



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 11 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

DICKSON MWANGI MUNENE.....1ST ACCUSED
ALEXANDER CHEPKONGA FRANCIS.....2ND ACCUSED

JUDGMENT

Like all international cities, Nairobi is a strange place after the fall of the sun. It is a place where different human beings within our society come out from their homes, hiding places, offices and place of work in order to continue with their unfinished businesses. Thugs, robbers, murderers, petty thieves also come out from their hiding places in order to interfere and disturb the peace and serenity of this beautiful city. A few kilometers away, the animals in Nairobi National Park also come out from their hiding places. It is a city that sustains the nocturnal activities of both human and wild animals. It has several landmark and less known facilities which different groups visit in order to quench their thirst for water. The wild animals in the National Park visit the watering points while the human beings go to restaurants and bars in order to quench their thirst. The incident subject of this determination started at a place called Crooked 'Q' in Westlands area. It is not an ordinary place where normal business is carried out. It is a place where beer and other alcoholic drinks are consumed by special members or class of our society. As the name connotes the events of 23rd and 24th January 2009 were crooked. The queue started from the said club until it ended in Westlands roundabout next to Sarit Centre resulting in the death of one **James Ng'ang'a Muiruri**. Coincidentally that is where the events leading to the death of the son of Prof. James Hillary Ang'awa Ocholla Odhiambo started. Perhaps it is also important to mention the events involved police officers who shot the deceased in that case. This restaurant is named the 'CROOKED Q' because of the crooked cue used in there to play a game of Pool or Snooker. As the name sounds, the activities and the business carried out therein may be twisted out of shape or position in order to accommodate the class or the group that frequents the said restaurant. It appears that the place has a long history because the persons who patronize the said club are from the affluent members of our society. In their quest to satisfy their social needs and drinking habits, there is a tendency to suffer from the

aftermath of the events or circumstances that is largely contributed by the nature of the business carried out therein. Now it appears that the events that may have started inside the restaurant must end up in court for determination. As is our duty it is our privilege and honour to determine every issue/question set for our answers. The question here involves murder. It is contended that simple and straightforward issues which started inside Crooked Q resulted in the death of the deceased. The question is who is responsible for the death of the deceased which occurred on the nights of 23rd and 24th January 2009. The two accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are;

1. DICKSON MWANGI MUNENE 2. ALEX CHEPKONGA FRANCIS on the 24th day of January, 2009 at Westlands in Nairobi within Nairobi Area Province, jointly murdered JAMES NG'ANG'A MUIRURI".

On 27th May 2010, this court ruled that the proceedings that were conducted before Apondi and Lesiit JJ were a nullity because there was a failure to comply with the mandatory provisions of section 200 (3) and 201(2) of the CPC; and that such failure had given rise to fundamental and gross defect in the case adversely affecting the whole trial. Consequently the earlier proceedings were declared a mistrial, incompetent and void.

On the same day a fresh plea was taken on the charge sheet dated 5th May 2009. The prosecution recommenced their case and called 23 witnesses to prove the charge against the accused persons. The basis of the prosecution case is that in the course of the night of 23rd and 24th January 2009 the deceased was at Crooked Q Bar and Restaurant together with his brother PW13 and **Jedidah Okudo** (PW14) where they were drinking alcoholic beverages. There was also another group composed of five men who were also in the same restaurant partaking alcoholic drinks amongst other things. The prominent members of the other group were the 2nd accused and **Mr. Sagini** PW6.

According to PW1 Isack Malenya, on the material day around 7.00 a.m. he was informed by his colleague that two groups were fighting inside the club. He then found his colleagues removed the 2nd accused and his friends. He contended that he took the 2nd accused to his car and he remained at the entrance to stop him from coming back to the club. PW1 also prevented the 2nd accused from going up to the club because he was informed that he was fighting with other patrons. After five minutes, the other group came down in the company of other bouncers. PW1 ensured that they did not fight with the other group which was still at the entrance of the club. By then the 2nd accused had come out of his car and exchanged words with the deceased and his group.

PW13 who is the brother to the deceased went for his car so that he could pick his brother and leave the venue. Before the deceased could enter the car, the 2nd accused tried to hit him but the bouncers pushed him back. As the deceased and his brother were leaving the 2nd accused started calling the name of Munene. At that time Munene was inside his car and had closed all the windows. It is the evidence of PW1 that Munene came out from his car together with Alex ready to fight the other group. When (the deceased) and his group left, the 2nd accused was restrained for few minutes by the bouncers but the 1st accused left immediately and drove his vehicle towards the direction followed by the first group.

The evidence of PW2, Morgan Guneno, is that on the material day, he heard commotion upstairs and he rushed to find out what was happening. On reaching upstairs, he found that there was a commotion between two groups. One group of about five men and the other group of two men and a lady. He tried to separate the two groups and after a few minutes removed the group of five men from upstairs to downstairs. After a few minutes the other group insisted on leaving and on reaching downstairs they found the 2nd accused together with his group still waiting. He contended that there was a little commotion between the 2nd accused and the deceased. The deceased allegedly punched the 2nd accused. PW13 then went for his car and drove off with the deceased. He also contended that after a few

minutes Alex (A2) left and after five minutes he saw a group of people running towards Sarit Centre. On reaching the scene, he found a lot of blood and a white striped shirt left at the scene.

The evidence of PW3 and PW4 is similar to that of PW1 and PW2 since they were all bouncers (security officers) at Crooked 'Q' club.

PW5 was the only independent eye witness as to the cause of commotion between the two groups. According to PW5, the deceased asked PW6 whether he was gay while thumping his chest. The other issue which caused the commotion is that the deceased called a patron by the name Tish that he is a poor man who cannot afford to play a beer game. It was then that the said Tish told the deceased that the only expensive thing he was wearing was the shoes. A commotion then broke out between the two groups and the bouncers intervened and removed the group of the 2nd accused. As the deceased and his brother were leaving, she contended that she saw the 2nd accused entering his car trying to follow them. The bouncers prevented them from following the deceased and his group and after a few minutes she said she saw the 2nd accused leave at high speed trying to follow the group of the deceased. Later she heard the deceased had been shot dead.

PW6 (Mark Sagini) was part of the group composed of the 2nd accused and others that were involved with the commotion that resulted in the removal of his group from the club. He contended that as he was drinking at the counter, one of the patrons came from the direction of the main entrance and thumped in his chest and asked him whether he was gay. He was offended and upset since the person was not known to him. When he asked him why he was insulting him, the patron just walked away to the direction where he came from. He then followed him and asked him why he was calling him an offensive name. As he was talking to the deceased, PW14 jumped on him and shoved him away. He stated that after the commotion his group was removed from the club to downstairs. He said that at the parking he found the 2nd accused driving off and later he came back with the car to pick them. The evidence of PW6 is that the vehicle the 2nd accused was driving was his (PW6's) and that the 2nd accused told him that the 1st accused had gone after the deceased.

PW7, Senior Superintendent of Police was the one in charge of Gigiri Criminal Investigation Department as the DCIO. He said that on the material day he was informed by the OCPD Gigiri that there was a shooting incident at Westlands and was directed to go to the scene. He stated that he instructed Sgt. Richard Wahome to record statement from John Gachara (PW13) and any other witness after he was informed that the deceased had passed on at MP Shah Hospital. He went to BuruBuru Police Station and met the 1st accused who had been arrested and disarmed. The suspect was then handed over to him together with one firearm (a pistol) and 11 rounds of ammunition and a pair of handcuffs. He identified the pistol serial No. as T275989K. He also escorted the suspect from BuruBuru police station to Gigiri for further investigations. He also handed over the exhibits to IP Joseph Muguna for further actions. He also contended that the pistol that was recovered from the 1st accused can accommodate up to 13 rounds of ammunitions or more according to the manufacturer's specification. In his view the pistol can accommodate 13 rounds in the magazine and one in the chamber. He also contended that the 1st accused did not show him any injury to his hand occasioned by handcuffs.

PW8 Dr. Zephaniah Kamau stated that on 30th January 2009, he was brought the 1st accused person with a request to assess his age, examine any injuries and his mental status. He contended that the 1st accused was 31 years then and he had tenderness on the right wrist which he allegedly sustained on 24th January 2009 during a scuffle. The injury had been caused by a blunt object and he assessed the degree as harm. He also found the 1st accused as mentally fit and produced the P3 form as exhibit P4.

On 15th May 2009 he was brought the 2nd accused with a request to assess his age, injuries and mental status. Having undertaken the examination, he confirmed the 2nd accused was aged 25 years old, had a healed bruise above his right ankle and gave a history of assault inflicted on him on 24th January 2009. He assessed the injury as harm and confirmed the 2nd accused was mentally fit to stand trial. He filled the

P3 form and produced it as exhibit P5.

PW9, Cpl Evans Mose is attached to Scenes of Crime as an investigator. On the material day, he went to the scene and took photographs of the scene, a shirt with blood stains, two spent ammunitions and then proceeded to MP Shah Hospital where he took several photographs of the deceased. He then prepared a certificate which he produced as 6A and 6B.

PW10 identified the body of the deceased at Lee Funeral Hospital to Dr. Ndegwa for purposes of carrying out a post-mortem examination. PW11 is the father to the deceased and contended that on the material day he received a call from his son John Gachara who informed him that the deceased had been shot and rushed to MP Shah Hospital. He immediately rushed to MP Shah Hospital where he was told that his son had already passed on.

PW12 Dr. Peter Ndegwa is a pathologist working with the Ministry of Medical Services and on 27th January 2009 he performed a post mortem examination on the body of the deceased. The body was identified to him by PW10 and IP Joseph Muguna from Parklands Police Station and after carrying out the postmortem examination, he confirmed;

- (1) Entry gunshot wound left praecordium 3cm medial to the nipple. The wound measured 1.5cm diameter. There was no discernable exit.**
- (2) Entry gunshot wound on the right praecordium 8cm above the right nipple. The bullet travelled superficially exiting on the right axilla, re-entering in the medial aspect of the right upper arm and finally exiting lateal right upper arm.**
- (3) Entry gunshot wound just below the lip, diameter 1.5cm. The bullet travelled downwards through the left side of the neck, fractured the cervical spinal column and then exiting posterioy between the shoulder blades.**
- (4) Internally the liver was lacerated, stomach perforated and there was blood in the abdominal cavity.**
- (5) The lower jaw was fractured.**
- (6) The cervical spinal column was shattered by bullet. The spinal cord was also lacerated.**

As a result of the examination, he formed the opinion that the cause of death was multiple organs injuries due to gunshot wounds. He then signed the postmortem form dated 18th February 2009 and produced it as exhibit P7. He also removed the bullet lodged to the body of the deceased and submitted it to the police for plastic examination.

PW13 and PW14 John Gachara Muiruri and Jedidah Ahawo Okudo were present at the time when the initial commotion occurred and at the time the deceased was allegedly shot by the 1st accused. They confirmed that the initial commotion was between the deceased and the group of the 2nd accused. They also confirmed that the bouncers intervened and separated the two groups. They further contended that the bouncers removed the aggressors and they were advised to stay back. At about 6.30 a.m. they decided

to leave and the bouncers escorted them outside since the other group was still waiting for them. The deceased then gave the car keys to PW13 so that he could bring it closer to the door of the club.

The evidence of PW13 is that as the deceased was entering the car, one member of the other group tried to attack him but the bouncers intervened and separated the two of them. They proceeded to drive home as they were followed by PW14 in her car. As they were driving home, PW13 noticed a car speed by their side and blocked them from the front. The car which blocked them from the front was a Mercedes Benz. On trying to reverse, he also noticed another car had blocked him from behind. There were two male persons who came out from the front car and PW13 recognized them as the same faces from the club. The two men then decided to punch and grab the deceased. As they were arguing, one person who was not part of the group told the deceased to handcuff himself by throwing the handcuffs at the deceased. The deceased refused to handcuff himself and asked, 'what have I done?' Shortly thereafter the man started shooting the deceased and the deceased fell next on the road. It is contended that the man who shot the deceased entered his motor vehicle and drove off. PW13 and PW14 then rushed the deceased to MP Shah Hospital and on arrival the doctors confirmed that he was dead. PW13 then went to Parklands Police Station to record his statement. Later he went back to record a further statement because he had missed out vital points in the first recording because of shock. In the first statement he said that the deceased resisted to be handcuffed. He also never mentioned the issue of handcuffs thrown at the deceased. He also never mentioned the presence of a Good Samaritan who assisted him and PW14 in putting the deceased into the car. He also contended that the person driving the silver Mercedes is the 2nd accused and he is the one who blocked their car in front.

The evidence of PW14 is similar to that of PW13 and contended that as they drove off from the club, she noticed two cars following them that were driven at high speed. The two cars overtook them and blocked the one that was driven by PW13. She also noticed two persons coming out from the Mercedes and who started attacking the deceased. She said the two were 2nd accused and PW6 Mr. Sagini. She also contended that she found one guy who had handcuffs and who informed the deceased to put them on himself. The deceased did not put handcuffs on and asked the man why he would handcuff himself. He then immediately heard gunshots and found the deceased lying on the floor. The two cars then took off in high speed. She then assisted PW13 to carry the deceased to the car and immediately drove off to MP Shah Hospital.

PW15, IP Wafula Simiyu, stated that on 24th January 2009 while working at Nairobi area central room he received a call from the 1st accused that there was a scuffle and somebody had been shot. He then consulted the PPO Nairobi area and the in-charge operations Nairobi. He then raised the OCPD Gigiri police division to move to the scene. Under cross examination, he said that the 1st accused told him that he had shot somebody who had resisted arrest.

PW16, CIP Alex Ndindi Mwandawiro is a firearm examiner attached to CID Headquarters Nairobi. On 30th January 2009 he received the following exhibits;

- (1) One Browning pistol S/No.T.275989K
- (2) 11 rounds of ammunitions
- (3) 2 expended cartridges.
- (4) One fired bullet

He then proceeded to examine the said exhibits and came to the conclusion that the Browning Pistol was a Belgian made in Caliber 9mm and designed to chamber 9 x 19mm rounds of ammunitions. The general and mechanical condition was good and its components parts was capable of being fired. He then proceeded to test fire the pistol by use of four rounds of ammunitions which were picked from the 11 rounds which were submitted to him. He concluded that the pistol and the ammunitions that were submitted to him were capable of being fired and that they were a firearm and ammunition in terms of chapter 114 Laws of Kenya. He also examined the two expended cartridges in conjunction with the four test fired cartridges and the result revealed sufficient matching in that they were fired or capable of being fired from one gun. In essence he confirmed that the two expended cartridges were fired from the

Browning Pistol S/No.T275989K. He then prepared a report which he produced before court as exhibit 11. He also confirmed that the letter K is missing from the last number of the pistol but he contended that that does not form part of the serial number.

The evidence of PW17, Eliud Kamau Mwangi generated a lot of heat from the defence, as it is alleged that he was not a hawker based at Westlands and that he was not present at the scene of crime when the alleged offence took place. However, he gave evidence and stated that he witnessed two people alight from a Mercedes Benz that blocked a vehicle of the deceased from the front. He also said that another car came from behind and blocked the car of the deceased from behind. He then went near the place to see what was happening and saw the person who blocked the deceased car from behind holding handcuffs in his hands. He then immediately heard gunshots and the person went to his car while the ones from the Mercedes went back to their car. It was then that he allegedly assisted PW13 and PW14 to put the deceased into the car.

PW19 attended the postmortem examination and received one bullet head that was removed from the body of the deceased from the doctor who carried out the postmortem examination.

PW20 was among the first police officers to arrive at the scene of the shooting and on arrival found there was a lot of blood at the scene and he took charge so that nobody would interfere with the scene.

PW21 was in charge of BuruBuru police division and he is the one who received the report from the 1st accused and also took over a Browning pistol that was allegedly used at the time of shooting from the 1st accused. He handed over the pistol serial number T275989K to the DCIO Gigiri Police Station.

PW22 and PW23 together with other police officers conducted the investigations and came to the conclusion of charging the two accused persons with murder subject of this determination.

After the close of the prosecution case, the two accused persons were put on their defence. The 1st accused gave sworn testimony and denied the charge of murder that was preferred against him. He stated that on 24th January 2009 in Westlands area outside a place called Crooked 'Q' he saw the 2nd accused removed from the bar and escorted outside. There was also another group behind the 2nd accused person. He stated that he saw one person get out and hit the 2nd accused and that the 2nd accused fell down but the gentleman followed him and started kicking him. He stated that he got out of his car and went to the bouncer whom he had earlier spoken to. Immediately he saw the gentleman who had kicked the 2nd accused go to a vehicle and move away towards Sarit centre. Being a police officer and having witnessed a cognizable offence, he went back to his car and followed the gentleman. On reaching the junction to Lower Kabete road he found the vehicle that had driven the gentleman had been forced to stop by a small jam. He then parked his vehicle in front of the car the gentleman had entered and came out with handcuffs but the gentleman also came out of his car and started approaching him. According to the 1st accused he introduced himself and informed the gentleman that he had committed an offence and he wanted to arrest him. The gentleman allegedly replied that he cannot be arrested but the 1st accused continued to effect the actual arrest by trying to handcuff him. It is the evidence of the 1st accused that the gentleman grabbed the handcuffs and a struggle ensued. During the struggle the gentleman pulled the 1st accused to the pavement which was on a higher ground. At that point the 1st accused removed his firearm which did not have a waister in order to secure it properly. When he removed the firearm the deceased grabbed it and immediately two shots got fired. The 1st accused then went back to his vehicle as he realized that it was safe to move away from the scene of crime. He then informed the controller so that the matter could be reported to his bosses. He then went to BuruBuru police station to make a formal report of what had happened. The 1st accused stated that he conducted himself professionally and that the allegations he threw handcuffs at the deceased are false. He also stated that he did not pull the trigger that resulted into fatal shooting of the deceased. In short he stated that he complied with all the relevant procedures by identifying himself to the suspect, telling him the reason why he wanted to arrest him and

cautioning him before and during the actual arrest.

Another issue raised by the 1st accused was that, he was issued with a firearm Serial No.27598K with 13 rounds of ammunitions on 6th January 2009 at Kilimani Police Station. He contended that the firearm that was issued to him is not the one that was produced before court. He also contended that the firearm that was in his possession was not subjected to fingerprinting and examination by the police to confirm whether the deceased had come in contact with the same.

On the other hand the 2nd accused gave sworn testimony and called three witnesses. He contended that he did not participate in the events resulting in the death of the deceased since he was not armed and that by the time he reached the scene the actual shooting had taken place.

The facts narrated above are a clear reflection of the events leading to the death of the deceased person. It is also a reflection of the events that took place after the deceased was fatally shot till the two accused persons were charged with murder. It is now my responsibility to determine whether the prosecution has proved its case beyond reasonable doubt. It is also my duty to determine whether the defences by the accused persons raise suspicion in my mind taking into consideration that the burden of proof lies throughout on the prosecution. In short an accused person assumes no burden to prove his innocence and it is the responsibility of the prosecution to prove its case beyond any reasonable doubt. In law an accused person must be proved to be responsible for the conduct or the existence of a state of affairs prohibited by the penal code or any other law which gives sanctions before a conviction can result. Whether a person will be held responsible depends usually on the intention to commit the crime. The commission or omission of an act does not itself constitute guilt unless the same is done with a guilty mind. Under section 203 of the Penal Code;

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

In order to convict the two accused persons with the murder of the deceased, it must be shown that they caused the death of the deceased with malice aforethought by an unlawful act or omission. From the definition above there are three ingredients of murder which must be established in order to secure a proper conviction;

- (1) The death of the deceased and the cause of death.**
- (2) The accused persons committed the unlawful act or omission that resulted in the death of the deceased.**
- (3) That the unlawful act was intended in that the two accused persons had the motive or intention to cause the death or grievous harm.**

In so far as the first ingredient is concerned, it is incumbent upon the prosecution to establish that the death of the deceased had occurred. There is no dispute about the death of the deceased. PW10 identified the body at Lee Funeral Home to Dr. Ndegwa who carried out the postmortem report. That evidence has been reinforced by the evidence of PW9, PW11, PW12, PW13, PW14 and PW20. PW12 Dr. Peter Ndegwa performed the postmortem examination on the body of the deceased. The examination was carried out in the presence of PW10 and PW19. Dr. Ndegwa recorded his results in a report which he produced as exhibit 7 and which is dated 18th February 2009. In his evidence in court and according to his findings in exhibit 7, the said doctor found that the deceased actually died as a result of multiple organ injuries due to gunshot wounds. The significant and most important finding was that the diaphragm of the deceased was perforated, his liver was lacerated and his stomach was also perforated. The lower jaw was also fractured. He also concluded that the cervical spinal cord was lacerated and the cervical spinal column was shattered by a bullet. The deceased died of gunshot wounds. It is therefore clear that the death of the deceased and the cause of death was established by the prosecution beyond reasonable

doubt. There are two issues that are yet to be determined;

(1) whether the two accused persons committed the unlawful act which resulted in the death of the deceased and

(2) Whether they had malice aforethought.

The prosecution in trying to prove the 2nd ingredient called the employees of Crooked 'Q' club namely PW1, PW2, PW3, PW4 (all bouncers) and PW5 a waitress all of whom in one way or another acknowledged that there was a commotion at the Crooked "Q' Club which called for their intervention of the removal of 2nd accused and his group from the club. PW5 was the only independent eye witness as to the events resulting in commotion between PW6 and the deceased. It was contended that the deceased called PW6 gay. It is also contended that the deceased was in an aggressive mood hurling insults at the group of 2nd accused person. He allegedly called a patron by the name Tish 'ngui' a Kikuyu word meaning "dog".

It is also clear that at the initial scuffle or commotion, the 2nd accused was not in any way involved with the events that resulted in the removal of his group. One thing is clear that the initial commotion was between the deceased, PW6 and a patron by the name Tish. After the two groups met at the downstairs of the club there was a second commotion which resulted in a brief encounter between the 2nd accused and the deceased. There is also evidence that the deceased was driven off by his brother PW13 as they were followed by PW14. The third vehicle to follow them was that being driven by the 1st accused. There is no dispute that in following them, the 1st accused was trying to arrest a person who had allegedly committed a cognizable offence. On reaching the junction to Lower Kabete road next to Sarit Centre, the 1st accused parked his car in front of the vehicle that was driven by PW13. There is evidence that he came out with handcuffs while the deceased also came out of his vehicle. A few minutes later, a vehicle that was driven by the 2nd accused joined them at the scene. It is contended that the punching of the 2nd accused by the deceased constituted a criminal offence committed in the presence of the 1st accused, therefore under section 29(b) of the Criminal Procedure Code, a police officer is authorized without warrant to arrest a person who commits a breach of peace in his presence.

It is further contended that the 1st accused with handcuffs approached the deceased at Sarit Centre roundabout and sought to effect arrest for an offence committed in his presence. The deceased according to the testimony of PW13 and PW14 recorded after the first incident stated in part;

“By the time the man had removed handcuffs and tried to handcuff my brother who resisted being handcuffed.”

PW13 confirmed in his initial statement that they were blocked by the motor vehicle that was being driven by the 1st accused. He also confirmed that as he tried to reverse he was blocked by another vehicle whose registration number he could not see and as such he was unable to drive from his position. It is also confirmed further that on seeing the deceased could not be handcuffed the 1st accused removed his pistol and pointed it in his direction as they continued arguing. Another important and crucial factor confirmed by PW13 is that after pointing the pistol and as they argued, the 1st accused shot the deceased twice or thrice. More importantly, PW13 confirmed that immediately after the shooting the 1st accused walked into his car and drove away. That evidence was confirmed and clearly corroborated by the evidence of PW14 who confirmed that PW13's motor vehicle was blocked from the front and behind. She also confirmed witnessing the actual shooting of the deceased.

It was submitted by Mr. Kilukumi learned counsel for the 1st accused that the intention of the 1st accused in removing the handcuffs and trying to arrest the deceased is the clearest testimony that he had no intention whatsoever to inflict any form of injury to the deceased. If his intention was to shoot the deceased, he would have removed his service revolver and not the handcuffs. Mr. Kilukumi also placed great reliance on the statements recorded by PW13 and PW14. He submitted the further statement of PW13 and PW14 are contaminated by suggestions, consultations, inducement and/or influence from others or made so as to strengthen the prosecution case and the same must be treated with circumspection and extreme caution by this court. He relied on the case of **Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259** where it was observed that;

“We have had reason before to commend on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such Statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”

And in the case of **Rex –vs- Shabani Bin Donaldi (1940) 7 EACA 60** it was held;

“We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such reports (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all.”

The question is whether the alleged disparities, contradictions, inconsistencies and the variance in the first statement and the second statement of

PW13 and PW14 is a material factor which goes to the root of the evidence they tendered in favour of the prosecution.

I have scrutinized and read in detail the first statement and the further statements recorded by PW13 and PW14. I have also gone through their evidence before court. In my analysis of all the various statements and evidence and having watched the demeanor of those witnesses, one thing is clear, they both mentioned that it was the 1st accused who blocked the vehicle that was being driven by PW13. The thread that runs through their evidence is that the 1st accused upon blocking the deceased's vehicle came out with handcuffs and tried to arrest him. As he was trying to arrest him, there was a confrontation between him and the deceased. The 1st accused in his evidence confirmed that as he was trying to arrest the deceased who was much bigger and much stronger tried to grab his pistol which got fired and fatally killed the deceased. The question is whether the 1st accused conducted himself professionally before, during and after the time of the said incident. It is also important to address and answer the question when a situation as the one in this case presents itself to a police officer whether he is required to observe minimum standards before he engages an accused person who may have committed a crime in his presence or one that was reported to him.

The law is that if an act is done in the exercise of an honest claim of right, without any negligence, a person cannot be criminally responsible for an act or omission which occurs independently of the exercise of his will or an event which occurs by sheer accident. Unless the intention to cause a particular result is

expressly declared to an element of the offence in whole or in part by an act or omission, the result intended to be caused by an act or omission is immaterial. The law is that every person is presumed to be of sound mind and to exercise common sense and practical reality when confronted in a situation which he did not foresee.

It is the evidence of the 1st accused that in trying to arrest the deceased and use of handcuffs against the deceased, he observed the requirements of section 15 of the Police Act. Under section 21 of the Criminal Procedure Code a person may be arrested by a police officer or any person and taken into custody. Section 21 of the Criminal Procedure Code states as follows;

“(1) in making an arrest the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.

(2) If a person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

It is therefore clear where a person forcefully resists any attempt to effect his arrest or attempts to evade arrest, the person doing so may use all means necessary to effect that arrest but nothing will justify the use of a greater force than is reasonable in the particular circumstances in which it was employed or is necessary for his apprehension. It is also clear that under section 28 of the Police Act Chapter 84 a police officer may use a firearm against any person who by force prevents or attempts to prevent his lawful arrest or that of any other person. However, the firearms shall not be used unless the officer has reasonable grounds to believe that he cannot otherwise effect the arrest of the said person.

It is also clear that there is no distinction between a police officer and a private person to arrest without warrant on suspicion of commission of a cognizable offence provided there are reasonable grounds even a private person is entitled to effect arrest. Whether the arrest is being made by a police officer or by a private person one is entitled to use such force as is reasonable in the circumstances. All is necessary for the apprehension of the offender. The question is whether it was necessary for the 1st accused to confront and attempt to arrest the accused person in the circumstances of this case. It is the contention of the 1st and 2nd accused that the deceased committed an offence of assault. One may also say the deceased together with others committed an offence of affray. Whatever position you take the question that needs answers is whether the 1st accused was justified in his attempt to arrest the deceased in the manner he employed. There is no doubt that the alleged offence committed by the deceased occurred within the premises or compound of Crooked 'Q' restaurant. The initial confrontation occurred in the upstairs of the said restaurant. The evidence on record is that the two groups were separated and immediately the bouncers removed the group of the 2nd accused.

It was the evidence of PW1 that the 2nd accused was the aggressor. After his group was removed, they remained downstairs of the club waiting for the deceased and his group to come down. There is also evidence that the 1st accused was in the company of the 2nd accused and his group earlier that night. The 2nd accused stated that the 1st accused passed at his home and went together to town. In town the 2nd accused and his group went to Florida. They left Florida club at 4.00 a.m. There is evidence that the 2nd accused and his group may have arrived at Crooked 'Q' club between 4.00 a.m. and 5.30 a.m. It is also clear from Florida, the 1st, 2nd and his group went to Mobil petrol station in Westlands. At the time the fight resumed at the downstairs of Crooked 'Q' club the 2nd accused sought the intervention of the 1st

accused. As was rightly pointed out by Mr. Kilukumi the events at Crooked 'Q' on the material day are important to determine whether the accused persons intentionally killed the deceased as contended by the prosecution.

(1) The 1st accused never entered the bar. He was never a participant in the confrontation or altercations that is alleged to have taken place in the club.

(2) The 1st accused never met the deceased.

(3) Outside Crooked 'Q' club the 1st accused allegedly witnessed a crime being committed i.e. the 2nd accused being punched by the deceased.

It has been contended that the deceased and his group were drunk, aggressive and were the ones who started the initial confrontation. It is alleged the deceased insulted a patron by the name Tish and PW6 by calling them dog and gay respectively. Now, what were the avenues or the routes available to the 1st accused in order to apprehend the deceased and his group? As a police officer, the situation as alleged by the defence was that there were three persons who were drunk and in an aggressive mood. What the deceased allegedly committed is a minor offence in the nature of assault or affray. In my view the moment the 1st accused confronted the deceased who was earlier involved in a scuffle with the 2nd accused and others, created a situation which was confrontational and likely to result in breach of peace. From the moment the deceased left the premises or the compound of the Crooked 'Q' club there was no basis or reason to make a lone police officer to follow such a group which was involved in a confrontation, who were aggressive and may be who were drunk. It was incumbent upon the 1st accused to effect the arrest of the deceased at the initial scene where the alleged offence took place. I am saying so because there were four security (bouncers) men who could assist him in effecting the arrest of the deceased or any other person. He also had the second option of restraining the deceased and his group from leaving the club if they had committed a cognizable offence.

The third option was to seek for reinforcement before he could embark on his mission to arrest the deceased because of the danger posed to his life and that of the deceased. The other option was also restrain the 2nd accused and his group from following him after he made his intention to follow the deceased and his group. In my view that is what a prudent and a reasonable trained police officer should have done. That was not done. What were the options available to the 1st accused at the scene when he stopped the vehicle of the deceased? The evidence available is that the 1st accused tried to handcuff the deceased without forewarning him of the dangers of failing to abide by lawful directive or authority. In my understanding a lone police officer should not come to a close proximity with an offender in an attempt to apprehend him. He must keep his distance before he engages him in a conversation as to whether he wants to arrest him or not. He must also show the person that he is armed and he is likely to use his firearm if provoked or his life is in danger. You cannot casually approach an offender whom you think is aggressive and drunk before you have shown what you are capable of doing in case he defies a lawful order. You can also direct him to drive to the next police station as you drive closely behind him. The fact of trying to engage and handcuff the deceased without telling him either to lie down or face the opposite direction or to raise his hands behind his back was careless and negligent in the first instance.

The 1st accused stated in his evidence that the deceased who was much bigger in size refused to be handcuffed and grabbed the handcuffs from him. He also stated that during that time he had not secured his pistol properly. In my view it is illogical and ironical that a police officer would engage a person who was aggressive, much bigger in size and confrontational before he has secured his firearm. That is the second limb of negligence or omission that caused the fatal death of the deceased.

Another issue which is equally important is that immediately after the shooting the 1st accused left the scene without securing it. R. Monda learned counsel for the State submitted that the conduct of the 1st accused immediately after the incident was wanting in the circumstances of this case. The 1st accused in his defence stated that he left the scene because there was a large crowd which had gathered immediately after the shooting.

DW3 who was the first police officer to arrive approximately five minutes after the incident, said that he had seen motor vehicles being driven off. He also said that he was informed by one member of the public that thugs had shot the deceased and run away. The evidence of DW3 was given support by PW13, PW14 and PW17 who stated that immediately after the shooting the 1st accused left the scene.

Another important aspect of the conduct of the 1st accused is that he surrendered to BuruBuru Police station which was several kilometers away from the scene of crime. The accused in his defence stated that he was attached to Kilimani Police Station but he did not go to Kilimani, Parklands, Gigiri, Shauri Moyo or Central Police stations which were nearest the scene. I therefore do not understand why the 1st accused travelled all the way to BuruBuru police station to surrender himself. Maybe there were certain matters which might have influenced his judgment which he regarded that it was prudent to report the matter to BuruBuru police station. The fact that the 1st accused left the scene unattended, travelled away from the nearest police stations, particularly his Kilimani Police Station, clearly shows or demonstrates that the conduct of the 1st accused was clearly wanting.

Before, I go, to the next point, I feel it necessary to address one pertinent issue which is the murder weapon. The 1st accused gave sworn testimony and said that the deceased who was much bigger than him in body size, and who was standing on a higher ground, pulled him to a higher ground and in order to secure his gun and subdue the deceased, two bullets were discharged which regrettably turned out to be fatal. It is the defence of the 1st accused that he never pulled the trigger of the gun and that it is the deceased who grabbed the gun and struggled for the possession of the firearm and hence two bullets were discharged. It was contended that the firearm was not fingerprinted to rule out that the deceased was in contact of that firearm. It was also not tested because when it was brought to court it was brought with 11 bullets and two spent cartridges. The 1st accused also stated that the firearm that he surrendered was different from the one that was submitted to the firearms examiner and produced before court. I have considered that angle of evidence and in my assessment the firearm that was used at the time of the fatal shooting and the one that was submitted for examination and the one produced before court were all one and the same. I have also carefully and closely considered that piece of evidence and I am of the considered view that the explanation given by the prosecution is honest, reasonable and clearly displaces the question of variance between the two serial numbers. One may be tempted to say, that I may be shifting positions because the gun issued to and used by the 1st accused is different from the one submitted for examination. In my view the omission of letter "K" in the serial number is a slight human error which does not go to the root and is not fundamental or material to the determination of the issues in this matter. It is not material because the 1st accused acknowledged and admitted that it was the gun that was assigned to him and which he was in possession of on the material day, that discharged two (or three) bullets.

As I understand the 1st accused's defence he was saying that the bullets were mistakenly discharged and that it was not him who discharged the bullets that killed the deceased. It is not the defence of the 1st accused that it is not his gun which discharged the bullets that fatally killed the deceased. In so far as the prosecution has proved that the gun that was assigned to the 1st accused is one and the same as the one that discharged the bullets that killed the deceased and the one submitted for examination is one and the same, the question of different serial numbers cannot arise. The only issue alive in this determination is whether it was the deceased or the 1st accused who discharged the bullets that resulted in the death of the deceased. Whichever way you look at that issue, it is not in dispute that the firearm that discharged the

bullets that took away the life of the deceased, was the one in the possession of the 1st accused. The State has contended that the serial difference is a minor issue and that the gun that was examined is the one officially issued and returned by the 1st accused. The explanation given by the firearm examiner was that an error was committed when recording the serial numbers of the Browning pistol and the murder weapon was the same gun issued to the 1st accused and submitted for examination. I am in total agreement with that explanation as given by the prosecution and belatedly admitted by the 1st accused.

I now turn to the role played by the 2nd accused in the circumstances leading to the death of the deceased. No doubt the incident started at the pool table inside Crooked 'Q' restaurant. The initial disagreement was not between the deceased and the 2nd accused. However, there is evidence that there was a minor confrontation between the deceased and the 2nd accused before the 2nd accused and his group were removed from upstairs of the club. It is contended by the defence that the 2nd accused was at all material times a peacemaker between the group and that of the deceased. However there is evidence to show that after the 2nd accused and his group were removed from the restaurant upstairs, they waited at the ground floor to sort out the issues with the deceased and his group. After the deceased and his group came to the ground floor there was a brief confrontation which resulted in a close exchange of words and fists between the deceased and the 2nd accused. PW2, PW3 and PW4 all confirmed that there was a commotion/confrontation between the deceased and the 2nd accused. PW2 said that it was the deceased who punched the 2nd accused and that he immediately moved in and separated them.

It is also clear that it is the 2nd accused who alerted the 1st accused that he was assaulted by the deceased. It is also clear that the 2nd accused followed the motor vehicles of the deceased, PW14 and the 1st accused in the direction of Sarit Centre. It is contended by the defence that he was restrained for five minutes. The evidence of PW13, PW14 and PW17 is that the vehicle carrying the deceased was blocked from the front and behind. Apart from giving the exact description of the 2nd accused, PW13 and PW14 were categorical that the vehicle carrying the deceased was blocked from both sides. The evidence of PW14 is that one vehicle went in front of PW13's car and the other went behind so that they could not move from the spot they were at. PW13 stated;

“When I turned towards Sarit Centre I saw another vehicle trailing us from behind and on turning left towards Sarit Centre I saw a motor vehicle reg. No. KAX driving past ours and stopped in front of us blocking the road. I tried to reverse the vehicle but was blocked by another vehicle whose registration number I could not see and as such I was unable to drive.”

The clear change of events which I accept is that the vehicle carrying the deceased was blocked by vehicles driven by the 1st and 2nd accused persons. There is no doubt that the vehicle that was being driven by the 2nd accused person belongs to PW6. There is evidence to show that the 2nd accused person left two of his passengers outside Crooked 'Q' club. He went back for them after the fatal shooting of the deceased. The question is whether a man who was not initially insulted and/or assaulted by the deceased and who was removed from the club as a result of a fight between the deceased and his group and who had waited for the deceased downstairs and who also alerted his friend who was a police officer and who also followed his friend in order to ensure the person who assaulted him is arrested, can be said to have participated in the murder of the deceased. In order to understand whether there was common intention, sections 20 and 21 of the Penal Code clearly applies. Section 20 states as follows;

“20.(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committed it, that is to say-

(a) every person who actually does the act or makes the commission which constitutes the offence;

(b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) Every person who aids or abets another person in committing the offence;

(d) Any person who counsels or procures any other person to commit the offence;

And in the last-mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.

(2) A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act such a nature that, if he had himself done? the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

Section 21 of the Criminal Prosecution Code states as follows;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

It was submitted by Mr. Murgor learned counsel for the 2nd accused that to prove the case of murder against the 2nd accused person, the prosecution is required to prove that;

(1) He was armed with a firearm with a caliber identified in the ballistic report produced as exhibit 11

(2) He had the opportunity;

(3) Participated with malice aforethought in the fatal shooting of the deceased.

He referred me to the case of **Aboud Rogo Mohammed & 3 others vs Republic Criminal Case No.91 of 2003 [2005] eKLR, PAG.7-8** where the judge stated;

“It is general principle of criminal law that a person may not be convicted of a crime unless the prosecution has proved beyond any reasonable doubt both:-

(a) That he had caused a certain event or that responsibility is to be attributed to him for the existence of certain state of affairs which is forbidden by criminal law; and

(b) That he had a definite state of mind in relation to the causing of the event or the existence of the state of affairs.

The event of the state of affairs is called the actus reus and the state of mind the mens rea of the crime. Much more often the actus reus requires proof of an act or an omission (conduct). Usually it must be proved that the conduct had a particular result.

In a charge of murder it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought. This is a technical term and it has a technical meaning quite different from the ordinary popular meaning of the two words. The meaning of the term is of the utmost importance, for it is in the presence or absence of malice aforethought which determines whether an unlawful killing is murder or slaughter. Murder is unlawful killing with malice aforethought.”

There is evidence from PW2, PW3 and PW4 that after the deceased and his brother had driven off, they were followed by PW14 and the 2nd accused in that manner. PW1, on cross examination contended that he physically restrained the 2nd accused for a full five minutes before releasing him whereupon he alone entered a silver Mercedes saloon and drove off in the direction of Sarit Centre, the same direction as the other vehicles. PW6 also testified that he saw the 2nd accused drive off alone the same direction that the deceased and his brother had taken but pointed out that the pursuit was not immediate. It is undisputed that from Crooked ‘Q’ to the scene of crime is about 300 metres and driving at a normal speed one would take about 20 seconds to reach the scene. It is on the strength of that evidence that Mr. Murgor submitted that the alleged participation of 2nd accused in any action that directly or indirectly led to the shooting of the deceased was a fabrication and distortion of evidence by the investigators and various witnesses in this case.

Mr. Murgor also submitted that the alleged eye witnesses, PW13, PW14 and PW17 misled investigators in witness statements and gave false testimony to court. As earlier indicated, the only person who stated that the 2nd accused remained behind because he was restrained is PW1. I have also indicated earlier, the person who was initially involved with the scuffle with the deceased was the person by the name Tish and PW6. The only involvement of the 2nd accused is when the deceased and his group came to the ground floor in order to go to their homes. It is at that juncture the deceased and the accused were involved in a minor altercation. It is alleged by the defence that the deceased hit the 2nd accused at that time and that is why the 1st accused pursued him in order to arrest him for assault.

I have taken into consideration the evidence of PW13, PW4 and PW17. I have also observed their demeanor and I am satisfied they were honest and truthful. PW13 and PW14 in their first statement to police when matters were still fresh in their minds mentioned the presence of the 1st and the 2nd accused at the time of the fatal shooting. They also mentioned the vehicle driven by PW13 was blocked from behind and from the front. The only inference that can be drawn from that piece of evidence is that it was the 1st and the 2nd accused who had blocked the said vehicle. PW13 and PW14 did not mention Tish and PW6 who were initially involved in the commotion that resulted in the removal of 2nd accused’s group from the club. PW6 himself confirmed that his vehicle was driven by the 2nd accused in the direction

followed by the deceased and the 1st accused. That evidence was also corroborated by PW1, PW2, PW3 and PW4. I am therefore satisfied that the said witnesses clearly and correctly narrated what happened on the material day in respect of the events leading to the death of the deceased. In such circumstances, can it, be said that the 2nd accused did not play any role or a major role in the commission of the offence under my determination? It is not true as submitted by Mr. Murgor that for a person to be deemed to have committed an offence, he must be armed with firearm or must have the opportunity or participated in the fatal shooting. What is required is that any of the four instances listed under section 20 of the Penal Code Cap 63 of Laws of Kenya be present and that its commission was a probable consequence of such purpose.

The conduct, acts, and/or omission of the 2nd accused leads are to the conclusion that he had a common intention to cause the death of the deceased. Possession of a firearm and participation on a physical manner are not the only reasons in the commission or execution of a common intention. The conduct and acts of the 2nd accused was a probable consequence of the prosecution or execution of such purpose. The act of following the deceased after the events was a furtherance of a common intention.

The question that remains is whether the two accused persons had malice aforethought. Malice aforethought describes mens rea or the mental element required for a conviction of murder. The term connotes an existence of culpability or moral blameworthy on the part of the accused person. If malice aforethought is missing, the unlawful act will be manslaughter. Section 206 of the Penal Code gives instances when malice aforethought is said to be in existence inferred or established. Section 206 Penal Code states as follows;

“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.”**

In my understanding malice aforethought may be proved through express, implied, and/or constructive action or omission. Express malice is proved when there is evidence that an accused person intended to kill the deceased, while implied malice is proved when it is shown that the offender intended to cause grievous bodily harm resulting in death of the deceased. Lastly constructive malice is proved when an accused person injures or kills in furtherance of a felony or when resisting or preventing lawful arrest even though there was no intention to kill or cause grievous bodily harm.

Now, the issue is whether the cause of death of the deceased can be attributed to the accused persons herein. Having analyzed the evidence on record, I am satisfied that the prosecution proved beyond reasonable doubt that the deceased died through the unlawful and voluntary actions of the accused persons. It is my decision that the two accused persons acted in concert with common intention or design

to execute an unlawful purpose. There is adequate evidence which establishes beyond doubt the existence of a common intention which was done with fatal consequences. As the accused persons were acting in concert pursuing a common design and unjustifiably and unlawfully justified their goal, it matters not that the 2nd accused was not armed and did not fire the bullets that resulted in the death of the deceased. It is also clear in my mind that it is the 2nd accused who put in motion the events leading to the death of the deceased. He alerted his friend (A1) who purported to arrest the deceased without establishing whether it was possible to do so.

It was absolutely unnecessary for the 1st accused to follow the deceased with a view to arresting him when he had committed a minor offence. And even as he tried to arrest him, he made no effort to immobilize him even if the deceased attempted or refused to be arrested. The explanation by the 1st accused that the deceased resisted arrest cannot be believed. The most telling aspect of his evidence is his attempt to handcuff the deceased and engage him in a confrontation when he had not secured his pistol properly.

I am satisfied beyond doubt that it is the 1st accused who fired the three shots that were discharged from his pistol. It is the three shots directed at the vital organs of the deceased which resulted in the death of the deceased. The 1st accused was not entitled to use his firearm, the manner was unjustified, unnecessary and in my view unlawful.

Assuming of course the intention was to arrest the deceased and that he refused or resisted to be arrested, it was incumbent upon the 1st accused to take two steps behind and even attempt to immobilize the deceased. A police officer who attempts to arrest any offender must be sharp, alert and efficient in his arrest. If it were the rule that any person who resists arrest would be shot, nobody would be safe from armed police officers. The fact that the deceased refused to be handcuffed was not a reasonable ground to engage in a confrontation with him resulting into fatal shooting. There were certain matters which might have influenced the judgment and the decision making of the 1st accused before he attempted to stop and arrest the deceased. The deceased committed a minor offence, if indeed he did. Secondly, that due to the nature of the confrontation, it was not possible for a lone police officer to arrest any of the parties. Thirdly, I do not understand how and why the 1st accused came to the conclusion of pursuing and arresting the deceased when there was evidence that there was a large group of people who were involved in the earlier and in the second confrontation. Had the 1st accused regarded and/or approached the situation more calmly, had he not answered the concerns of the 2nd accused, he would not have followed the deceased whom he termed as aggressive. The fact that the deceased refused to be handcuffed or arrested in an orderly manner, if at all, was largely due to the fact that the person effecting arrest was associated with his perceived enemy, the 2nd accused. There is a possibility that the deceased thought there was no justifiable basis for his arrest due to the presence and attitude of the 2nd accused.

In conclusion there is no evidence of the 1st accused firing shots in the air in order to scare the deceased into submission. By firing three shots in the direction and at the vital organs of the deceased, the 1st accused took a substantial risk of hitting him as in fact happened and it was not necessary for the purposes of effecting the deceased's arrest. The amount of force used in the particular circumstances of this case was neither reasonable nor necessary. It was an absurd lack of self control and poor judgment.

It is therefore my finding that the prosecution proved its case against the accused persons beyond reasonable doubt that it is the 1st accused who shot the three bullets that hit the deceased on his vital organs. The shooting was not accidental and was not by the deceased. It was intentionally and unlawfully carried out by the 1st accused in concert with the 2nd accused. My mind is therefore clear that from the evidence, circumstances, facts and exhibits produced before me, the two accused persons are guilty of murder of the deceased as charged. I do hereby convict them accordingly under the provisions of section 203 of the Penal Code. It is so ordered.

Dated, signed and delivered at Nairobi this 5th day of October 2011.

M. WARSAME

JUDGE