



REPUBLIC..... PROSECUTOR

VERSUS

AHMED MOHAMMED OMAR.....1ST ACCUSED

AHMED ABDALLAH SHAFFI2ND ACCUSED

MICHAEL NGUNGU LEWA3RD ACCUSED

MOSES LOCHICH4TH ACCUSED

NELSON KIPCHIRCHIR TOO5TH ACCUSED

ERICK EBERE MELCHIZEDEK6TH ACCUSED

J U D G M E N T

The accused persons, **AHMED MOHAMMED OMAR, AHMED ABDALLAH SHAFFI, MICHAEL NGUNGU LEWA, MOSES LOCHICH, NELSON KIPCHIRCHIR TOO and ERICK EBERE MELCHIZEDEK** were charged together with **ALEX MUTETI MUTISYA**, with the offence of Murder **contrary to section 203 as read with section 204 of the Penal Code.**

Each of the seven persons was charged with seven (7) counts of murder. Each count was in relation to one victim, and the said victims were;

- (1) **HARRY GIDEON THUKU;**
- (2) **JAMES MUGWERU MWANGI**
- (3) **JOSEPH MAINA MWANGI;**
- (4) **GEORGE NG'ANG'A THAIRU;**
- (5) **WILLIAM GITONGA NJAU;**
- (6) **JOSEPH NGUGI CHEGE; and**
- (7) **JOSEPH THIONGO NJOROGE.**

The offences were all said to have been committed on 11th March 2010, along Naivasha Road, in Kawangware, Nairobi.

The prosecution asserted in the charge sheet, that the offences were committed jointly.

The prosecution called a total of 28 witnesses.

After the prosecution closed its case, the court held that a *prima facie* case had been established against six (6) of the seven (7) accused persons.

The 7th accused, **ALEX MUTETI MUTISYA**, was acquitted at that stage, as the court held that he had no case to answer.

The six (6) remaining accused persons gave unworn testimonies, in their respective defences.

I have now evaluated all the evidence on record. I have also given due consideration to the legal submissions advanced by both the prosecution and the defence. This therefore is my considered judgment.

PW 1, WILSON MWANGI MUGWERU, lived in Kawangware. He is a businessman, who does electrical wiring.

At about midnight, on 10th March 2010, PW 1 was at his house, sleeping, when his neighbour knocked on his door. The neighbour, "Baba Elijah" informed **PW 1** that he had received a phone-call from Maina, a guard at Naivasha Bar. The said bar was located along Naivasha Road, in Kawangware, Nairobi.

At the request of the neighbour, **PW 1** accompanied him to the bar, where they met Maina, the guard.

Maina informed them that there had been a fight between taxi operators and motor-cycle operators near the Shell-BP Petrol Station.

According to Maina, one of those involved in the fight was **PW 1's** son, Mugweru.

Later, **PW 1** identified the body of his son at the City Mortuary, for purposes of post mortem.

PW 2, SALOME NJERI MUKIRAI, was a resident of Kikuyu road. She works as a Deaconess at Chrisco Church, Harambee Co-operative Plaza, Nairobi.

She identified the body of her brother's son, **GEORGE NGANGA THAIRU**, for post mortem purposes.

PW 3, MARY NYAMBURA MAINA, is a Business-Lady. Her husband, **JOSEPH MAINA MWANGI**, was a taxi operator. On the fateful night, the husband left their house at about 7.00p.m. He went to the BP Petrol Station, Kawangware, from where he operated his taxi business.

At about 1.00a.m. **PW 3** heard gunshots from the direction of the petrol station. She later learnt that her husband was one of the people who were shot dead that night.

PW 4 ESTHER WAITHERA KIBE, lives at Waithaka, Dagoretti. She is a business-lady, who sold charcoal. Her husband, **WILLIAM GITONGA NJAU** used to work as a taxi driver and a mechanic. His place of work was the BP Petrol Station, Kawangware.

Ordinarily, the husband would work as a taxi operator between 2.00p.m. and 5.00a.m. But on 11th March, 2010, the husband did not return home.

PW 4 learnt that all the drivers of the taxi vehicles which were at the petrol station on that morning, had been shot dead the previous night. The vehicle which her husband used to drive was one of those parked at the petrol station.

PW 4 informed her father-in-law about what she had heard. But **PW 4** did not go to the mortuary with her father-in-law. She fainted when she got to her house.

Later, **PW 4's** father and her father-in-law informed her that they had verified that WILLIAM GITONGA NJAU was dead.

PW 5, JAMES NJANE MUNGAI, is a brother-in-law to JOSEPH MAINA MWANGI. His sister was the wife to the said Joseph Maina Mwangi.

PW 5 identified the body of his brother-in-law, for purposes of post-mortem.

PW 6, JOSEPH NDERI THAIRU, is a brother to GEORGE NGANGA THAIRU, who used to operate a taxi at BP Petrol Station, Kawangware. His sister-in-law informed him that George and other people had been killed by policemen.

PW 6 identified his brother's body at the City Mortuary, for purposes of post mortem.

PW 7, DANIEL KAMAU MUNGAI, identified the body of his brother-in-law, JOSEPH MAINA MWANGI. The deceased was the husband to his sister.

PW 7 also stated that the deceased used to operate a taxi at BP Petrol Station, Kawangware.

PW 8, GEDION MBOGO KARANJA, is a taxi operator. He drives a "Nissan Sunny" registration KAC 883Y. He operates from the BP Petrol Station, Kawangware. He had done that job for eleven (11) years.

On the night of 10th/11th March, 2010, **PW 8** was at the petrol station. There were a total of about 15 taxis present, when two motor-cycle operators (hereinafter cited as "boda bodas") arrived.

The taxi operators asked the boda boda operators to find another place from where to conduct their business. The reason for asking the boda bodas to relocate is that they were providing competition to the taxis which the taxi operators did not like.

PW 8 drove a client to Waithaka, which is 3 kilometres away from the BP Petrol Station. Whilst **PW 8** was at Waithaka, he got a phone-call from his colleague, who told him that the other taxi operators had been arrested by Administration Police Officers.

Thereafter, **PW 8** heard gunshots from the direction of Naivasha Road. He got scared, and drove away to his house.

On the morning of 11th March, 2010, PW 8 drove to the petrol station at about 6.00a.m. He found seven (7) taxi vehicles. The said vehicles belonged to the seven (7) deceased persons, namely;

- (1) **Harry Gideon Thuku;**
- (2) **Joseph Thiongo;**
- (3) **Joseph Ngugi;**
- (4) **William Gitonga;**
- (5) **George Ng'ang'a;**
- (6) **Joseph Maina; and**
- (7) **James Mugweru.**

It was the evidence of **PW 8** that there were no blood-stains at the petrol station. However, there were blood stains about 100 metres away from the said BP Petrol Station, near the Chief's Camp.

The Chief's Camp was also the camp for the Administration Police Officers.

Later, on 16th March, 2010, **PW 8** identified the body of his cousin, HARRY GEDION THUKU, at the City Mortuary. He noted one bullet wound on the stomach of the deceased.

During cross-examination, **PW 8** said that the taxi operator had reported to the Administration Police Offices that the boda bodas were moving too close to the place from where the taxis used to operate. However, the officers are said to have taken no action on the complaints lodged by the taxi operators.

PW 8 said that the taxi drivers were not armed at all, on the night of 10th/11th March 2010. He also said that there was no fight between the boda boda operators and the taxi operators.

Indeed, by the time **PW 8** got the customer whom he drove to Waithaka, the boda boda operators had agreed to move away from the place where the taxis were based.

PW 9, EUNICE MUTHONI KABUCHI, was the wife to JOSEPH NGUGI CHEGE. Her husband used to operate a taxi from the BP Petrol Station, Kawangware. His vehicle was a Toyota, registration number KAC 092J.

On 10th March 2010, **PW 9's** husband left her at home, when he was going to his place of work.

That night, at about 12.00 midnight, **PW 9** heard gunshots from the direction of Kawangware. There were many gunshots.

PW 9 phoned her husband. When the phone was answered, **PW 9** told the person at the other end of the line, (whom she thought was her husband) that he should be careful.

PW 9 said that there were thugs out there.

The person at the other end of the line did not speak to **PW 9**.

At about 8.00a.m. on 11th March 2010, a neighbour of **PW 9** went to look for her husband, as she wanted to hire his taxi.

PW 9 phoned her husband's number, but got no answer. She then walked to the "Car-wash" where the husband used to have his car washed.

PW 9 found no vehicles at the "Car wash". But whilst still the Car-wash, **PW 9** heard that some taxi drivers had been shot dead.

PW 9 contacted the owner of the vehicle which her husband used to drive. He accompanied her to the BP Petrol Station, where they found the vehicle.

Later, **PW 9** learnt from her sister-in-law that her husband was one of the taxi drivers who had been shot dead. **PW 9** did not visit the mortuary as she was pregnant at the time.

PW 10, CPL JAMES WAMBUA, was based at the Kawangware AP Post.

On 10th March 2010, he issued the first accused with a Ceska Pistol and 15 rounds of ammunition.

PW 10 was the In-charge at the Kawangware AP Post. He issued the firearm to the 1st accused, who was going to the Riruta District Headquarters, from where the said accused was to be deployed.

PW 10 knew that the 1st accused was to be deployed on special duties, which included the detection of crime and arrest of offenders. In the course of the said duties, the officer, and his colleagues, were to inter-mingle with members of the public.

At about 1.00a.m. on 11th March, 2010, **PW 10** heard gunshots.

He went with 2 other officers, from the Kawangware, AP Post, towards the scene of the firing. On arrival, they found officers from both the Regular and the Administration Police.

PW 10 also found 7 persons who had been shot dead.

PW 10 heard the officers talking, saying that the 7 dead suspects had been attacking boda boda operators.

The 1st accused was one of the officers at the scene when **PW 10** got there.

PW 11, CHIEF INSPECTOR ANTONY NDERITU, was the Officer Commanding Station (OCS), Muthangari Police Station, at the material time.

On 11th March 2010, at about 1.00a.m, he was within Kawangware, checking on the officers who were on patrol duties.

PW 11 received a call on his mobile, from the 1st accused. The said accused informed him about a group of over 10 people who were attacking other persons, who were riding motor cycles.

The 1st accused informed **PW 11** that the officers on duty intercepted that group of over 10, along Niavasha Road.

PW 11 immediately phoned the Duty-Officer at Muthangari Police Station, and instructed him to join him at the scene.

PW 11 rushed to the scene where he met over 10 Administration Police Offices. Some were in uniform, but others were in civilian attire.

At the scene, **PW 1** saw broken helmets scattered on the road.

He also saw a total of 7 bodies. Two of the bodies were under a truck and another body was near the gate to a garage. The truck was adjacent to the garage gate.

PW 11 also saw a simi, a panga and an iron bar next to the 2 bodies which were under the truck.

Meanwhile, next to the other 4 bodies, **PW 11** saw a wooden toy pistol.

It is **PW 11** who called the scenes-of-crime officers to the scene. After the said officers had taken photographs at the scene, the bodies of the deceased were removed to the City Mortuary.

During cross-examination, **PW 11** said that the two motor cycles were not at the scene when he got there. He was the first regular police officer to reach the scene, and it took him about 15 minutes to get there, after the 1st accused phoned him.

However, there were many Administration Police Officers at the scene when **PW 11** got there.

PW 12, SGT SALEH MULAMA, was the Duty Officer at the Muthangari Police Station at the material time.

He confirmed that **PW 11** phoned him at about 1.00a.m.on 11th March 2010, and directed him to

proceed to Naivasha Road, near K-Rep Bank, where there had been a shooting incident.

When **PW 12** reached the scree; **PW 11** was already there, together with very many Administration Police Officers.

PW 12 saw the bodies of 7 persons who had gunshot wounds. He also saw a toy pistol, an iron rod, a panga, a simi and some broken pieces of helmets.

The Administration Police Officers said that they challenged the deceased persons to stop attacking boda boda operators, and to surrender. But the deceased responded by firing at the officers, prompting the said officers to fire at the persons who were attacking the boda boda operators.

It is then that the 7 suspects were gunned down.

However, **PW 12** saw no other functional guns at the scene, apart from those in the hands of the officers.

PW 13 STEPHEN KIBE WAWERU is the father-in-law to **WILLIAM GITONGA NJAU**. He identified the body of the deceased at the City Mortuary, for purposes of post mortem.

PW 14, STEPHEN WATENE, operated a taxi at the BP Petrol Station.

He and his colleagues felt that there was a need to harmonise the charges for the taxis with those of the boda bodas. At the time, the taxis were charging Kshs.200/- whilst boda bodas were charging Kshs.30/-.

On 10th March 2010, the 2 groups had a meeting near the Chief's Camp, Kawangware. They resolved that the boda boda operators would pick-up customers from Stage Number 46, whilst the taxis would remain at the BP Petrol Station. The 2 spots were about 150 metres apart.

Shortly after reaching an amicable settlement, and after the 2 groups parted ways, the taxi operators suddenly noticed about 20 motor cycles approaching them. At the time, the taxi operators were walking towards the petrol station, where they had parked their vehicles.

What followed was 2 gun-shots followed with more gunshots. **PW 14** heard about 10 shots. He hid himself.

Later, he learnt that 7 of the taxi operators had been shot dead.

PW 14 testified that when the taxi operators were talking to the boda boda operators, none of the taxi operators had any weapons.

During cross-examination, **PW 14** admitted that in his recorded statement he had said that the taxi operators threatened to chase away the boda boda operators. He however said that they only wished to talk to them.

PW 14 also said that the first shot came from the direction of the AP Camp. Those first 2 shots were fired into the air, causing the taxi operators to run away.

PW 15 FRANCIS MBUGUA KARIO, was a boda boda operator at the material time. On the night of 10th March 2010 he left his house at about 9.00p.m, and went to work. His place of work was Dagoretti Market.

At about midnight, **PW 15** got a customer who wished to be ferried from Dagoretti, to Kwa-Ng'ang'a stage which is between Dagoretti and Kawangware.

After dropping-off the customer, he set off to return to Dagoretti. Whilst still on the way back, **PW 15** received a phone-call from a boda boda operator named George Kamau. He was told that taxi drivers at Kawangware were threatening to beat up boda boda operators, for carrying passengers from that place.

PW 15 called the boda boda operators who used to work with him at Dagoretti, and together, they rode to Kawangware. When they reached the junction of Kikuyu Road and Naivasha Road, they heard gunshots.

The other boda boda operators rode away, but **PW 15** returned to Kawangware. He was accompanied, on his motor bike, by George Kamau.

On arrival near the K-Rep Bank, **PW 15** noted a big crowd including some police officers.

One officer asked **PW 15** what he was doing there, and he explained that they had come for the motorcycle of George Kamau, which had been left in that area. The officer said that the motor-cycle had been taken to the Chief's Camp.

PW 15 saw 3 bodies at the scene, and over 10 police officers. Shortly thereafter, officers from the scenes-of-crime arrived and took photos of the scene.

During cross-examination, **PW 15** said that he told the police that George Kamau had left his motor-bike at Kawangware after being threatened by the taxi operators.

At that time George Kamau was based at Dagoretti.

PW 16, PC STANLEY KIRUI, was based at Muthangari Police Station. He was on duty at the station when the OCS phoned PW 2.

PW 16 accompanied **PW 12** to the scene of the shooting. They used the police vehicle, a Toyota Landcruiser; and it took about 10-15 minutes to get there.

At the scene, **PW 16** saw seven (7) bodies. Two of those bodies were under a lorry, whilst one body was behind the lorry. All the bodies had multiple gun-shot wounds.

PW 16 also noted over ten (10) Administration Police Officers at the scene.

He saw four (4) broken pieces of a helmet on the road. He also saw a wooden toy pistol, a simi, a panga and an iron bar.

PW 17 SNR. SERGEANT SAMUEL KIPLANGAT, was the In-charge of the District Armoury at the Dagoretti District Headquarters.

He testified that on 8th March 2010 he issued a Browning Pistol to ALEX MUTISYA. The pistol was serial number 171-27278.

On 9th March 2010, **PW 17** issued a G3 Rifle to the 2nd accused, Ahmed Abdullah.

On 10th March 2010, **PW 17** issued the following guns to the following persons;

- (a) Ceska Pistol to Michael Lewa (3rd accused)
- (b) Ceska Pistol to Erick Ebere (6th accused)
- (c) G3 FMP to APC Moses Lochich (4th accused)

On 11th March 2010, PW 17 issued a G3-A3 rifle to Nelson Too (5th accused).

Each police officer who was issued with a gun signed for it. They also signed for the ammunition which was issued to each of them.

It was the testimony of **PW 17** that when the officers returned their respective guns and ammunition, each of them had used ammunition as follows;

- (a) Alex Mutisya – 5 rounds
- (b) Ahmed Abdullah – 18 rounds
- (c) Michael Lewa – 6 rounds
- (d) Moses Lochich – 6 rounds
- (e) Nelson Too – 2 rounds
- (f) Erick Ebere – 13 rounds

When an officer returns to the armoury less ammunition than those issued to him earlier, he has to explain what happened to those that were missing.

PW 17 said that after each accused person had signed the register to confirm that he had returned less ammunition than had been issued to him, he explained that they had had an exchange of fire, with a gang.

PW 18, DR ZEPHANIA KAMAU, is a medical doctor based at the Police Surgery, Nairobi. He examined the accused persons, and made the following findings;

- i. *Ahmed Mohammed Omar – 25 years old. He had no physical injuries, and was mentally fit to stand trial.*
- ii. *Ahmed Abdullah Shaffi – 27 years old. He had no bodily injuries, and was mentally fit to stand trial.*
- iii. *Michael Ngungu Lewa – 25 years old. He had no physical injuries, and was mentally fit to stand trial.*
- iv. *Moses Lochich – 27 years old. He had no physical injuries, and was mentally fit to stand trial.*
- v. *Nelson Too - 38 years old. He had no bodily injuries, and was mentally fit to stand trial.*
- vi. *Erick Ebere – 24 years old. He had no physical injuries, and was fit to stand trial.*
- vii. *Alex Mutisya – 28 years old. He had no physical injuries, and was fit to stand trial.*

PW 19 CPL JOHANNA TANUI, was attached to the Scenes-of-Crime Division of the Kenya Police Service.

On 11th March 2010, at about 12.10a.m., he was at the scene of crime connected to this case.

He was told that about 10 armed men attacked motorists. The Administrative Police Officers from the adjacent camp, responded to the commotion, and managed to shoot dead 7 of the armed men.

PW 19 took 25 photographs at the scene. The said photographs showed a total of seven (7) bodies; broken pieces of a helmet; a panga; a masai sword; and two (2) motor-cycles.

PW 19 also prepared a report. The said report and the photographs were produced in court, as exhibits.

The report was titled “Robbery with Violence”. He explained that that title was derived from the information which he got when he first arrived at the scene. However, **PW 19** said that he was not sure if the title of his report reflected the correct factual position on the ground.

PW 20, TIMOTHY NDEKE NEBERT, used to operate a motor-cycle boda boda in Kawangware. He used to operate from a place that was near the BP Petrol Station.

He never used to carry any weapon when doing his job.

PW 20 used to have a reflective jacket and two (2) helmets. One helmet was grey, and it was for use by his passengers. The other helmet was blue, and **PW 20** used to wear it.

About 50 metres away from the place where the boda bodas used to operate from, the taxi vehicles used to operate.

PW 20 was at the BP Stage at about 11.00p.m. He had parked his motor-cycle aside, and was having tea at an “open-air hotel”.

He testified that at the said hotel, there was light from a lantern. There was also electric light from the petrol station.

Some people were having tea whilst seated, but **PW 20** was standing. As they continued to have tea, a group of about 10 men arrived. At the head of that group, **PW 20** identified persons who used to operate taxis at the BP Petrol Station.

The group wanted to know the owners of the motor-bikes that were parked there. **PW 20** said that his motor-bike was one of those parked at that place.

A few other boda boda operators identified themselves. That prompted the taxi drivers to beat up the boda boda operators, using slaps, blows and kicks. The taxi drivers then poured out whatever food the boda boda operators had been having.

Those who were beaten, ran away, leaving their motor-bikes behind. The boda boda operators gathered near the chief's gate, wondering amongst themselves what would happen to the motor-bikes that had been left behind. They then managed to push the said motor-bikes to the place where they were.

At that point, the boda boda operators noticed a group of people approaching them from the direction of BP Petrol Station. As the group was hitting the tarmac, using metal rods, the boda boda operators decided to run off.

In the process, some motor-bikes remained behind.

As **PW 20** was running away, he decided that his two (2) helmets would slow him down. He therefore dropped them.

It was the evidence of **PW 20** that the helmets could not break easily. Therefore, he believed that when he dropped them, the two (2) helmets were intact.

When he got to the K-Rep Bank, **PW 20** stopped. He begun thinking about how he would retrieve his helmets. But a short while later, he heard many gunshots. He ran away along Ngena Road, and hid inside a bar.

Later, **PW 20** went to the Chief's Camp where an Administration Police Officer told him that if his

(PW 20) motor-bike was one of those that had been left behind on the road, it had been taken to the Chief's office.

The officer also told him that the helmets had also been retrieved, but that they were in pieces.

PW 20 identified the pieces of the blue helmet, which was retrieved, as belonging to him.

PW 20 also identified his motor-bike at the Chief's office.

As regards the differences between the taxi drivers and the boda boda operators, **PW 20** recalled only one incident. He said that on 6th March 2010 a boda boda operator who had stopped at the BP Petrol station was beaten up by taxi drivers. That incident took place at about 2.00a.m. It prompted the boda boda operators to gather together, ready to avenge the assault on one of their own.

But **PW 20**, who is also a well-known church minister prevailed upon the boda boda operators to abandon the revenge mission.

The reason why the taxi drivers beat up the boda boda operator was that the boda bodas were charging a much lower hire charge than that charged by taxis. For that reason, the taxi drivers were losing business to the boda bodas.

During cross-examination, **PW 20** confirmed that in general, boda bodas charged less than taxis. That is what brought about a misunderstanding between the 2 groups. The taxi drivers, therefore, wanted the boda boda operators to move away from the BP Petrol Station.

PW 20 said that when the taxi drivers manhandled the boda boda operators on the material night, the taxi drivers did not have any pangas or other weapons.

However, during cross-examination **PW 20** admitted that in his statement to the police, he had talked about hearing the,

“sound of pangas and metal objects being hit on the tarmac”

PW 20 also said that the taxi drivers who harassed the boda boda operators came to the open-air hotel, on foot. None of them was driving

PW 20 explained that he was the last person to run away. Other boda boda operators had run-off ahead of him. He therefore denied the suggestion by Mr. Ombeta, (the learned advocate for the 2nd to 6th accused persons), that the helmet may have been broken by the other boda boda operators.

PW 21, CHIEF INSPECTOR EMMANUEL LAGAT, is a Firearms Examiner. He was provided with;

- (1) 3 G3 Rifles
- (2) 3 Ceska Pistols
- (3) 1 Revolver
- (4) 20 fired cartridges
- (5) 4 Bullet fragments

He was asked to verify if the guns were “Firearms” pursuant to the law.

He was also asked if any of the 20 fired cartridges and the 4 bullet fragments were fired by any of

the 7 guns.

After carrying out tests, **PW 21** established that all the 7 guns were indeed Firearms. They were in good general and mechanical condition, and they were in working condition. In effect, the guns were capable of firing bullets.

PW 21 said that Exhibits 19, 20 and 18 fired some bullets whose cartridges were amongst the 20.

However, the 4 bullet fragments were not suitable for comparative microscopic analysis.

During cross-examination by Mr. Kilukumi, the learned advocate for the first accused, **PW 21** said that in the Exhibit Memo Form, which is ordinarily prepared at the police station, before exhibits are sent to experts for analysis, it was said that the exhibits in issue were found after Administration Police Officers had responded to screams at K-Rep Bank.

PW 22, JOHANA MBOGUA MUNGAI, was a taxi driver at Kawangware. He worked from the Shell BP Petrol Station, Kawangware.

He knew all the 7 deceased persons. All of them used to be taxi drivers at Kawangware.

On the night of 10th March 2010 he was together with the deceased persons at the BP Petrol Station. He then got a call from a customer, who wished to be picked up from town. Whilst **PW 22** was still in town, he received a phone-call from Wandai, who was a taxi driver.

The time was about 1.00a.m., on 11th March, 2010.

PW 22 tried to reach the 7 deceased on their respective mobile phones, but was not successful.

At about 8.00a.m., **PW 22** went to the scene, where he saw blood-stains about 50 metres from the gate to the chief's camp.

During cross-examination **PW 22** said that the boda boda operators used to park elsewhere during day-time. They only used to go towards the BP Petrol Station at night. And because the boda bodas charged less than taxis, the taxi drivers wanted to meet them at the BP Petrol Station, on the material night, because the taxis were losing work to the boda bodas.

PW 22 said that although they did sometimes encounter difficult customers, the taxi drivers did not carry any weapons in their cars.

However, he conceded that he did not inspect the vehicles used by his colleagues on the material night.

PW 23, PC ROBERT KARIUKI, was on duty at the Kilimani C.I.D. Offices, when he was detailed to investigate this case. The date was 12th March 2010.

He was given 7 guns together with an Exhibit Memo in which the circumstances of the offence were spelt out.

PW 23 carried the guns and the Exhibit Memo to the Ballistics Experts at Mazingira House, for analysis.

PW 24, CHIEF INSPECTOR BERNARD GICHERU MAINA, was attached to the Kilimani C.I.D office, at the material time.

On 11th March 2010, he was instructed by the D.C.I.O, Mr. Ithaiba SSP, to proceed to the Dagoretti District Commissioner's office, to collect firearms which were exhibits. The firearms are the 7

guns issued to the 7 accused persons in this case.

PW 24 received 7 guns from AP Siema (PW 25), who was the In-charge of the armoury.

PW 25 AP SGT FRANCIS SIEMA, testified that he was the 2nd-in-command at the Dagoretti District Headquarters Armoury. The In-charge was SENIOR SERGEANT SAMUEL KIPLAGAT.

PW 25's duties included the issuance of firearms, ammunition and tear-gas. He records information in the Firearms Movement Book. And he did produce the said book, as an exhibit in this case.

He said that he issued the following guns and ammunition to the accused persons;

(a) AHMED ABDULLAH – G3 special, with 20 rounds of ammunition: that was on 9th March 2010.

(b) MOSES LOCHICH – G3 Rifle, with 20 rounds of ammunition on 10th Maarch 2010.

(c) MICHAEL LEWA – Ceska Pistol, with 15 rounds of ammunition, on 10th March 2010

(d) ERICK EBERE – Ceska Pistol, with 15 rounds of ammunition, on 10th March, 2010.

(e) NELSON TOO – G3-A3 Rifle with 20 rounds of ammunition, on 11th March 2010, at 12.40a.m.

(f) ALEX MUTISYA – Revolver with 5 rounds of ammunition, on 7th and again on 8th March 2010.

PW 25 identified the physical guns that he issued to each of the six accused persons, above. He also identified each of the said accused persons in the dock. He had known them because they used to work under his command.

According to **PW 25**, the accused persons had each used ammunition as follows;

(a) Ahmed Abdulla – 18

(b) Moses Lochich – 6

(c) Michael Lewa – 13

(d) Erick Ebere – 13

(e) Nelson Too – 2

(f) Alex Mutisya – 5

The officers explained to **PW 25** that they had used the bullets when exchanging fire with thugs who had been robbing members of the public at the Kawangware BP Stage.

PW 25 confirmed that he did not issue any firearm to the first accused, Ahmed Mohammed Omar.

As relates to ALEX MUTISYA, **PW 25** said that the records show that the Revolver was issued to him on 8th March 2010; and it was returned on 7th March 2010.

PW 26, DR, PETER MURIUKI NDEGWA, is a pathologist. He conducted post mortem examinations on the bodies of the deceased persons. These were his findings in respect to each of the persons;

(i) HARRY GIDEON THUKU

He had 3 gunshot wounds. The body had 3 exit gunshot wounds, which were corresponding with the 3 entry points.

7 ribs were fractured. Both lungs were fractured. Both lungs were lacerated by bullets. There was blood in the chest cavities. The liver was lacerated. The intestines were perforated. The tissue covering the abdomen was torn. There was blood in the abdominal cavity. His considered opinion was that the cause of death was chest and abdominal injuries due to gunshots.

(ii) WILLIAM GITONGA NJAU

He had 2 gunshot wounds. The first one was between the ear and the eye. The bullet entered from the right and exited on the left. It had fractured the right mandible, and the left eye.

The second gunshot wound was on the left thigh bone. The mid thigh bone was fractured. That bullet exited around the right pubic area.

The doctor concluded that the cause of death was gunshot wounds to the head and the thigh.

(iii) GEORGE NGANGA THAIRU

He had one gunshot wound. The bullet entered the abdomen from the front, and it exited at the back.

It perforated the diaphragm. There was blood in the chest cavity. The spleen and liver were ruptured, with blood in the abdominal cavity.

The cause of death was abdominal and chest injuries due to gunshots.

(iv) JAMES MUGWERU

He had 3 gunshot wounds. The first one just below the ribcage, on the right. The entry was on left lateral forearm, and the bullet exited inwards.

The second bullet was also just below the ribcage. That bullet exited on the left side of the neck, just below the shoulder-blade.

The left diaphragm was perforated. The 9th rib, on the right, was fractured. The liver and spleen were lacerated. The bowels were perforated. The thoracic spinal column was shattered.

The cause of death was multiple organ injuries due to multiple gunshots.

(v) JOSEPH MAINA MWANGI

He had 2 gunshot wounds.

The first one entered through the hand and exited close to the thumb.

The second bullet entered through the right eye and exited through the left ear. That bullet caused a blow-out compound comminuted fracture of the skull.

The brain was lacerated, contused and displaced. Indeed, a part of the brain was lost.

The cause of death was severe head injury due to gunshots.

(vi) **JOSEPH NGUGI**

He had 2 gunshot wounds.

The first one entered through the left upper arm and exited at the back of that same arm.

Another bullet entered on the left posterior axillary line and exited on the front.

The forehead had abrasions. The chin had multiple abrasions. Both lungs were lacerated, with blood in the chest cavity. The left and the right ventricles of the heart were lacerated.

(vii) **JOSEPH THIONG'O**

He had a number of gunshot injuries. The left thigh bone was fractured. There was an entry gunshot wound on the left shoulder, at the back.

The left scapula and the bone on the upper arm were fractured.

A bullet was recovered in the left shoulder area. They were in 4 pieces, being 2 heads and 2 small fragments.

The doctor documented six (6) entry wounds and an equivalent number of exit wounds.

The cause of death was multiple gunshot wounds to the chest, the abdomen and the extremities. The doctor explained that extremities are the body parts far from the heart; these include the legs and the arms.

PW 27, PC JOSEPHAT MURIUKI, was an Investigator. He was with the Investigating Officer (**PW 28**) when they collected some cartridges from **PW 25**. The said 20 cartridges had been recovered from the scene on the night of 10th/11th March 2010.

On the next day after **PW 27** and **PW 28** got the 20 cartridges from **PW 25**, **PW 27** got 4 bullet fragments from **PW 28**. The fragments were recovered from the body of JOSEPH THIONGO, during post mortem.

PW 27 prepared an Exhibit Memo, then forwarded the exhibits to the Ballistics Experts, for analysis.

During cross-examination, **PW 27** said that he did not know the person who had recovered the 20 cartridges from the scene.

PW 28, CHIEF INSPECTOR HILLARY MUTIE was the initial Investigating Officer.

On 11th March 2010, **PW 28** was at his office, at Kilimani Police Station, when he received a signal from **PW 11**, (the Officer-in-charge Muthangari Police Station). The signal indicated that 7 people had been shot dead by Administration Police Officers from the Dagoretti District Commissioner's office.

PW 28 visited the scene at about 12.00 noon on 11th March 2010. At that hour there were members of the public who were holding demonstrations to protest against the shooting of 7 people.

At about 2.00p.m. Hon. Beth Mugo, the Member of Parliament for Dagoretti Constituency, arrived at the scene. She talked to the protesters and cooled them down. Eventually the protesters moved away.

On 12th March 2010, **PW 28** recorded the statements of the police officers who had been at the scene; he did so at Muthangari Police Station.

PW 28 collected exhibits from Muthangari Police Station. Those were a photo album; a somali sword; a panga; a toy pistol; and 2 damaged pistols. He was also shown 2 motor-bikes at the police station, but he left them there for safe custody.

The other exhibits were stored at Kilimani Police Station.

On the same date, 12th March 2010, **PW 28** re-arrested the seven (7) accused persons.

On 15th March 2010, **PW 28** visited the scene of crime. He was accompanied by the OCS Muthangari Police Station, and PC Makau. The said PC Makau was operating a metal detector, which they used to try and find any firearms or cartridges. However, no firearms or cartridges were retrieved on that day.

PW 28 went to the AP Camp, Dagoretti, where **PW 25** handed over to him;

(a) 12 spent cartridges of G3 rifles;

(b) 8 spent cartridges of 9mm calibre; and

(c) A copy of the Arms Movement Register, showing the firearm and ammunition issued to various people.

On 16th March 2010, **PW 28** attended the post mortem of all the seven (7) deceased persons.

From the investigations carried out by the Investigating Officer, it was clear that the taxi drivers were unhappy that the boda boda operators were picking up customers from very near the place where the taxis operated from. As the boda bodas were cheaper than taxis, the customers preferred them; thus the taxi drivers lost business to the boda boda operators.

It was the evidence of **PW 28** that on the material night, **PW 20** and George Kamau were attacked by some taxi drivers, when they arrived in Kawangware, near the place where the taxi drivers operated from.

The boda boda operators went to report the assault, at the Chief's camp. But they left their motor-bikes behind.

The Administration Police Officers are said to have responded by confronting those who were attacking the boda boda operators. The accused persons were the officers who confronted those people.

During cross-examination, **PW 28** confirmed that after the 7 deceased were shot dead, members of the public held demonstrations in Kawangware.

However, he said that the said demonstrations did not influence him, in his investigations. He made it clear that Hon. Beth Mugo did not exert any pressure on the investigators.

PW 28 said that there was no evidence that any of the deceased persons had fired at the Administration Police Officers. However, there was evidence that the APs fired their guns.

PW 28 conceded that at about midnight when the incident took place, a police officer could not have been able to tell if the wooden toy pistol was real or not. It was his evidence that if the toy pistol was aimed at an officer, the said officer could imagine that he might get shot.

But in this instance, the APs were responding to a report, not a distress call.

PW 28 said that the taxi drivers only had pangas.

PW 28 also said that the 1st accused was issued with a gun at the Kawangware Chief's Camp, whilst the other accused persons were issued with guns at the Dagoretti District Headquarters.

By **PW 28**'s calculations, a total of 61 bullets were used by the accused persons on the material day. As most of the spent cartridges were not recovered, **PW 28** assumed that the officers who had fired their guns collected the same. His assumption was that the officers collected the spent cartridges because they wished to use them to account for the bullets they had expended on the material night.

However, **PW 28** conceded, during cross-examination, that he did not know if any of the accused persons actually collected any exhibits from the scene.

In the report which the 2nd accused made at their station, he said that they collected exhibits, including motor-bikes and broken helmets.

The O.B. Entry Number 4, on 11th March 2010 was made at 3.00a.m, by the 1st accused. **PW 28** admitted that that report was recorded after the OCS Muthangari Police Station had visited the scene of the shooting.

As regards the broken helmets, **PW 28** said that they belonged to **PW 20** and Kamau. Those 2 boda boda operators had run away, leaving their motor-bikes behind.

It was the evidence of the Investigating Officer that the accused persons were given guns for lawful use whilst they were on duty. And the officers said that they were fired at twice, when they had challenged the crowd to stop. In those circumstances, **PW 28** suggested that the officers should have approached the scene cautiously.

When responding to questions from Mr. Muoki advocate, **PW 28** emphasized that he was never under pressure from his superiors, to be seen to be taking action. He was simply asked to complete investigations.

PW 28 testified that he remained objective, fair and just to all, including the victims and suspects. After **PW 28** completed his investigations, it was the Director of Public Prosecution who made the final decision to prefer charges against the accused persons. The said decision was made after **PW 28** had made his recommendation, that the accused persons be charged.

It was the testimony of **PW 28** that Nelson Too and ALEX MUTISYA were alleged to have only joined the other five (5) accused persons after the said 5 had retired to the camp, following the shooting.

But these allegations were to be only rumours.

However, in the signal from the OCS Muthangari, Alex Mutisya was not named. The signal named the other six (6) accused persons.

Notwithstanding that omission, **PW 28** did not inquire from the OCS why Alex Mutisya's name was not on the initial signal. Instead, he concluded that the 7th Accused was also involved because the 1st accused had named him in the report made at the Riruta Ap Camp, and also because the other six(6) accused persons implicated him.

However, the documents from the Riruta AP Camp were never produced before this court.

When shown the statement recorded by **PW 17**, **PW 28** admitted that Alex Mutisya was only shown to have been issued with a gun on 8th March 2010. **PW 28** did not find out how long was the shift that Alex Mutisya worked in from 8th March 2010.

PW 28 also noted that the gun allegedly issued to Alex Mutisya on 8th March 2010, is shown on the Arms Movement Register, as having been returned a day earlier.

The entries on the Register as relates to Alex Mutisya, appeared to have been interfered with, conceded **PW 28**.

PW 28 also said that five (5) of the accused hoped that they would be promoted because, in their considered view, they had done a good job. The five (5) were Ahmed Mohammed, Ahmed Abdullah, Michael Lewa, Moses Lochich and Eric Ebere. They are the officers who are said to have made the report No. 4 in the O.B. at the Muthangari Police Station, on 11th March, 2010, at 3.00.m.

In the light of that testimony, this court acquitted Alex Mutisya. I gave to him the benefit of doubt because of the real possibility that he was not with the other officers at the time of the alleged shooting.

All the other six accused persons were put to their defence.

In my ruling, I did find that the six accused persons were, on a *prima facie* basis, all shown to have been on duty on the material night. I also found that they were on duty within the area where the seven (7) deceased were shot dead.

At that stage, I did find, on a *prima facie* basis, that each of the six accused persons returned lesser rounds of ammunition than those that had been issued to them before the shooting incident.

In their respective defences, each of the six accused persons confirmed that they were issued with guns on the material day.

The 1st accused said that he was on patrol duties together with the 2nd, 3rd, 6th and 7th accused persons.

The 2nd, 3rd and 6th accused persons corroborated the evidence of the 1st accused. They confirmed that they were on foot patrol covering the areas of "Stage 2", "56", "Congo" and "Muslim Area", which are all within Kawangware.

At about 12.30a.m, the officers heard screams from the direction of the K-Rep Bank, Kawangware. They therefore approached that direction, to ascertain what was happening.

The officers saw a group of more than 10 people, about 40 to 50 metres ahead of them. Within that group, one person was pleading that he should not be killed.

The 1st accused shouted in a loud voice, to alert the group that he and his colleagues were police officers. He ordered the group to surrender. However, instead of giving themselves up, the group fired at the officers.

It was the testimony of the 1st, 2nd, 4th and 6th accused persons that when the incident took place, it was a dark night. Consequently, the officers could not distinguish between the person who was being attacked within the group of 10, and the persons who were the attackers.

Therefore, the officers fired into the air, to disperse the group.

According to the 1st accused, some members of th group dispersed. But those who remained behind continued to fire at the officers.

A second shot was fired into the air by the officers. But the group did not stop approaching the officers.

At that point in time, the officers became scared, believing that their lives were in danger. According to the 1st accused, there was a real danger that the officers could not stand up to the group in that confrontation.

It is then that the 1st accused used his radio-call to seek reinforcement.

After the reinforcements arrived, the officers continued to exchange fire with the thugs until the shooting died down.

None of the officers were injured, but seven (7) of the thugs lay dead.

Near the bodies of the 7 dead men, the officers recovered pangas, simis, an iron bar and a black wooden toy pistol. The officers also found broken pieces of helmets and 2 motor-bikes.

Thereafter, the OCS Muthangari Police Station arrived at the scene.

Later, the accused persons were arrested, at about 3.00p.m, on 12th March 2010.

The 2nd accused gave a defence that was the mirror-image of the defence given by the 1st accused.

The 3rd accused also gave a similar defence. He only added that the police officers stopped shooting when the shooting from the other side stopped.

The 6th accused also gave a defence that was similar to that of the 1st accused.

The 4th and 5th accused were a part of the reinforcements who joined the other four (4) accused persons after the 1st accused had sought help.

As they were going towards the K-Rep Bank to join the other officers, the 4th and the 5th accused heard several gunshots.

Once they joined up with their colleagues, the officers

decided to use ***“reasonable force by returning fire towards the direction where gunshots were coming from.*”**

After a short time, the firing ceased and we stopped firing.”

On his part, the 5th accused added that the officers who constituted the reinforcements;

“were given a code for use by the officer;

direction and the position where those on

patrol had taken cover for their safety.”

Having given their defences, the accused persons submitted that they were among very few men who sacrifice their time; their families and their lives for this country.

Through their sacrifices, the rest of Kenyans were able to enjoy peaceful sleep.

Therefore, when they fired 61 rounds of ammunition, they must be deemed to have been in extreme danger. They were all under attack, from persons who appeared to be having superior fire-power.

In firing towards the persons who were firing at them, the accused persons assert that they had neither malice aforethought nor motive to kill the 7 deceased persons.

The defence submitted that there were inconsistencies and gaps in the case put forward by the prosecution.

The evidence does not show which accused person was issued with which specific weapon, or which of the weapons fired the fatal bullets.

The prosecution is also said to have failed to prove where the 20 cartridges, which were exhibited in court, were collected from; or who collected them and when he did so.

And if 61 bullets were fired, the accused wondered what happened to the other 41 spent cartridges or bullet heads.

As the Investigating Officer admitted that there are numerous firearms within Kawangware, this court was asked to bear in mind that fact.

The accused persons insisted that they only returned fire in self defence and to protect the lives of Kenyans.

The accused say that they did not shoot the deceased accidentally. As far as they were concerned, they did so whilst in the line of duty. That assertion was made in order to distinguish this case from **REPUBLIC Vs DICKSON MWANGI & ANTOEHR, CRIMINAL CASE NO. 11 of 2009.**

Miss Machuki, learned advocate for the 2nd to the 6th accused pointed out that in that case, the accused had confessed that he had shot the deceased. He then explained that he had done so accidentally.

In contrast, the accused herein say that they had a common intention to prevent a crime. In effect, the shooting that took place was justified.

The officers say that they were empowered, by law, to use firearms when they had no alternative ways to prevent crime. And even then, they could only use their firearms after giving due warning.

In this instance, the officers say that they gave 2 warnings, by firing into the air, hoping to disperse the mob. As the mob did not disperse, but continued to approach the officers, the accused persons concluded that their lives were in danger.

They also asserted that they used their guns because there was a person who was in need of the protection of the police. That is the person who was crying out to the mob, asking them not to kill him.

Thirdly, the mob was said to have been intent on destroying the motorcycles which had been abandoned by the boda boda operators who had been attacked by the taxi drivers. Therefore, the police say that they needed to act to prevent the destruction to the motorcycles.

Similarly the lives of the boda boda operators was said to be in danger, hence the need to protect them.

Pursuant to the provisions of **Section 17 of the Penal Code**, the accused submitted that they became entitled to use force as a means to self defence.

In this case, the accused persons insist that they used only such force as was necessary in their self-defence. Therefore, if they did commit any offence in those circumstances, the said offence cannot be one of murder; so it was submitted.

Having evaluated all the evidence tendered, together with the legal arguments advanced I find as follows;

All the seven victims were killed by bullets.

All the six accused persons have confirmed that they were within the area in which the victims were killed.

The 1st, 2nd, 3rd and 4th accused persons all confirmed that they were on patrol duties on the material night. The said duties were being carried out within the Kawangware area.

At some point in time, the 4 heard screams from the direction of K-Rep Bank. They therefore went towards that direction, to try and establish the source of the screams.

When the officers were about 40 to 50 metres away from a group of more than 10 people, they heard one person pleading that he should not be killed.

The 1st accused shouted out in a loud voice, so that the group of people was made aware that police offices had arrived. But the people in that group did not disperse or surrender.

Instead of surrendering or dispersing, the people continued to come towards the officers.

The officers fired a warning shot into the air, but that only resulted in a small part of the group running-off. The others continued approaching, as they fired at the officers.

It is at that moment, that a second warning shot was fired by the officers. That warning was also not heeded And that prompted the officers to conclude that their lives were in danger.

The 1st accused sent a radio-call for reinforcement.

When the reinforcements arrived, they joined the officers who had been on patrol. Together, the officers engaged the group in an exchange of fire. It is then that the seven men were felled.

In effect, the accused persons have confirmed that they were at the scene of crime, and that they fired bullets.

From the results of the post mortem on all the bodies of the seven deceased, no bullet heads or spent cartridges were recovered inside the bodies, except in one respect. The body of JOSEPH THIONGO had four pieces or fragments from bullets. Those were recovered and handed over to the police.

As no other bullet heads or spent cartridges were recovered from the bodies of the deceased persons, the prosecution was not able to link the death of any one of the victims to shots fired from any specific gun.

The 4 fragments recovered from the body of Joseph Thiongo were also found to be unsuitable for analysis.

That, of itself, does not mean that the bullets that killed the 7 men did not come from the guns which the accused used that night. The bullets may or may not have come from one or more of the guns which the accused fired. It is just that the prosecution did not prove the specific gun or guns which fired the fatal bullets.

This situation is wholly distinguishable from one in which the projectile which caused the death of the victim was found to have not come from the gun which the accused used at the material time.

I am fully alive to the fact that the legal onus is always on the prosecution to prove its case beyond any reasonable doubt. That burden never shifts to the accused person.

An accused person has no obligation to say or to do anything in his defence. He can choose to remain completely silent. That is his right. And if he should choose to exercise that right, the court cannot draw an adverse inference from that fact alone. The court would still be obliged to evaluate all the evidence on record, to ascertain whether or not the prosecution had discharged the onus of proof.

However, when an accused person chooses, of his own volition, to put forward a defence, he cannot ask the court to only give consideration to the evidence put forward by the prosecution. The court would be under a legal duty to give consideration to the totality of the evidence that had been placed before it.

In this case, the lines adopted by the accused persons during cross-examination suggested that they were challenging the prosecution to prove that they were at the scene of crime; and that they had been issued with the guns which the prosecution exhibited before this court; and that the bullets which killed the seven (7) men were fired by them.

If the accused persons decided to stick to that line of defence, the court would have had to ascertain whether or not the evidence advanced by the prosecution discharged the onus of proof.

But when put to their defences, the accused persons changed tune. They readily admitted being in possession of guns.

That admission made it un-necessary for the prosecution to prove the specific gun which each accused person was issued with.

The accused persons also said that they fired at the group of persons within which the deceased were. That admission meant that the prosecution was no longer required to prove that each and every one of the accused persons shot at the deceased.

However, I must also emphasise that the prosecution did prove that each of the accused persons fired one or more bullets. The accused had signed for bullets when they received them. And when they later returned their guns, they also signed the register to confirm that they had each used the following numbers of ammunition;

- (1) Ahmed Abdullah – 18
- (2) Michael Lewa - 6
- (3) Moses Lochich - 6
- (4) Nelson Too - 2
- (5) Erick Ebere - 13

The accused confirmed that they fired at the direction of the deceased.

The circumstances in which they did so needs to be appreciated. By their own admission, they first saw the group of about 10 men when the men were at a distance of 40 to 50 metres away.

It was a dark night. Consequently, the accused said that they could not even distinguish between the one person who was being attacked by the men in the group, and the men who were the attackers.

If, as the accused said, the men continued to approach the officers, the gap between the 2 groups was reduced.

And when the group of men continued to further approach the officers even after the officers had, first identified themselves; then, secondly, after the police fired the first warning shot; and thirdly, after the police fired the second warning shot, I find that the officers must have been fairly close to the taxi drivers.

In those circumstances, if the taxi drivers were armed with more superior fire-power than the officers, and if they fired towards the officers, it would have been expected that there should have been some injuries amongst the police officers. But none of the officers was injured at all.

And even after the police had shot dead the seven (7) men, no firearms were recovered from where the men were found lying dead.

The only “weapon” close to a firearm was a wooden toy pistol. Obviously, that toy could not be termed as a firearm, at all, leave alone a firearm which had superior fire-power compared to the guns in the hands of the accused.

The facts are wholly consistent with the case advanced by the prosecution; that neither the taxi drivers nor the boda boda operators were armed with guns.

The prosecution has proved that the helmets which were recovered at the scene, in a broken state, were not broken when the owner was being attacked by the taxi drivers. The owner dropped the helmets, when he felt that they were slowing him down.

And the reason why he was running away was that he had just heard gunshots which came from the direction of the Chief's camp.

The two (2) gunshots which **PW 20** talked about were thus consistent with the warning shots which the accused persons fired.

And the two (2) motor-bikes which remained on the road were also abandoned by their owners when fleeing after they had heard those gunshots.

Therefore, the motor-bikes were not abandoned because the owners were being attacked by the taxi drives, as alleged by the accused persons.

If the taxi drivers were attacking one person who was in their midst, and because the accused persons confirm that it was dark, that implies that when they fired the 61 shots towards the taxi drivers, they cannot have intended to protect the person who was being attacked.

The alleged victim of an attack by the taxi drivers would have definitely been killed by the officers.

The 5th accused explained that when the 1st accused called for reinforcements, the officers who were dispatched to join those who had been on patrol found those who they had gone to render support to, having taken cover.

That would imply that the officers who first encountered the taxi drivers were not in imminent danger at the time. I so find because if the taxi drivers had superior fire-power, and if they continued approaching the accused whilst firing at them, I cannot comprehend how the officers were not overrun, as they feared might have happened.

I can only conclude that the story about the alleged superior fire-power, coupled with the continuous approach by the taxi drivers is nothing more than a figment in the imagination of the accused persons. It was a story calculated to try and justify the use of the firearms which the accused had.

I find the indiscriminate shooting by the accused persons to constitute a reckless use of firearms.

And because they continued firing at the deceased until there was silence, the implies that they only stopped when all the deceased were dead. I say so because by the estimation of the accused, the original group they encountered had over 10 people. When the police fired the 2 warning shots, some of the people in that group ran away. Therefore, it would be reasonable to conclude that 7 persons who were killed were the only members of the group who remained, if the story by the accused is believed.

Yet when they were all shot dead, no firearms were recovered.

Of course, I do accept the contention that if a toy pistol is pointed at a person, especially in

darkness, the person may never know whether or not it was a real gun. He would therefore have reason to be apprehensive.

But none of the accused persons said that they saw any of the taxi drivers holding the toy pistol in a manner that would suggest that it was a real gun. Therefore, I find that the accused cannot have feared for their lives on the basis of a toy pistol which none of them had seen.

Whereas the accused persons have confirmed that they did shoot at the taxi drivers, the prosecution has not established which of the accused persons actually killed the 7 persons or any of them. Does that exonerate the accused?

In my considered view, the accused were all working in concert. They had a common intention. The intention was clearly to take out the persons who they deemed to have had the audacity to defy them. Therefore, it did not make a difference whether only one or the other of accused is the person who fired all the bullets which caused the fatalities; all the accused would be culpable.

By firing indiscriminately at the deceased, using many bullets, the accused must have intended to either kill or to cause grievous harm to the deceased. But even if they were indifferent whether death or grievous bodily harm would be caused by their actions, the accused are nonetheless deemed to have had malice aforethought.

That is not to say that the accused had malice or a motive to want to kill the taxi drivers. The phrase “malice aforethought” does not have a literal meaning. It is a “term of art” as Lord Goddard C.J. Said in **R vs WHYBROW (1951) 35 CRIMINAL APPEALS**, at page 146;

“In murder the jury is told- and it has always been the law – that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder.”

That decision was quoted with approval by the Court of Appeal in the case of **SOLOMON MUNGAI & OTHERS Vs REPUBLIC [1965] EA 782, at Page 785.**

A look at the nature and degree of injuries sustained by the deceased leaves no doubt as to the amount of force that was expended by the accused and their colleagues.

In the case of **WANJIRO Vs REG (1955) E.A.C.A.521** made the following observation on common intention;

“ ‘Common intention\’ generally implies a pre-arranged plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”

In this case, the accused may not have had a pre-arranged plan to shoot to death the taxi drivers or anybody else. But as events unfolded, they decided to shoot at the group of persons who had defied them. They then used so many bullets that the only reasonable conclusion was that they intended to either kill or otherwise cause grievous bodily harm to those at whom they shot. And they did succeed in shooting dead seven (7) people.

But were their actions not justified in the circumstances prevailing?

In **ANTHONY NJUE NJERU Vs REPUBLIC, CRIMINAL APPEAL NO. 77 of 2006** it was held as follows;

“A killing of a person can only be justified and excusable where the accused’s action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For that 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 and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.”

In this case, even if the court accepts the story about the officers on patrol being confronted by over 10 men, who allegedly fired at them, I note that the officers were able to “take cover”. They then sought and obtained reinforcements.

The reinforcements were mobilised and then they linked up with those who had been on patrol.

In effect, by the time the accused persons (including the reinforcements) shot at the taxi drivers until there was silence, the element of a “sudden and serious attack” was not present.

Secondly, I find that the degree of force used was not reasonable in the circumstances. It was excessive.

In “*Halsbury’s Laws of England*” Volume 25, 5th Edition, at paragraph 20, the learned authors discussed the use of force in the prevention of crime or in effecting or assisting in lawful arrest. This is what they said;

“The circumstances in which it can be considered reasonable to kill another in the prevention of crime must be of an extreme kind; they could possibly arise only in the case of an attack against the person which is likely to cause death or serious bodily injury and where killing the attacker is the only practicable means of preventing harm.”

In this case, it was not shown by the accused that the killing of the taxi drivers was the only practicable means of preventing harm.

The bodies of the victims were found in 3 different positions. Two of them were under a lorry. The lorry had no signs of any damage caused by bullets. It thus follows that the bullets targeted the victims, where they were hiding, under a lorry. Next to the bodies was a Somali sword, still in its sheath.

It cannot be said that those victims or any of the other five (5) had to be killed, as the only practicable means of preventing them from harming the accused persons or any other persons.

I pause here to say that the role played by police officers is well appreciated by this court. They perform their duties in circumstances that are often fraught with danger to their very lives. It is not an easy job.

That is why they have to be carefully chosen, during recruitment. Thereafter, they undergo rigorous training, to prepare them for the tough assignments awaiting them.

In my understanding, they are supposed to provide security to life and property. They are not supposed to take away lives of citizens.

By shooting live bullets towards the taxi drivers, they must have known that there was a real probability that the said taxi drivers would be killed.

As they killed them, they cannot escape criminal responsibility unless they could justify their actions. And they have failed to persuade this court that their actions were justified in the circumstances. Accordingly, I find each and every one of the six (6) accused persons guilty of murder, in the seven (7) counts. Each of them is therefore duly convicted on seven (7) counts of murder.

Dated, Signed and Delivered at Nairobi, this 18th day of December, 2012.

.....
FRED A. OCHIENG
JUDGE