP-J52002 and one of the cartridges was fired from G3 Rifle KE-AP-J52910. PW12 also concluded that the bullet jacket fragment had been fired from G3 Rifle No. KE-AP-J52002. **PW13, HENRY GICHINGA** is a son of the deceased. On the 1st of August 2009 he went to Vihiga District Hospital and identified the deceased's body to the doctor who conducted the post mortem.

PW14, CIP ALBERT TAWAYA investigated the case. He was based at the Vihiga District investigation office. On the 31st of July 2009 he got instructions from the OCPD to handle the matter. It was at about 12.30 a.m. (midnight). He went to the scene that night with other officers. He found at the scene APs from Hamisi District at the home of SIMON IRIAINI (PW5). They found a lorry registration number KBH 986 J Mitsubish Canter at the compound next to a small house. The lorry had several holes at the front cabin and three tyres were deflated. The deflated tyres were two on one side and one on the other side but all on the rear side of the lorry. PW14 got information from Inspector Chacha who was at the scene that the AP officers were chasing the lorry and it was suspected that the lorry was carrying stolen timber that had been loaded at the Hamisi hospital. Dr. Marwa (PW) the owner of the timber was at the scene.

PW14 saw the 1st accused at the scene and he was the only one at the scene who had a gun. He was informed that the 1st and the 2nd accused were the ones who were chasing the lorry but the 2nd accused was not at the scene. PW14 saw the deceased's body lying facing downwards with an injury on the head and bleeding. The body was at a distance from the lorry. PW14 caused the scene of crime officers to photograph the scene and he drew a sketch plan. He took possession of the rifle that was with the 1st accused and noted from its magazine that it had 7 rounds of ammunition. He went to Hamisi District Commissioner's residence and took the G3 Rifle from the 2nd accused. According to PW14 the 1st

accused was allocated G3 Rifle No. KE-AP-J52002 while the 2nd accused had been issued with G3 Rifle No. KE-AP-J52910. The Rifle recovered from the 2nd accused had 10 rounds of live ammunition in the magazine. He went with the two accused persons to the Vihiga police station. The 2nd day he went back to the scene and found out that some police officers had identified some empty cartridges and where the body of the deceased had fallen in a small structure PW14 recovered a small particle of a bullet cartridge several inches from the head of the deceased. He suspected that it was part of the bullet cartridge. He confirmed from the armory that the two rifles had been issued to the two accused persons on the 30th of July 2009 and each of the accused had been issued with 20 live ammunition.

PW14 investigated the case and had the rifles, cartridges and magazines sent for ballistic examination. He concluded that the G3 rifle issued to the 1st accused had fired 13 rounds of ammunition while the rifle issued to the 2nd accused had fired 10 rounds of ammunition. He received the ballistic expert's report and charged the accused with the offence of murder. He came to find out that it was Sgt. Mutswenje who had instructed the AP officers to stop the lorry. The lorry had been parked at the hospital and the driver drove off from the hospital. He did not recover any cartridge at the hospital. The 1st accused was pursuing the lorry on a motorcycle together with another officer who was not armed. There was a bullet on the deceased's head and it was recovered during the post mortem. The scene was about 4 km from the hospital. He saw the movement permit for the timber which had been issued to a different person and not Dr. Marwa. When he reached the scene, the lights of the lorry were off. According to the ballistic report the particle of bullet cartridge that was found near the deceased's head had been fired from G3 rifle KE-AP-J52002.

PW15, DR. MASIKA COLLINS, produced the post mortem report on behalf of Dr. Limo who was pursuing further studies. Externally the body had a gunshot wound at the margin of the scapula. It had an exit wound from the base of the neck and fracture of left mandible. Internally, there was fracture of left clavicle, fracture of 1st and 2nd rib on the left side and the left lung was completely shattered. The rest of the other systems were normal. The doctor concluded that the cause of death was cardiopulmonary arrest secondary to hemorrhagic shock from gunshot wounds. PW15 produced two P3 assessment reports which had been conducted by doctor Limo and the accused were found to be mentally fit to stand trial.

The accused persons were put on their defence. The 1st accused person **BOAZ AUMA OCHUODHO** in his sworn testimony testified that on the 30th of July 2009 he was stationed to guard the residence of the Hamisi DC. He was issued with G3 rifle KE-AP-J52002 at 6.00 p.m. At about 11.00 p.m. he heard gunshots coming from the side of the hospital which was located about 500 meters from the DC's residence. Shortly Sgt. Mutswenje went to the DC's residence armed with a G3 rifle. The Sergeant asked him to take a motorbike that was already available and chase a vehicle. He went with the sergeant on the motorbike along the Hamisi Majengo road. After about 4 km they approached a vehicle and the sergeant told him that they were following the vehicle of a criminal. The vehicle branched to a feeder road on the right hand side and the accused was told by the sergeant to deflate its tyres. He saw the vehicle moving near a house and the sergeant told him to continue deflating the tyres. He told the sergeant that he spent most of his bullets and didn't want to finish all of them. The 1st accused and sergeant Mutswenje were being carried on the same motorbike by a motorbike operator. The vehicle went slowly and hit one of the houses at a homestead. There was a phone ringing in the vehicle and the sergeant went and picked it. They saw somebody who had fallen next to the vehicle already dead. Other officers went to the scene. The 2nd accused arrived at the scene on another motorbike with another colleague. The 2nd accused was directed to go and guard the DC'S residence. It is the 1st accused's evidence that he used his gun and the sergeant also had a gun which he used that night. After the shooting he remained with 7 rounds of ammunition in his gun. The incident occurred at night and one could not see. Sergeant Mutswenje was the one in command.

In his sworn evidence, the 2nd accused **ERIC MAHINDU RAVUNA**, testified that on the 30th of July 2009 he was stationed at the Hamisi DC's office. He was on patrol with other officers namely – **GEORGE MUSYOKI, KEYA NYUNDO** and **ROBERT KIPKOECH**. Sergeant Joseph Mutswenje was their commander. He had been issued with a G3 rifle KE-AP-J52910 with 20 rounds of live

ammunition. They concluded their patrol at 10.00 p.m. and went to their respective homes. At 11.00 p.m. sergeant Mutswenje and Inspector Johnson Nyamuwanga woke him up together with his colleagues and informed them that there was a lorry loaded with illegal timber parked at the hospital yard. They were instructed to take the lorry to the DC's residence and guard it until morning. Keya Nyundo also had a gun. George Musyoki went to check on the lorry and the driver simply ignited the lorry and drove off. Keya Nyundo rushed to the gate and closed it but the driver smashed the gate and started hooting. The accused was instructed by the sergeant to shoot in the air to warn the driver.

The accused further testified that sergeant Mutswenje tried to take the gun from him but he couldn't manage as the accused had his sling over him. While in that condition of struggling with the sergeant, the gun fired on the air. The sergeant had no gun and left. They went to look for a motorbike and got one from Alex (PW10). He boarded the motorbike with AP George Musyoki and followed the vehicle. They heard gunshots ahead of them. They went up to where the lorry had stopped and found the 1st accused, sergeant Mutswenje and a motorbike driver by the name Aura together with the owner of the homestead. They found the deceased had already died. He was told to go back to the DC's residence. On checking his gun he discovered that 10 rounds had been shot on the air. He recorded his statement and was released but later arrested and charged. According to the 2nd accused sergeant Joseph Mutswenje did not have a gun.

Counsel for both accused agreed by consent to file written submissions. Mr. Masheti, counsel for the 1st accused submitted that the prosecution did not prove its case. The shooting started from the hospital and the investigating officer did not collect spent cartridges from the hospital compound. Counsel contends that there is no proof that it is the 1st accused who shot at the deceased. Both accused persons were ordered by Sgt. Mutswenje to shot at the lorry. Cartridges from the two rifles issued to both accused were recovered at the last scene. No proper investigations were conducted and the deceased could have been shot by a stray bullet. Further a crucial witness by the name AURA who was the motorcycle driver carrying the 1st accused and Sgt. Mutswenje was not called to testify.

On her part Mrs. Arunga, counsel for the 2nd accused submitted that the 2nd accused arrived at the scene when the deceased had already been killed. Counsel contends that the evidence of PW9 and PW10 who were with the 2nd accused does confirm that the 1st accused and the late Sgt. Mutswenje were ahead. Counsel maintains that the 2nd accused's gun did not fire the fatal bullet.

The main issue for determination is whether the two accused persons committed the offence of murder as charged. The prosecution evidence does show that the deceased herein had been hired by PW2 Dr. Joel Makenge Marwa to transport timber and other items from Hamisi to Emuhaya. The deceased decided to sleep in the cabin of the vehicle while his loader PW6 opted to stay for the night in PW2's house. The evidence does show that police officers at the Hamisi District Hospital where the motor vehicle registration number KBH 986 J became suspicious and thought that the timber that had been loaded on to the vehicle had been stolen. The police officers decided to have the vehicle taken to the DC's office. Sgt. Mutswenje was instructed by **PW11 IP AP JOHNSTONE NYAMWANGA** to ensure that the lorry was taken to the DC's office. The deceased was woken up by AP police officers and the intention was to have the vehicle taken to the DC's office. The deceased thought that his life was in danger as it is clear that he woke up from his sleep and saw armed police officers. The deceased opted to drive off passed the gate which had been locked.

The prosecution evidence does establish that Sgt. Mutswenje was the one who was in-charge and opted to pursue the lorry. Two motorcycles were obtained with the intention of pursuing the lorry. The first motorcycle was being driven by one AURA who was not called to testify and he was carrying the 1st accused and the late Sgt. Mutswenje. The second motorcycle was being driven by **PW10 ALEX KHEITSI KIBAYIRO** and it was carrying **PW9 APC GEORGE MUSYOKI** and the 2nd accused. The evidence does establish that the shooting started at the Hamisi District Hospital and by that time the 1st accused was not there. **PW3, MARGARET KANGUA** testified that she saw the police officers shouting "*funga gate, funga gate*". I believe that was the time the deceased had decided to drive off. PW3 saw

bullets directed towards the tyres. The road broke the gate and left. **PW4, JONATHAN SHAHALE**, a watchman at the Hamisi District Hospital also saw the police officers directing their shots on the tyres of the lorry. The 2nd accused testified that the late Sgt. Mutswenje struggled with him in an attempt to take the rifle from him. In the process the gun fired on the air. Sgt. Mutswenje had no gun according to the 2nd accused. It is clear from the prosecution evidence that shots were directed at the tyres of the vehicle while it was leaving the Hamisi District Hospital compound. At that time the deceased was alive and he was able to call PW7, his wife, at about 9.30 p.m. informing her that his life was in danger. According to the prosecution evidence the distance covered from the Hamisi District Hospital to where the deceased's body was found was between four to five kilometers as per PW6. Along that distance it is clear from the prosecution evidence that the 1st accused was the one who was ahead together with Sgt. Mutswenje. According to the 1st accused he kept on shooting the tyres and he informed the Sgt. that he didn't want to finish all his bullets. Although the 1st accused testified that Sgt. Mutswenje also had a gun that evidence is displaced by that of the investigating officer PW14. According to PW14 he went to the scene and at the scene the 1st accused was the only who had a gun. According to **PW10 ALEX KHEITSI**, when he reached the scene he saw a motorcycle operator by the name Aura and the 1st accused. The 1st accused had a gun and also the 2nd accused. **PW9, APC GEORGE MUSYOKI**, had a leather whip.

As indicated herein, the main issue for determination is whether the accused persons murdered the deceased as charged. According to the evidence on record the two accused persons were issued with G3 Rifles. It is the evidence of **PW8 APC ALICE ASILI**, that the 1st accused was issued with a rifle and he was guarding the District Commissioner's residence. According to **PW14, ALBERT TWAYA**, the 1st accused was allocated G3 Rifle number KE-AP-J52002 while the 2nd accused was issued with G3 Rifle number KE-AP-J52910. It is the evidence of PW14 that when he repossessed the two G3 rifles the one for the 1st accused had fired 13 rounds of ammunition while that of the 2nd accused had fired 10 rounds. The prosecution evidence establishes that the deceased deviated from the main road into a feeder road. His body was found in a pool of blood at the compound of **PW5, SIMON IRIAINI WALUGHA**. It is clear from the evidence that the lorry had its tyres deflated and the windscreen had a bullet hole. According to PW6, three tyres had been deflated. Similarly PW14 testified that three tyres had been deflated and all from the rear side of the lorry, two on one side and one on the other side.

Then who shot at the deceased. As indicated hereinabove the shooting started at the Hamisi District Hospital. However, I am satisfied that the shots that were made at the hospital were aimed at the tyres of the lorry and did not touch the deceased. The deceased was able to drive for a distance of over four kilometers up to where his body was found in a pool of blood. From the evidence on record I do find that the 2nd accused reached the scene after the deceased had been shot. There is no evidence that there were other people pursuing the deceased other than the two accused persons and their colleagues. It is established that it was only the 1st accused who was having a gun while pursuing the deceased. PW14 recovered a bullet jacket that was near the head of the deceased. According to the Ballistic Expert **PW12, JOHNSTONE MUSYOKI MWONGELA**, the bullet jacket was fired from the rifle issued to the 1st accused. Counsel for the 1st accused submitted that although a bullet was removed from the deceased's body it was not subjected to ballistic examination. That might be so but I do find that there is no evidence to the effect that there were other people who were shooting at the deceased. According to PW15, the doctor who produced the post mortem report the entry point of the gun shot was at the margin of the scapular. The Concise Oxford English Dictionary defines scapular as a technical term for the shoulder blade. It is clear from the evidence of PW15 as per the post mortem report that the gunshot entered from the shoulder area and exited from the base of the neck. The deceased had several of his organs damaged including fractured left mandible, first and second rib on the left side, fractured clavicle as well as a shattered left lung. From the evidence on record I do find that it is the 1st accused person who fired the fatal shot. Sgt. Mutswenje had no gun and it was only the 1st accused who was shooting at the lorry. The 2nd accused arrived late and by then the deceased had already been shot. According to PW10 they heard gunshots as he was riding motorcycle while carrying the 2nd accused.

The next issue is whether the accused persons were justified in their shooting. Section 18 of the Penal Code Cap 63 Laws of Kenya states as follows:-

“18. Where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested the court shall, in consideration whether the means used were necessary or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person.”

The offence occurred on the 30.7.2009. By that time the new Police Act had not come into force. The two police officers are from the Administration Police section. The now repealed Administration Police Act Cap 85 provided under section 14 the circumstances under which an officer could use firearms. Section 14 thereof states as follows:-

“14. An officer may use firearms, if and to such extent only as is necessary, against-

- a) any person in lawful custody charged with or convicted of a felony, when that person is escaping or attempting to escape:**
- b) any person who by force rescues or attempts to rescue any other person from lawful custody:**
- c) any person who by force prevents or attempts to prevent the lawful arrest of himself or any other person:**

Provided that resort shall not be had to the use of firearms-

- i. under paragraph (a), unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he shall give warning to such person that he is about to use firearms against him and such warning is unheeded;**
- ii. under paragraph (b) or paragraph (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 such rescue, or, as the case may be, effect such arrest.”**

It is clear from the prosecution evidence that the police thought that the timber loaded on to the lorry had been stolen. The 1st accused testified that Sgt. Mutswenje told him that they were pursuing a criminal. Assuming the timber had been stolen and the deceased was running away from lawful arrest, were the accused persons justified in using the force they did to arrest the deceased. The deceased was not armed and he was only driving off thinking that his life was in danger. The accused persons were armed and were pursuing the deceased. This is not a case whereby the accused persons were defending themselves but they were pursuing a suspected criminal who was not armed. It might be argued that the accused persons were not aware that the deceased was not armed, however, I do find that there was no evidence in form of counter shooting by the deceased and the accused persons ought to have been aware that their lives were not in danger. According to the Administration Police Act, the police are supposed to use firearms only to such an extent as is necessary in the circumstances. Further an officer who uses firearm should have reasonable ground to believe that he cannot otherwise prevent the escape of the person he or she intends to arrest or that he reasonably believes that his life or the lives of other people are in danger or that he cannot otherwise prevent the escape or rescue.

In **Nyeri Civil Appeal No. 129 of 2004 Charles Munyeki Kimiti vs Corporal Joel Mwenda & 3 Others [2010]eKLR**, the defendants were sued for damages arising out of shooting by the police. The Court of Appeal had this to say:-

“The driver had already moved out of the vehicle and thus there was no fear that the robbers would drive away and escape. The police could also have immobilized the vehicle before they approached it by

deflating the tyres through gunshots. It seems to us that the two police officers just sprayed the stationary matatu with bullets not caring that the two occupants are killed or not. The law only allows the police to use all means necessary to effect arrest and even then, they are not allowed to use greater force than reasonable or necessary in the particular circumstances”.

As indicated herein above, I am satisfied that it is the 1st accused who shot at the deceased. The deceased could have been shot while he was trying to escape after the vehicle had stopped at the compound of PW5. Since the intention was to simply get hold of the timber there was no reason to shoot at the deceased. The vehicle had been immobilized as its rear tyres had been deflated. The deceased could not have kept on driving and the vehicle had stopped. It is the evidence of PW5 that the deceased's body was inside his daughter in-law's kitchen. According to PW10 when they reached the scene the lights of the lorry were on and the driver's door was open. According to PW14 when he reached the scene he saw the deceased's body facing downwards with an injury on the head. The body was at a distance from the lorry. Given the nature of the injuries described in the post mortem report it can be concluded with certainty that the deceased was shot while he had come out of the lorry. There is no evidence that the cabin had blood. The photographs that were produced indeed show that the lorry could not have moved any longer as the tyres were completely shattered.

Since the 1st accused was the one ahead while pursuing the deceased and the vehicle had stopped there was no need to shoot at the deceased. Although it was dark it is clear from the evidence on record that the lights of the lorry were on and the deceased just fell beside the lorry as established by some of the photographs that were taken at the scene. The 1st accused was not justified in using the force he did to apprehend the deceased. The life of the 1st accused and that of Sgt. Mutswenje and the motorcyclist were not in danger. Since the 2nd accused arrived late and did not fire the fatal bullet I do find that the prosecution has not proved its case against the 2nd accused and he is hereby acquitted of the charge of murder contrary to **section 203** as read with **section 204** of the Penal Code.

Section 203 of the Penal Code defines murder in the following terms:-

“203. Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder.”

Section 206 states as follows:

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

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

The evidence on record establishes that the 1st accused person was assigned the duties of guarding the home of the District Commissioner. He was asked by Sgt. Mutswenje to help in pursuing the lorry that was suspected to carry stolen timber. In the process the 1st accused shot at the lorry as well as the deceased. I do find that there was no malice aforethought on the part of the accused as the main intention was to arrest the lorry. It appears that the decision by the deceased to drive off after he had been told to

stop indeed provoked the police who swung in action and opted to pursue him. **Section 208** of the Penal Code defines provocation as follows:-

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

I do find that the deceased’s decision to drive off after having been told to stop was act of provocation. The deceased was aware that he was in a hospital compound. He saw one of the police officers at the gate of the hospital who was armed but the deceased opted to smash the gate and drive off. The police at that time were not aware that a lawful permit had been issued for the timber and were under the impression that it was stolen timber. Having been provoked by the deceased the police officers including the 1st accused opted to pursue the lorry and in the process the deceased sustained fatal injuries. In the case of **ROBERT MUNGAI V REPUBLIC [1982-1988]1KAR 611** the court stated as follows:-

“However, we think, in view of the earlier East African cases we have considered, and the more recent English decision of R vs Shannon Crim. LR 438 1980, that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered.”

In the case of **RAYMOND KIPTOO ROTICH V REPUBLIC [2006]eKLR**, the appellant was convicted of the offence of murder. The appellant was a police driver and the firearm examiner found that he was the one who had fired the fatal bullet. The Court of Appeal while substituting the conviction of murder with manslaughter stated as follows:-

“That the appellant shot the fatal bullet from the gun that was given to him is certain and we have found so on our own fresh analysis and evaluation of the evidence available to that extent, we do agree with the trial court. However, the question that weighs heavily in our mind and causes us concern is as to whether he did so with any of the above four ingredients of malice aforethought. In other words, whether it was established that the appellant caused the death by unlawful act with malice aforethought. It was not established that he was aiming at the deceased when he shot the fatal bullet. There was no evidence to establish that he had the intention of killing the deceased or anybody else. There was no evidence that he intended to commit a felony.....”

From the evidence on record, I do find that there was no malice aforethought on the part of the 1st accused. However, I do find that the 1st accused used unnecessary force in an attempt to arrest the deceased. The 1st accused’s action does not come under the provisions of the then **Section 14** of the Administration Police Act. No life was in danger. However, I do find that the deceased had provoked the 1st accused. The deceased’s action of speeding off after he had been told to stop as well as failing to stop while he could hear gunshots was an act of provocation. The 1st accused is not found guilty of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The deceased’s death occurred within a short time after he had been told to stop and the 1st accused does qualify for the defence of provocation as stated in **section 207** of the Penal Code. The 1st accused is hereby found guilty of the offence of manslaughter contrary to section 202 as read with **section 205** of the Penal Code.

In the end, the two accused persons are hereby acquitted of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The 1st accused is hereby found guilty of the offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and shall be convicted accordingly. The 2nd accused is hereby set at liberty and shall be free unless otherwise lawfully held.

DATED AT KAKAMEGA THIS 29TH DAY OF MAY 2013

**SAID J. CHITEMBWE
J U D G E**