



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 9 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD KIRUI.....ACCUSED

J U D G M E N T

The accused, **EDWARD KIRUI**, is charged with the offence of murder, **contrary to section 203 as read with section 204 of the Penal Code**. The particulars of the charge, as set out in the Information dated 6<sup>th</sup> February 2008, are that on 16<sup>th</sup> January 2008, at Kondele Market within Kisumu City, Nyanza Province, the accused murdered **GEORGE WILLIAM ONYANGO** and **ISMAIL CHACHA**.

The plea was taken before Apondi J. on 8<sup>th</sup> February 2008, and the accused pleaded **“Not Guilty”** to the two counts of murder. The case was then set down for hearing on 9<sup>th</sup> and 10<sup>th</sup> April, 2008.

As scheduled, the trial commenced on 9<sup>th</sup> April 2008, before Mutungi J. Between that date and 18<sup>th</sup> February 2009, the learned trial Judge had received evidence from a total of nineteen (19) prosecution witnesses. Thereafter, the said learned Judge retired.

Following the retirement of Mutungi J., the case was assigned to me.

When the matter first came up before me, the accused expressed a desire to have the further hearing of the case proceed from the stage it had already reached before the retired Judge. The prosecution also shared the same view.

I then drew to the attention of the accused person to the fact that he had a right to demand that any of the 19 witnesses who had already testified be recalled to testify afresh.

When the accused notified the court that he did not wish to demand the re-call of any of the prosecution witnesses, I directed that the trial should proceed with the remaining witnesses.

In total, the prosecution called 22 witnesses, whilst the defence called two witnesses, (including the accused).

As I now get started on the substantive aspect of this judgment, I will first summarise the evidence tendered.

Thereafter, the court will analyse the evidence and make findings on the same.

Ultimately, after giving due consideration to the matters of factual evidence, the applicable law and the submissions made before me, I will arrive at a determination as to the guilt or innocence of the accused.

**PW 1, DAVID WAFULA MANYONGE** told the court that he hails from Bungoma. He also said that he used to be a salesman, but that he had stopped in December 2007, when politics started.

In Kisumu, **PW 1** lived at Kondele.

On 16<sup>th</sup> January 2008, **PW 1** left Cheseni at about 6.00a.m, arriving in Kisumu at about 11.00 a.m. By the time he reached the Kondele area, he found people holding demonstrations and burning tyres. He noted that members of the public were on one side of the road, whilst the police were on the other side of the said road.

The people were throwing stones.

According to **PW 1**, the deceased in count 2; Ismael Chacha was talking to a white man. **PW 1** said that Ismael Chacha was also known as Jomba.

The white man who was with Chacha tried to interview **PW 1**, but the OCS Kondele Police Station ordered them to disperse. **PW 1**, Chacha and the white man ran off, whilst a police officer begun firing in the air.

A little while later, **PW 1** saw Chacha lying down, dead. He had been shot in the back.

**PW 1** further testified that there was a second person who was shot alongside Chacha; and that that other person lay on top of Chacha.

The askari who had fired into the air, then arrived and he kicked the two victims, as they lay on the ground.

Later, **PW 1** learnt that the other person who was shot with Chacha, also succumbed to his injuries.

During cross-examination, **PW 1** said that the police officers who were with the OCS were wearing “regular police shirts”.

He also said that the OCS was only about 100 metres away from where the deceased fell down.

Meanwhile, after the two victims were shot and then kicked about, the police officer who kicked them raised the helmet he was wearing. When he did so, **PW 1** saw his face clearly.

And as regards the clothing worn by the police officer who kicked the two victims, **PW 1** said that he had worn a jungle jacket, with a helmet which was inscribed with the word “police”.

According to **PW 1**, the officer who shot the victims is Kirui. **PW 1** said that he had known two officers named Kirui, at the Kondele Police Station. He also testified that he had known the accused, as Kirui; and he knew him from a date prior to the material date.

Finally, **PW 1** emphasized, during cross-examination, that the Kirui whom he saw at the scene, was the accused herein.

**PW 2, CHIEF INSPECTOR HANSENT KALOKI**, was the Officer Commanding Station (OCS), Kondele Police Station, Kisumu.

On 14<sup>th</sup> January 2008, **PW 2** was called by SSP Simon Kiragu, the OCPD, for briefing. The briefing was given to **PW 2** together with other senior police officers; and it was about a security operation that was intended to address issues emanating from a notice issued by ODM, for a peaceful demonstration. At the briefing, each station commander was assigned areas of command.

All the officers were told to exercise restraint on the use of firearms and live bullets.

The demonstration had been scheduled from 16<sup>th</sup> to 18<sup>th</sup> January 2008. However, the police officers were deployed from 15<sup>th</sup> January,

2008. On that date, (15<sup>th</sup> January, 2008) nothing happened.

On the following day, **PW 2** went through the Kondele area before 6.00a.m. He was assessing the mood in the area.

He then went to his assigned area of operation, which was Kibuye. However, at about 11.00a.m. the OCPD directed him to move to Kondele, where he was to take charge.

At Kondele, he found large crowds of people who were singing and dancing, saying;

***“No Raila, no peace.”***

**PW 2** identified a few people, who appeared to be group leaders, within the crowds. He intended to have them persuade the crowds to disperse, because their planned demonstration was not allowed.

After **PW 2** talked to the people, they demanded that all the “Museveni soldiers” should go away. However, as far as **PW 2** was concerned, those being cited as “Museveni soldiers” were actually personnel from the General Service Unit (GSU).

But even whilst **PW 2** was addressing the crowd, some of them were hurling stones at the GSU, resulting in the GSU throwing tear-gas at the crowds. The GSU personnel expressed the view that **PW 2** was being “too good” to the crowds.

As the crowd sought to know why tear-gas was being thrown at them when they were peaceful, a group of people arrived carrying an empty coffin. Those carrying the coffin were saying;

***“Kibaki rest in peace”***

At that stage, some people had pangas; some had farm implements, whilst others were throwing stones. And as the crowd was very huge, **PW 2** felt that the crowds would overrun the police. **PW 2** therefore ordered the police to disperse the crowds.

At the order, every police officer who had tear gas canisters threw the same, causing the crowd to run away.

As the police pursued them, the crowd blocked the road using the body of a tipper lorry, big stones and sticks. Therefore, even as the crowds continued to scatter, the police had to remove the debris from the road. Whilst they continued clearing the road, **PW 2** heard gunshots.

**PW 2** noted that it was Inspector Sachita, from Maseno, who was shooting. He ordered him to stop shooting, even though the Inspector said that he had only fired rubber bullets.

It was the testimony of **PW 2** that the accused worked with PC Boniface Andayi, (**PW 4**); PC Peter Mugi (**PW 5**) and two GSU officers, in pushing back the crowd which was moving in the direction of Nyamasaria.

By about 4.00p.m, the crowds had been dispersed although the police did not have the same success in clearing the roads, at the same time. **PW 2** then returned to his office at Kondele Police Station.

Whilst at his office, he received a phone-call from Dr. Juliana of the New Nyanza Provincial Hospital. She informed him that somebody had been shot dead. Dr. Juliana also informed **PW 2** of two other persons who were injured. **PW 2** then instructed Police Corporal Christine Amaya to visit the hospital, and to ascertain from the hospital superintendent, the particulars of the victims.

The medical superintendent named Vincent Oketch, Dominic Okoth and Naftali Siaki as the three victims injured at Kondele. He provided the names on a note, (Exhibit 3).

**PW 2** then sent to the OCPD, a report regarding the injured persons.

But even before he sent out the signal to the OCPD, **PW 2** received a radio call about a shooting incident at Arina Estate. He also

heard gun shots from the direction of that estate. He therefore set out to go and investigate.

As he approached the gate to the New Nyanza Provincial Hospital, **PW 2** met a group of people who were carrying others who appeared injured. Although he asked them what had happened, the people only cried and hurled abuses at the police.

Shortly thereafter AP Barui arrived in a Land rover, and he informed **PW 2** that it was he and his officers who had shot some people at Arina Estate. AP Barui then took **PW 2** to the house of a Kisumu businessman named Charles Chege.

AP Barui informed **PW 2** that he had received a call that the house of Charles Chege was being broken into.. And as the AP camp where AP Barui lived was next to Arina Estate, he rushed to that house. He was with his officers. They found people carrying away some household goods from Chege's house.

From the observations of **PW 2**, at the scene of the shooting at Arina Estate, the shooting was not inside Chege's compound. That is because there was a lot of blood outside the fence to Chege's house. **PW 2** therefore concluded that the people were shot as they came out of that compound, through a hole in the fence.

By the time **PW 2** got to Chege's house, there was nobody else present. He therefore returned to the hospital, where he met Dr. Juliana. She informed him that she had earlier forgotten to tell **PW 2** that at the hospital, there was the body of a man who had been shot at Kondele.

In another room, **PW 2** was shown several people with gunshot wounds. One of those people was in critical condition. And Dr. Juliana told **PW 2** that the person in critical condition was William Onyango.

Later still, **PW 2** went back his house, which he shared with the DCIO. By the time **PW 2** got home, the DCIO was already there. The time was before 11.00p.m.

The DCIO, SSP Ali Zimbu, (**PW 13**), told **PW 2** that one police officer had shot an innocent person. It is then that **PW 2** learnt that during the 9.00p.m.news bulletin on KTN, a shooting incident at Kondele area, had been shown on television.

**PW 2** waited up until 11.00p.m. when he saw the news item on television. However, as at that time, **PW 2** did not identify the police officer who shot the victims at Kondele.

On the next day, 17<sup>th</sup> January 2008, **PW 2** assembled all the sectors at Kondele Police Station. He inquired from the officers about who had shot the victims at Kondele. However, none of the officers owned up.

During the 9.00p.m. news broadcast on KTN television, the shooting incident was shown repeatedly. The said item was shown in slow motion.

It was then that **PW 2** identified the police officer who was captured on film, as PC Kirui. He was able to identify him because of the following factors;

**“PC Kirui had a unique walking style. His body structure is quite different from the other two officers from my station, who were moving toward that direction during the shooting. While moving from the scene he was wearing a helmet with the glaxis. He lifted it.”**

In the morning of 18<sup>th</sup> January 2008, the DCIO went to **PW 2**'s office and told him that he (the DCIO) had come to withdraw Kirui's firearm.

At that stage, **PW 2** did indicate to the DCIO that he too had identified PC Kirui as the person who had done the shooting.

On 18<sup>th</sup> January 2008 **PW 2** tried to approach the place where the shooting had taken place, but he withdrew when the members of the

public reacted. But on the next day, **PW 2** visited the scene, in the company of the DCIO and the PCIO.

On the same date, (19<sup>th</sup> January 2008) **PW 2** witnessed the DCIO making an entry in the Occurrence Book, indicating that the DCIO had taken an AK 47 rifle from the accused. The said rifle was indicated as bearing the number 08378.

During cross-examination, **PW 2** said that on 16<sup>th</sup> January 2008, he did not see **PW 1**.

And whilst he was with the accused when his team moved from Kibuye to Kondele, **PW 2** testified that the accused was not with him when **PW 2** later returned to the police station, on 16<sup>th</sup> January 2008. If anything, **PW 2** saw the accused moving towards the direction of Nyamasaria.

**PW 2** also confirmed that the signal he sent indicated, inter alia, as follows;

**“The police had to fire because the crowd charged at them.”**

It is not clear from the record whether that signal was in relation to the incident at Arina Estate or the incident at Kondele area.

But as regards William Onyango, **PW 2** made it clear that he had been shot at Kondele, not Arina.

**PW 2** also said that although the accused had not been issued with a Jungle Jacket, by the police, he wore one on 16<sup>th</sup> January 2008. And it was **PW 2**'s evidence that the accused told him that he had borrowed the Jungle jacket from PC Leting.

**PW 3, INSPECTOR EVAN CHUNA SACHITA** (Retired), told the court that he retired after 26 years of service.

As at 15<sup>th</sup> January 2008, he was based at Maseno Police Station, where he was the Deputy OCS. On the instructions of his boss, Chief Inspector Onesmus Kombe, **PW 3** went to Kisumu, for duties arising out of post-election violence.

On 15<sup>th</sup> January 2008, **PW 3** and his team covered the area of Manyatta Estate, Car-wash Migosi area and Kenya Estate. However, on that date, there were no incidents.

On 16<sup>th</sup> January 2008, at about 11.00a.m, **PW 3** received a phone-call from the OCPD, SSP Simon Kiragu, instructing him to move to the City Clock near Kondele Police Station, to reinforce the police officers deployed there.

Whilst at Kondele, **PW 3** witnessed **PW 2** talking to the crowd, urging them to abandon the intended procession to Kisumu Sports Ground. The said procession had been declared illegal.

The crowd declined to disperse. Instead, they threw stones at the police.

**PW 3** felt that the lives of the police officers were in danger. He therefore fired two bullets into the air. That prompted the crowd to start running off, in all directions.

The officers who were under **PW 3**'s command followed the crowd that ran towards Kibos.

It was the evidence of **PW 3** that all the police officers, regardless of where they had come from, were wearing Jungle uniforms. He also recalled that the OCPD Kisumu had briefed them against use of live bullets.

As the police officers had blanks for suppression, and rubber bullets for use when the crowd was resistant; the live bullets were only for use when the lives of officers were in danger. **PW 3** added that the officers under his command could only have used live bullets if he ordered them to do so. And he said, that none of the officers under his command used live bullets.

On the evening of 16<sup>th</sup> January 2008, as **PW 3** was having his supper at the canteen, he saw a news item in which a police officer shot down two members of the public. However, **PW 3** was not able to identify the officer concerned.

When the video clip was replayed on 17<sup>th</sup> January 2008, **PW 3** was still unable to identify the police officer who was shown in it. **PW 3** said that even **PW 2** was not able to identify the police officer shown in the video.

**PW 4, PC ANDAYI BONIFACE**, was stationed at the Kondele Police Station, at the material time.

On 16<sup>th</sup> January 2008 he wore a blue pair of trousers, a blue shirt, a blue beret and a jungle jacket. He was armed with a G3 rifle.

**PW 4** recalled that when the crowd at Kondele refused to disperse after **PW 2** talked to them, the police dispersed them using tear gas.

According to **PW 4**, it is **PW 2** who then ordered the police to shoot into the air, to disperse those who returned, and who were throwing stones at the police. **PW 4** testified that he was with the accused, P.C. Mugi (**PW 5**) and 3 officers from the GSU.

**PW 4** and **PW 5** pursued the rioters who ran towards the Kenya Medical Training Centre (KMTC), Kisumu. Meanwhile, the accused and the 3 GSU officers were trying to block the corridors from which the rioters were emerging.

At that stage, **PW 4** and the officers in his group, were acting on their own initiative: they had no senior officer commanding them.

At about 12.00noon, **PW 4** and **PW 5** went back to Kondele Police Station, but **PW 4** did not see the accused for the rest of that day.

In the evening of 16<sup>th</sup> January 2008 **PW 4** watched the T.V. and he saw an officer who was shooting.

On 18<sup>th</sup> January 2008, **PW 4** was called to the DCIO's office, where he recorded a statement, to assist in investigations. And on 26<sup>th</sup> January 2008, he was once again, called to the office of the DCIO. On that occasion, he was shown a video clip.

**PW 4** said that he did identify the accused in the video clip. The reason why he was able to identify him was that the accused wore green jungle trousers, a green jungle shirt, a green jungle jacket and a helmet. The accused also had a pouch for carrying ammunition.

During cross-examination, **PW 4** revealed that both he and **PW 5** were considered as suspects alongside the accused. All three of them were photographed by the scenes-of-crime personnel on 24<sup>th</sup> or 25<sup>th</sup> January, 2008.

**PW 4** also told the court that when he was shown the video clip on 26<sup>th</sup> January 2008, he was together with **PW 5** and the accused.

**PW 5, PC PETER MUGI**, was attached to the Kondele Police Station at the material time.

On 16<sup>th</sup> January 2008 he wore a blue police uniform, with a jungle jacket and an anti-riot helmet. He was armed with an AK 47 rifle with 68 rounds of ammunition.

Although they were originally deployed at Kibuye, under the command of **PW 2**, at about 11.00a.m. they were ordered to move to the City Clock, Kondele.

**PW 5** recalled that **PW 2** talked to the crowd, trying to persuade them to disperse. When the crowd refused to move, **PW 2** ordered that they be dispersed using teargas.

As **PW 5** did not have any tear gas, he did not do anything at that stage. But after the crowds dispersed, **PW 2** told his officers to seal the routes from which the crowds were emerging, so that the crowds could not re-group at the City Clock.

It was the testimony of **PW 5** that the situation prevailing was such that **PW 2** did not instruct any specific police officer to go towards any particular direction. If anything, the police officers made their own decisions regarding the group of officers that he would join.

**PW 5** joined a group which had **PW 4**, the accused, and 3 officers from the GSU. That group then took the route towards KMTC. But before they moved, the group noticed that stones were being thrown at them, from some buildings. In those circumstances, **PW 5** and **PW 4** proceeded towards KMTC, leaving the accused and the 3 GSU officers behind.

Later, when **PW 2**, **PW 4** and **PW 5** re-grouped at the City clock, at about 12.30p.m, there was a group of about 50 officers. But **PW 5** did not see the accused there.

On 17<sup>th</sup> January 2008, **PW 5** saw, in a news item on television, a shooting incident.

The said news item was captured on video, and was replayed to **PW 4**, **PW 5** and the accused. The reason for the replay was ascertain if the person shown in the video clip could be identified. However, **PW 5** did not identify the person concerned.

During cross-examination, **PW 5** said that there were two officers named Kirui, at Kondele Police Station. He also said that he saw the other Kirui, (who is not the accused), in the morning of the incident and also after the operation. The said other Kirui was at the police station.

**PW 6**, **PETER OPONDO**, was a Special Project Editor with KTN. He testified that KTN assigned a camera-person, Baraka Karama, to cover events in Kisumu.

On 16<sup>th</sup> January 2008, the said camera-person sent to KTN, a footage which he had captured. The footage was reviewed by the Editorial Committee of KTN, who then had the footage aired in their bulletins.

After the caption was first played in court, the court directed **PW 6** to produce a slow-motion version of it.

In compliance with the directions of the court, **PW 6** did, subsequently, play the caption in slow motion.

At the time the slow motion version of the caption was played in court, the trial was being presided over by Mutungi J. That fact prompted the accused person to later submit that I did not get the advantage of seeing the caption. I will revert to that issue at a much later stage.

Meanwhile, suffice it to say that according to **PW 6**;

**“The slow motion clearly shows the suspect lifting the cover of his helmet, then when he turned round, the face is very clearly seen.”**

**PW 7**, **SUSAN ASEWE ONYANGO**, was a charcoal trader who conducts her business near the Post Office at Kondele, Kisumu.

She got to her place of business at about 7.00a.m. on 16<sup>th</sup> January, 2008.

Shortly thereafter, she noted some youth who said that they were going for demonstrations called for by ODM. However, the police did not allow the youth to proceed with their intended demonstrations.

After the police had driven back the youth, **PW 7** heard gunshots, prompting her to hide in a big storey building.

As she was hiding, **PW 7** saw a police officer coming from the direction of the Post Office. She also saw some youth who were dancing.

**PW 7** then heard gunshots which felled two youth.

Although the witness did not identify the police officer who shot the youth, she heard another officer giving him orders to shoot.

According to **PW 7**, the officer who shot the youth was wearing an “army uniform”, whilst the officer who gave the orders was wearing a brown uniform;

**“the colour of uniform worn by the OCS.”**

**PW 8, SGT. ISAAC SEREM**, was in-charge of the armoury at the Kondele Police Station. He was responsible for the issuance of firearms and ammunition; and the particulars of the items issued were recorded in the Arms Movement Register.

On 28<sup>th</sup> December 2007, **PW 8** issued to the accused an AK 47 Rifle, serial number 23008378.

His records show that the same rifle was re-issued to the accused on 5<sup>th</sup> January 2008; 12<sup>th</sup> January 2008; 15<sup>th</sup> January 2008 and 18<sup>th</sup> January 2008.

On 19<sup>th</sup> January 2008, **PW 8** handed over the said rifle to the DCIO Kisumu, together with the Arms Movement Register.

**PW 8** pointed out that there was an error in the serial number he recorded in the register on 30<sup>th</sup> December 2007. On that date, the serial number was shown as 03378, instead of 08378.

He also explained that there are two numbers on rifles. And in respect to the rifle he issued to the accused, the two numbers were 23008378 and 08378

**PW 8** testified that between 5<sup>th</sup> January 2008 and 19<sup>th</sup> January 2008, the accused had 36 rounds of ammunition.

The rifle and the ammunition were taken from the accused on 19<sup>th</sup> January 2008.

Meanwhile, on 16<sup>th</sup> January 2008, **PW 8** saw the accused, at the Kondele Police Station. And it was his evidence that the accused was wearing blue uniforms.

Indeed, **PW 8** added that at Kondele Police Station, jungle suits were not issued.

During re-examination, **PW 8** said that he did see the accused in the evening of 16<sup>th</sup> January 2008. He saw him within the station precincts, at about 3.00 to 6.00 p.m. At that time, the accused was wearing a blue pair of trousers and a blue shirt.

**PW 9, AGT SENIOR SUPERINTENDENT JOHNSTONE MUSYOKI MWONGERA**, was a Firearms Examiner based at the C.I.D. headquarters, Nairobi. His role is to examine firearms, ammunition and the components thereof.

On 28<sup>th</sup> January 2008, **PW 9** received from **PW 21**, an assault rifle with magazine; 36 rounds of ammunition; and one fired bullet.

He was asked to determine if the rifle was a firearm, and whether the fired bullet had been fired from the assault rifle presented to him.

After examining, the rifle, he ascertained that it was in good general and mechanical condition. The rifle was complete in all its component parts, and it was capable of discharging ammunition.

**PW 9** also ascertained that the 36 rounds of ammunition were of the caliber used in the rifle.

After test-firing six rounds, he verified that the 36 rounds were ammunition, within the meaning assigned to them under the Firearms Act.

**PW 9** also testified that the bullet which was delivered to him, after it had been fired, was fired from the rifle serial number 3008378.

Later, on 27<sup>th</sup> June 2008, **PW 9** received another assault rifle and a G3 rifle. The assault rifle was serial No. 3010851, whilst the G 3 rifle was serial No. 6928482.

He verified that both the rifles were firearms, as defined in the Firearms Act.

He also verified that the bullet which he had obtained earlier, cannot have been fired from either of those two rifles.

During cross-examination, **PW 9** said that firearms do transfer unique characteristics to the bullets fired from them. Therefore, from the unique characteristics, it was possible for a ballistics expert to tell which gun fired which particular bullet. He likened the characteristics of firearms to those of finger-prints.

**PW 10, ALAGO NYITONG JOHN**, was a secondary school teacher. As at the material date, the 16<sup>th</sup> of January 2008, he was teaching at St. Barnabas Girls Secondary School, which was situated about 25 kilometers from Kisumu Town.

At about 3.30p.m., he got a phone-call from his sister, notifying him that his brother, George Onyango, had been shot at Kondele. Regrettably, **PW 10** was unable to get transport to Kisumu on that day.

He arrived in Kisumu on 17<sup>th</sup> January 2008, and went to the mortuary, where he was told about the procedures governing post mortems. He then went to the Kondele Police Station, where he was given a police officer to escort him back to the mortuary.

Once at the mortuary, **PW 10** identified the body of his younger brother, George William Onyango.

**PW 10** noted that there was a bullet wound on the body. The wound was below the armpit.

As the doctor conducted the post mortem examination, **PW 10** waited outside. And after the post mortem examination was completed, the doctor who conducted it showed **PW 10** the bullet head which he had recovered from the body. The bullet head was then handed over to Pc Mitei.

**PW 11, DR. MARGARET ODUOR**, is a medical doctor.

On 16<sup>th</sup> January 2008, she was at the Provincial General Hospital, Kisumu, where she worked as a pathologist. She had worked there for 16 years.

On 17<sup>th</sup> January 2008, **PW 11** performed a post mortem examination on the body of George William Onyango. She did so at the request of the Kondele Police Station.

**PW 11** noted that there was a gunshot wound through the back, around the spinal cord. The bullet had gone through the chest, torn the left lung and emerged through the third rib of the left side. The bullet was then lodged on the upper left side of the chest.

After recovering the bullet, the doctor formed the considered opinion that the cause of death was hemorrhage, secondary to chest injury, which was due to the gunshot.

**PW 11** also performed the post mortem examination on the body of Ismael Chacha. That examination was conducted on 23<sup>rd</sup> January 2008.

The body of Chacha had a gunshot wound at the back. There was a perforation of the diaphragm on the left side, with fractures of the 7<sup>th</sup> and 8<sup>th</sup> ribs.

The right hand lobe of the liver was torn, with bleeding into the abdominal cavity.

In the considered opinion of the doctor, Ismael Chacha died of hemorrhage from the lacerated liver, as a result of a gunshot.

During cross-examination, **PW 11** stated that the body of William Onyango was found at Kondele, at about 6.00p.m. on 16<sup>th</sup> January, 2008. Thereafter, **PW 11** conducted the post mortem examination on 17<sup>th</sup> January, 2008.

**PW 12, LUCY HANNAH**, was a journalist who was working with a small media company in Nairobi. The company is called Vox.

In January and February 2008 she was working for "Channel 4 News", a British station.

She went to Kisumu on 15<sup>th</sup> January 2008, with a view to covering the mass protests which ODM had announced. She was accompanied by two cameramen; one from Nairobi and the other from London.

On 16<sup>th</sup> January 2008, at Kondele, **PW 12** saw a large crowd, GSU officers and the media. According to **PW 12**, the GSU was the focus of anger from the crowd; the reason for that is that there were rumours that the officers were Ugandans who were working for the Government of Kenya. The crowd was threatening to kill the alleged Ugandans.

**PW 12** talked to **PW 2**, who seemed confident of crowd control. In fact, **PW 2** told the journalists that they could go into the crowd, as there was no confrontation.

**PW 12** did go into the crowd. Whilst she was within the crowd, **PW 12** saw an effigy of Kibaki being buried.

Shortly thereafter, as the crowd kept on swinging forward and backwards, shooting begun.

As the crowd had been swinging forwards and backwards the whole morning, **PW 12** failed to see any obvious trigger to the shooting by the officers.

**PW 12** testified that the officers who were firing were all dressed in camouflage. Some were firing in the air whilst others fired horizontally. As a consequence of the shooting, the crowds dispersed. But the police officers continued to pursue them.

**PW 12** was scared, but she followed into the residential area, where she heard periodic shooting.

When she came near a small alley, between buildings, **PW 12** saw one officer in camouflage, running. The officer appeared to be stalking, with his gun ready to fire.

Along with her cameramen, **PW 12** captured that officer on film. The film showed the officer shoot two young men who were taunting him whilst laughing.

The young men were not armed. When she reached the young men, **PW 12** saw that one had a bullet wound under the shoulder blade, and the other had a bullet wound on the chest.

During cross-examination, **PW 12** said that she did hear a voice, as if directing the police officer who shot the two young men.

At the close of her testimony, **PW 12** was directed by the court to officially get the tape in which the incident had been captured for Channel 4. The said video tape was thereafter to be produced in evidence, by the cameraman who captured the incident. But it was never produced in court thereafter.

**PW 13, SSP ALI ZIMBO**, was the DCIO, Kisumu. His role was to coordinate investigations of crimes committed in Kisumu District.

In the course of his work, **PW 13** would keep the Provincial Police Officer (PPO) informed about crime in the District. He would also direct or guide officers working in the branch offices within the District.

Whenever it was deemed necessary, **PW 13** would also go out into the field, to conduct investigations. And if there were emergencies, **PW 13** would have the police and GSU working together.

On 16<sup>th</sup> January 2008, **PW 13** saw a footage on KTN news bulletin, in which a police officer appeared to not only shot two young men, but also kicked them when they were on the ground.

On 17<sup>th</sup> January 2008, the PPO ordered **PW 13** to commence investigations into the incident.

On 18<sup>th</sup> January 2008, **PW 13** tried but failed to get to the scene, because the situation on the ground was still tense.

On 19<sup>th</sup> January 2008, **PW 13** visited the scene, in the company of **PW 2**, the PCIO, and personnel of the scenes-of-crime. At the scene, they found **PW 1**, who told them that he had been with the two young men who were shot.

Later that day, **PW 1** told **PW 13** that he had identified the accused herein, as the police officer who shot the two young men. After recording **PW 1**'s statement, **PW 13** went with **PW 8**, to withdraw the firearm and ammunition issued to the accused.

When the accused handed over his gun to **PW 13**, the latter ascertained from the serial number, that it was the gun that had been issued to the accused. He did so by perusing the Arms Movement Register.

**PW 14 CPL DAVID ONGWENYI**, worked in the scenes-of-crime section, of the PCIO's office, Nyanza.

His duties entailed visits to scenes where there had been serious incidents of crime. He would go there to collect the evidence, which he would then package, for later use in evidence.

On 17<sup>th</sup> January 2008, **PW 13** instructed him to visit the Provincial Hospital Mortuary. He did so, and whilst at the mortuary he took 3 photos of the body of William Onyango.

On 19<sup>th</sup> January 2008, **PW 14** went with the PCIO, Mr. Mbogo, and **PW 1**, to the scenes of the shooting. It was **PW 1** who identified the scene. **PW 14** then took 7 photos.

All the photographs were produced in court, as exhibits.

**PW 15, PC JOSEPHINE MWIKALI**, had worked at Kondele Police Station for about 5 years.

On 16<sup>th</sup> January 2008, she was instructed by **PW 2** to drive them to Kibuye. **PW 15** was a driver.

Later, **PW 15** drove back to Kondele area.

It was her evidence that the accused was in the vehicle in which **PW 15** ferried **PW 2** to Kibuye and back to Kondele. However, **PW 15** could not recall the clothing worn by the accused on that day, or even if the accused was armed.

**PW 15** recalled that at some point, the accused took to the OCS (**PW 2**), his rifle, which the OCS had earlier left with the accused.

Later, **PW 15** ferried two injured people from the area near Gor Mahia Hotel, to the New Nyanza General Hospital.

During cross-examination, **PW 15** said that it took 3-4 hours before she next saw the accused at the police station, where they were on crime standby, that evening.

During the evening and night duties, **PW 15** recalled that the accused wore the regular police uniform, which is blue in colour. But she could not recall whether or not the accused had a coat or a sweater.

**PW 16, PC JOHN BOSCO MULEI**, was attached to the Kondele Police Station at the material time.

On 17<sup>th</sup> January 2008, **PW 16** was instructed by Cpl. Amaya to accompany the relative of William Onyango, to the New Nyanza General Hospital Mortuary.

On arrival at the mortuary, **PW 16** witnessed Dr. Oduor performing the post mortem examination on the body of William Onyango. He was then given a bullet head which the doctor retrieved from the body of the deceased.

He wrapped the bullet head in a piece of paper, which he later handed over to **PW 2**.

During the post mortem examination, **PW 16** did not see any photos being taken.

**PW 17, MUSA MADUGU ATHUMANI**, was a resident of Tanzania. He is a businessman.

On 23<sup>rd</sup> November 2008, he received a call, when in Tanzania. He was informed that his elder brother, Ismael Chacha Jomba had been shot dead in Kisumu.

He informed other family members, and then went to Kisumu. In Kisumu, **PW 17** went to the mortuary, in the company of Saitumi. He identified the body.

During cross-examination, he said that he last saw the deceased 3 months before he was shot dead.

**PW 18, PC ROBERT OKALO**, was attached to the crime section, Kisumu at the material time.

On 23<sup>rd</sup> January 2008, he went to the New Nyanza General Hospital Mortuary, where he met Inspector Nyarindo, of C.I.D. Kisumu. The Inspector showed him the body of one Ismael Chacha.

On the instructions of Inspector Nyarindo, PW 18 took 4 photos of the body.

Those photographs were exhibited at the trial, as Exhibit 14.

On 26<sup>th</sup> January 2008 SSP Muinde, of the CID Headquarters, requested PW 18 to take photos of 3 police officers. The said officers were **PC EDWARD KIPKOECH KIRUI**, (the accused); **PC PETER MUGI GITHAIGA (PW 5)**; and **PC ANDAYI BONIFACE ABUYA (PW 4)**.

After he had photographed the 3 officers, **PW 18** took photos from captions shown on a video screen. The said caption was one in which a police officer, dressed in a jungle jacket and a helmet, appears to be at a scene similar to that captured in the KTN caption.

It was the evidence of **PW 18** that the reason for taking the photographs was for identification.

**PW 19, SGT. JOSEPH TOO**, was attached to the "C" Company of the GSU.

On 15<sup>th</sup> January 2008, the OCPD Kisumu deployed **PW 19**, together with his 13 officers, to quell riots at the City Clock area, Kondele, Kisumu.

On 16<sup>th</sup> January 2008, the GSU officers were dressed in red berets; smoke jackets; jungle trousers; military boots; shields, batons and tear gas canisters. The officers had either G3 rifles or AK 47 rifles.

**PW 19** stated clearly that it was only the GSU officers who wore red berets.

**PW 19** testified that **PW 2** negotiated with the large crowd, to have them disperse. However, the crowd declined to disperse. At that point, the crowd was dispersed using tear gas.

After the crowd was dispersed, **PW 19** and his men sealed off the crowd from the area.

According to **PW 19**, none of his officers fired any live ammunition.

Indeed, it was not until the 9.00p.m. news that **PW 19** learnt that there had been shooting. And from the pictures shown on television, **PW 19** was convinced that the person concerned with the shooting of the two victims was from the police formation. He said that the person was definitely not from the GSU.

On 22<sup>nd</sup> January 2010, SSP Muinde ordered **PW 19** to parade before him, all the personnel he had worked with at Kondele, on 16<sup>th</sup> January 2008. Although **PW 19** paraded all the GSU officers, the accused failed to identify those that he was with on 16<sup>th</sup> January, 2008.

During cross-examination, **PW 19** explained that on 17<sup>th</sup> January 2008 the officers under his command, at Kondele, were different, because the team he was with on the previous day had been deployed elsewhere. He said that the responsibility for rotating officers was that

of Chief Inspector Lekuto.

However, when he was asked to make available those who were under his command on 16<sup>th</sup> January 2008, **PW 19** did so, readily.

**PW 20, INSPECTOR ANDREW NYARINDU**, worked with the C.I.D. Divisional Headquarters, Kisumu.

On 17<sup>th</sup> January 2008, he was instructed by the DCIO, (**PW 13**), to open an Inquest File on a shooting incident which took place at Kondele on 16<sup>th</sup> January 2008.

**PW 20** went to Kondele Police Station and met the OCS (**PW 2**). The latter told him that he had only seen the incident on television. The OCS also told him that although he had seen the television footage, he was not able to identify the officer who had shot the two victims.

Later, **PW 2** gave to **PW 20**, the post mortem report on William Onyango and the bullet head that had been retrieved from Onyango's body.

**PW 20** then went to the New Nyanza Hospital, to interview those who had been brought to the hospital on 16<sup>th</sup> January 2008.

After obtaining requisite authority at the hospital, **PW 20** interviewed Dominic Okoth, who denied having been at the scene. **PW 20** then went to the mortuary.

At the mortuary, **PW 20** perused the register in which particulars of deceased persons are recorded, when received at the said mortuary. He noted that the register had the following particulars;

“1. Ishmael

2. Unknown”

**PW 20** then organized for the fingerprints to be taken.

On 18<sup>th</sup> January 2008, **PW 20** sought the assistance of Mr. Ouya, the Bureau-in-chief, KTN, Kisumu, in getting the television footage. Mr. Ouya advised him to either write to KTN Nairobi, or to travel to Nairobi personally.

On that day, (18<sup>th</sup> January 2008), **PW 20** read in the newspapers that one of those persons who were shot at Kondele was called Ismail. Because of that, **PW 20** concluded that the body he had seen at the mortuary was of the same Ismail.

On 19<sup>th</sup> January 2008, **PW 20** recorded the statements of two police officers who had been close to the scene. The said officers included **PW 5** and another officer whose name **PW 20** could not remember.

It was also the evidence of **PW 20** that when the doctor conducted the post mortem examination on William Onyango, both **PW 1** and the relatives of Onyango were present. The bullet head which was retrieved from Onyango's body was given to **PW 20**, by **PW 2**. And, in turn, **PW 20** handed it over to **PW 21**.

On 21<sup>st</sup> January 2008, **PW 20** attended the post mortem examination on the body of Ismail Chacha. That body was identified by **PW 1**.

It was **PW 20's** evidence that there was no bullet head which was recovered from the body of Chacha.

**PW 21, INSPECTOR PATRICK GIKUNDA**, testified that on 19<sup>th</sup> January 2008, he was called by Mr. Muinde, who was the officer-in-charge of investigations at the Police Headquarters, Nairobi.

**PW 21** met Inspector Ali and Inspector Magiri in Mr. Muinde's office. Mr. Muinde instructed those officers to accompany him to

Kisumu, to investigate the incident in which a police officer had been shown on T.V, shooting some demonstrators.

The officers from Nairobi reached Kisumu on 20<sup>th</sup> January 2008, where they met **PW 2** at Kondele Police Station. **PW 2** took them to the scene of crime.

On 21<sup>st</sup> January 2008, when the team from Nairobi commenced investigations, **PW 21** received a bullet head from **PW 20**. The said bullet head had been recovered from the body of William Onyango.

On 22<sup>nd</sup> January 2008, **PW 21** received from **PW 13**, a rifle, serial Number 08378; together with 36 rounds of ammunition. **PW 13** also gave to him the Arms Movement Register for Kondele Police Station. He kept the rifle and ammunition safely, until 29<sup>th</sup> January 2008 when he forwarded the same to the Ballistics Expert.

After the Ballistics Expert examined the items, **PW 21** collected the exhibits and the report of the expert. And when he testified in court, PW 21 produced, as exhibits, the rifle serial No. 08378, the Exhibits Memo and the Report of the Ballistics expert. When producing the exhibits, he said that the rifle which he had handed over to the Ballistics Expert was serial No. 08378.

**PW 21** also produced, amongst other exhibits, the bullet head which was retrieved from the body of William Onyango, during the post mortem examination.

During cross-examination, **PW 21** said that he was only aware of one bullet head that was removed from the body of William Onyango.

As the Investigating Officer in this case, **PW 21** was not aware that two bullet heads were recovered.

And when he was asked if he was aware that **PW 9** had testified that he had handed over the exhibits to Mr. Chemweno, **PW 21** said that that would be surprising, as **PW 9** handed over the exhibits to him. He emphasized that he personally collected the exhibits from **PW 9**.

**PW 22, INSPECTOR EDWARD MAGIRI**, was attached to the C.I.D. Headquarters, Nairobi.

On 19<sup>th</sup> January 2008, he was instructed by the Director of C.I.D. to proceed to Kisumu, to investigate a case in which there had been a shooting incident at Kondele, on 16<sup>th</sup> January, 2008.

Although **PW 22** and his colleagues left Nairobi on 19<sup>th</sup> January, 2008, they did not reach Kisumu until the next day, because there were obstacles on the roads.

When they got to Kisumu, at about 12.00noon, they went to the offices of the Provincial C.I.D. boss. Thereafter, their next point of call was the Kondele Police Station.

PW 22 explained that those in his team were Senior Superintendent Muinde; Inspector Patrick Gikunda (**PW 21**); and Inspector Ali Samata. When they got to Kondele Police Station, they met the OCS (**PW 2**). They then visited the scene of the incident, which **PW 22** described as an open ground, about 200 metres from the Kondele Police Station. There was a market place adjacent to the open area, where people used to gather during meetings.

After the scenes-of-crime personnel had taken photos at the scene, **PW 22** and his team commenced their own investigations. They interviewed witnesses and recorded their statements. Some of the witnesses were police officers, whilst others were persons who had been present when the incident occurred.

Later, they collected the bullet head which had been retrieved from one of the deceased. They also collected the O.B wherein the shooting incident had been recorded.

As they proceeded with further investigations, they collected the Arms Movement Register, and the AK 47 which had been held by the

accused.

While the team was still in Kisumu, they tried to have the suspect identified, using the video clip. They had obtained the video clip from the Police Headquarters.

For the process of identification they got some of the officers who had been at the scene, at the time of the incident.

**PW 4** and **PW 5**, who had been with the accused at the scene, were thereafter photographed, when they were wearing the uniforms they had worn on 16<sup>th</sup> January 2008. The accused too, was photographed in the uniform he had worn on 16<sup>th</sup> January, 2008.

It was the evidence of **PW 22** that **PW 1** and **PW 2** did identify the accused as the officer shown in the video clip.

He went on to explain that there was a dispute about the uniforms worn by the officers at the time of the shooting incident. However, **PW 2** is said to have identified the accused positively, through the photographs.

When **PW 22** was asked why the police did not conduct an Identification Parade, he said that a parade was unnecessary because the officers who were called to view the video tape could not identify the officer captured on film.

As far as Inspector Edward Magiri (**PW 22**) was concerned, it was the OCS (**PW 2**) who could identify the accused because he had been with him for long.

An Identification Parade could not have worked, as far as **PW 22** was concerned, because the officers who were involved in quelling the riotous crowds were from different police stations and different disciplines, including the regular police and the GSU.

But when he was pressed further, Inspector Magiri said that a parade was conducted through the video clip.

As regards the uniform which the accused wore on 6<sup>th</sup> January 2008, the witness said that he did not check the records to ascertain if the accused had been issued with such uniform. He felt that there was no reason to warrant checking the "kit cards" on which are recorded any property issued to each police officer.

**PW 22** informed the court that whilst the rifle retrieved from the accused was taken to the ballistics experts on 29<sup>th</sup> January 2008, the two guns retrieved from **PW 4** and **PW 5** were taken to the ballistics experts on 27<sup>th</sup> June, 2008. In effect, those two guns were sent for expert analysis more than four (4) months after the accused had been charged with murder.

The reason for taking those two guns to the ballistics experts for analysis, was that **PW 22** and the rest of the team investigating the shooting incident wanted to know if the said guns could have fired the bullet that was recovered from the body of the deceased.

After the testimony of **PW 22**, the prosecution closed its case.

Thereafter, when the accused was placed on his defence, he gave sworn testimony. He then called one other witness.

The accused, **PC EDWARD KIRUI**, testified that he had been posted to the Kondele Police Station in 2002.

On 28<sup>th</sup> December 2007, the accused was issued with a firearm. It was an AK 47 rifle "**of body parts number 08378**"

The same firearm was thereafter re-issued to him on a regular basis.

On the material day, 16<sup>th</sup> January 2008, the accused had the same rifle. That morning, the accused was in the group led by the OCS (**PW 2**), which was assigned operations at the Kibuye area. The operations were intended to curb an intended mass action which had been called for by the ODM, a political party.

The accused says that he wore the regular police uniform, which is blue in colour.

The team which the accused was in, stayed at the Kibuye area until about 11.00a.m. That area remained calm.

At 11.00a.m, **PW 2** told the officers under his command, that the OCPD had directed him to go to Kondele Market area, to reinforce the team which had been assigned there.

Upon arrival at Kondele, **PW 2** gave his AK 47 rifle to the accused. **PW 2** then proceeded to address the crowd. The said crowd was chanting;

***“No Raila No Peace”***

They were also demanding that “Museveni’s soldiers” should go away. But the accused knew that the persons being called “Museveni Soldiers” were actually officers from the General Service Unit (GSU).

As some youths begun throwing stones at the GSU, the latter responded by throwing tear gas at the crowd.

The crowd dispersed but re-grouped after a few minutes. When they re-grouped, they were carrying a new empty coffin, and they were shouting;

***“Kibaki, rest in peace”***

The accused testified that the crowd was armed with pangas and other crude weapons. Others were throwing stones.

Meanwhile, some had blocked the Kisumu-Kakamega Road with shells of burnt-out vehicles.

**PW 2** then ordered that the crowds be dispersed. According to the accused, most of the police officers started firing.

At that stage, the accused took to **PW 2**, his AK 47, at the City Clock.

The accused saw **PW 4** and **PW 5** pursue the crowds which went towards Nyamasaria. However, he insists that he did not join that group. He says that he remained near the City Clock and also went along the Kisumu-Kakamega Road, where he joined the officers who were removing the barricades from the roads.

The accused testified that he, and the other police officers continued removing the barricades until about 3.00p.m, when they returned to the police station.

The accused identified PC Eric Kirui as one of the officers who was with him along the Kisumu-Kakamega Road, when they were removing barricades from that road.

Thereafter, the accused stayed at the police station until about 6.00p.m, when the OCS officially released them from duty. But about 30 minutes later, **PW 2** recalled the accused and a few other officers. They then rushed to Arina Estate, where there had been some shooting.

The officers were informed by some Administration Police officers that they had shot several people who had looted House No. 509, in Arina Estate.

The police officers from Kondele visited the scene of the shooting at Arina Estate, but they did not find the victims, as they had been taken to the hospital.

When the officers visited the Nyanza Provincial Hospital, they found six (6) people who had been shot at Arina Estate.

According to the accused, one of those persons, whose particulars were recorded by **PW 2**, is William Onyango. Indeed, the accused said that **PW 2** sent a signal concerning that incident. However, that signal was not produced as evidence at this trial.

It was the case of the accused that he did not fire even a single bullet on 16<sup>th</sup> January 2008. It is for that reason that when he renewed

his firearm and ammunition on 18<sup>th</sup> and 19<sup>th</sup> January 2008, he still had the 36 rounds of ammunition that he had been issued with on 16<sup>th</sup> January, 2008.

It is those 36 rounds of ammunition that he surrendered to **PW 8**, **PW 13**, and the DCIO, on 19<sup>th</sup> January, 2008.

On 19<sup>th</sup> and on 21<sup>st</sup> January 2008, a video clip was replayed to the accused together with **PW 4** and **PW 5**: However none of them was able to identify the police officer who had been captured on that clip.

On 23<sup>rd</sup> January 2008 the accused surrendered all the kit that had been issued to him. He said that the kit included his regular police uniform, which is blue in colour.

On 26<sup>th</sup> January 2008, Mr. Muinde gave to the accused a jungle uniform to wear. Thereafter, scenes-of-crime personnel took photographs of him, in the jungle uniform.

On 6<sup>th</sup> February 2008, the accused was arrested and then escorted to the C.I.D. Headquarters, Nairobi. Mr. Muinde told him that the ballistics expert had examined a firearm serial number 3008378, which he ascertained as the firearm that had fired the fatal bullet retrieved from the body of one of the deceased in this case.

Mr. Muinde said to him that it was that firearm which had been issued to the accused. But he reiterated that the firearm issued to him had “body parts number 08378”.

For completeness of record, the accused pointed out that the serial number on the gun issued to him was **23008378; and NOT 3008378**.

The accused confirmed that **PW 8** had initially made a mistake on 28<sup>th</sup> December 2007, when he noted in the Arms Movement register that the gun issued to the accused was No. 03378.

The accused believes that an Identification Parade should have been conducted, so as to test the veracity of the alleged identification by **PW 1**, David Wafula Manyonge. He said that he had not known **PW 1** prior to the incident in question.

In a nutshell, the accused asserted that he had simply been framed. He did not wear any jungle uniform on 16<sup>th</sup> January 2008, nor did he go anywhere near the scene of the shooting incident.

During cross-examination, the accused said that he did not know why **PW 1**, whom he had not known prior to the shooting incident, would want to implicate him.

He also said he had never had any differences with the OCS (**PW 2**). Therefore, he knew that the OSC had no reason to implicate him in the incident.

Similarly, the accused had no grudge with **PW 4**. But he believed that **PW 4** had reason to implicate him, as **PW 4** had also been a suspect.

When the accused was asked if he had the signal in which **PW 2** had stated that William Onyango had been shot at Arina Estate, he answered in the negative.

**DW 2, PC ERIC KIRUI**, is attached to the Nyanza Provincial Police headquarters. But as at 16<sup>th</sup> January 2008, he was attached to the Kondele Police Station.

On 16<sup>th</sup> January 2008, he was one of the officers assigned to control riots. He was under the command of AP Chief Inspector Nyamwaro. The team he was in was assigned duties at the City Clock, Kondele.

He recalled that more police officers were deployed from other sectors to go and provide reinforcements to the team deployed

at Kondele.

When the crowd had declined to disperse, as **PW 2** had requested them to do; and because they continued to throw stones at the officers, the crowd was dispersed.

The police officers then went about removing barricades from the roads. **DW 2** testified that the accused joined the officers who were removing the barricades.

According to **DW 2**, they removed the barricades until 3.00p.m, when they were overwhelmed. They therefore returned to the police station.

**DW 2** also testified that after the OCS had visited the scene of some shooting at Arina Estate, the OCS recorded the particulars of the victim's in the O.B. The OCS also drew up and dispatched a signal to the Divisional Radio Room for onward transmission to Police Headquarters.

On 18<sup>th</sup> January 2008, **PW1** is said to have gone to Kondele Police Station at about 6.00p.m. **PW 1** was an accused person in Criminal Case No. 895 of 2007, before the Winam Court.

His case was being handled by **DW 2**, in Police File No. 62A/243/07. **DW 2** was the Investigating Officer in that case.

**PW 1** requested **DW 2** to assist him by terminating the case. The said case was one in which **PW 1** had been charged with the offence of obtaining money by false pretences.

When **DW 2** declined to terminate the case, **PW 1** went away.

On the next day, **DW 2** saw **PW 1** at the Kondele Police station, in the company of the PCIO Nyanza, the DCIO and Mr. Nyaringo. He was requested to join the team, which was led by **PW 1**, to the scene of the shooting incident at Kondele.

As regards the uniform which the accused wore on 16<sup>th</sup> January 2008, **DW 2** said that it was the regular blue police uniform.

During cross-examination, **DW 2** conceded that he was not detailed to monitor the movements of the accused. He also admitted that there were times when he was not with the accused, on the material day.

Meanwhile, when asked what he understood **PW 1** to have been doing, by asking him to terminate the criminal case against him, **DW 2** said that **PW 1** wanted to compromise him. However, although the action constituted a criminal offence, to his knowledge, **DW 2** did not arrest him or have him charged with any offence.

And although the accused was his friend, **DW 2** denied the suggestion that he could do anything to get him acquitted. **DW 2** emphasized that he was committed to justice. And, with those words, the defence case drew to a close.

I now have the task of evaluating all the evidence on record. As I embark on that task, I do remind myself that I did not have the benefit of observing nineteen (19) prosecution witnesses when they gave their evidence. The reason for that is that the said witnesses testified before Mutungi J., before the said learned Judge retired.

Secondly, I do remind myself that the onus rests on the prosecution to prove beyond any reasonable doubt that the accused committed the murders of George William Onyango and Ismail Chacha. The accused bears no legal responsibility in proving his innocence as he is presumed to be innocent until and unless the prosecution proves him to be guilty.

In this case, the facts are largely accepted as accurate, by the accused person. The facts about which I am making reference are those of the circumstances under which the shooting incident occurred. I will summarise the same briefly.

On or about 15<sup>th</sup> January 2008, the Orange Democratic Movement (ODM) gave notice of the intention to hold peaceful protests across

the country, Kenya. The said protests were said to have been the chosen medium through which that political party would express their displeasure at the declared results of the national elections which were held in December 2007.

ODM believed that they and their leader, Mr. Raila Odinga, had won the elections. However, the Electoral commission of Kenya had declared that the Party of National Unity (PNU) and their leader, Mr. Mwai Kibaki, were the victors.

I have deemed it necessary to state those brief historical facts because they would then help place in context, some of the words and actions of the riotous mobs that gathered at Kondele on 16<sup>th</sup> January, 2008.

As both the prosecution and the accused said, the police responded to the ODM's declaration of its intention to hold three days' of peaceful protests, by declaring the protests illegal. Thereafter, the police started making preparations to handle the protests.

The preparations entailed the mobilization of police officers from the various disciplines within the Kenya Police. The said disciplines included the regular police, the Administration Police (AP), and the General Service Unit (GSU).

Secondly, police officers from Maseno Town were also directed to travel to Kisumu, to assist their counterparts in that city.

On the evening of 15<sup>th</sup> January 2008, SSP Simon Kiragu, the Officer commanding Police division (OCPD), Kisumu, briefed the police officers, at Victoria Park.

Amongst the senior officers who were present at the briefing were SSP Mwalili, who was the in-charge of the Administration Police; Mr. Mwiranda, the in-charge of the GSU; and Mr. Baya, the Assistant Commissioner of Police, Kisumu.

At the briefing, all the officers were told to exercise restraint on the use of firearms and bullets, when handling the expected protestors.

After a long briefing session, each of the station commanders was assigned his area of command. He was also directed to raise a certain number of personnel. And when the briefing ended, each station commander moved with his team, to his designated area of deployment. However, on that day, 15<sup>th</sup> January 2008, nothing significant transpired.

On 16<sup>th</sup> January 2008, **PW 2** and his team went to Kibuye area, which was his area of deployment. The accused was in that team.

The Kibuye area did not experience any protests.

At about 11.00a.m, the OCPD, Kisumu, instructed PW 2 to move with his team to the Kondele area. The reason for that instruction is that huge crowds of people had gathered at Kondele, and they were intent on going to Kisumu city Centre.

The crowds were singing and dancing, saying;

***“No Raila No Peace.”***

They were also demanding the removal of Museveni's soldiers. To their minds, the GSU personnel were soldiers from Uganda, hence their reference to “Museveni's soldiers”.

The OCS, Kondele Police Station, Chief Inspector Hansent Kaloki (**PW 2**), talked to those whom he assessed to be leaders of the protestors. He was trying to persuade them to disperse peacefully. However, the crowd declined to disperse.

Instead, some pockets of the riotous mobs started pelting the GSU personnel with stones.

Another group of the protestors arrived at the scene, carrying an empty coffin, and shouting;

***“Kibaki, Rest in Peace”.***

Meanwhile, many people in the crowd were carrying pangas or other crude weapons or stones.

As their numbers were large, and because they had become restless, **PW 2** concluded that it was possible for the crowd to overrun the police contingents present. He therefore ordered that the crowds be dispersed.

**PW 12** and the accused testified that some of the GSU officers fired either into the air or horizontally into the crowds. None of the other witnesses testified about such indiscriminate shooting.

In my considered view, had the GSU officers or any other officers fired horizontally into the crowds, the consequences would have been catastrophic. Many other persons could have been killed or maimed.

However, neither **PW 12** nor the accused, nor any other witness talked of the consequences of the alleged shootings. I therefore arrive at the considered conclusion that **PW 12** and the accused did exaggerate, when they testified about the GSU personnel shooting horizontally at the crowds, when **PW 2** ordered that the crowds be dispersed.

It is, however, clear that tear gas was thrown at the crowds. It is that that caused them to disperse in all directions. As the crowds dispersed, the police officers pursued them. But some people in the crowds made every effort to slow down or block the progress of the police officers, by placing obstacles on the roads. They used the body of a tipper lorry, burnt-out shells of vehicles, big stones and sticks, to barricade the roads.

**PW 2** and **PW 3** were amongst the senior officers who were involved in removing the barricades from the roads.

But **PW 2** testified that the accused was in the group comprising **PW 4**, **PW 5** and 3 GSU officers, who pursued the group of protestors, who went towards Nyamasaria. In other words, **PW 2** said that the accused was not in the team of officers who were removing barricades from the road.

On the other hand, the accused testified that he never joined the officers who went in the direction of Nyamasaria. **DW 2** also said that the accused was with the officers who were clearing the barricades.

Then again, **PW 4** and **PW 5** testified that the accused did go towards Nyamasaria.

On the sketch-map, Exhibit 16, the shooting incident is shown to have taken place along a small road. Although the said road is not named, on the sketch-map, I understand it to be the road leading towards Nyamasaria.

Obviously, if the accused did not go along that road, he could not have been involved in the shooting incident.

In cases where some witnesses testify to a fact and other witnesses testify to an opposite fact, the court sometimes resolves such inconsistency by relying on its assessment of the demeanour of the witnesses.

In this case, however, I did not have the benefit of observing **PW 2**, **PW 4** and **PW 5** when they testified, because by that time, it was Mutungi J. who was presiding over the trial.

Meanwhile, the fact that more witnesses have testified about a fact does not, of itself, mean that if fewer witnesses said the opposite, the bigger number of persons must have been speaking the truth. Justice cannot be equated, in that respect, to democracy, where the bigger number has their way.

How then does the court determine whether to accept the evidence led by the prosecution or that led by the defence? I will revert to that issue shortly.

Meanwhile, there is no doubt at all that there was a shooting incident at Kondele. That fact has been proved by the prosecution. The proof was provided through a very rare kind of evidence; a video caption, in which the incident was captured.

The video caption was played before the court. The learned Judge then directed that there be produced a slow motion version of the

caption.

However, by the time the video caption was played before the court, I was not yet presiding over this trial. The defence counsel, Mr. Mitey has therefore submitted that the prosecution ought to have recalled **PW 6**, to re-play the video caption before me.

It is the defence case that the prosecution ought to have invoked the provisions of **section 146 (4) of the Evidence Act**. That section provides as follows;

**“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively”.**

In my understanding of that section, the court is clothed with power to recall a witness. The reasons for such recall can be either for further examination-in-chief or for further cross-examination.

In this case, the learned state counsel, Mr. Mule submitted that the video caption had already been produced in evidence, and that therefore, there was no need to recall **PW 6** to play it afresh, before the Judge who succeeded Mutungi J.

Exhibit 6 is the video caption, in the normal speed in which it was recorded. Exhibit 7 is the slow version of the same caption. As soon as the caption was produced in evidence, it became the property of the court. Therefore, in my considered opinion, there was no need, in law, to have the witness who had produced it, recalled to play it again to the court.

As the caption was already in the hands of the court, I did organize to have it replayed. I therefore saw what had been shown to Mutungi J. By so doing, I was not doing anything different from perusing the other exhibits which had been produced before Mutungi J.

In the circumstances I find that there was no need for the prosecution to seek to recall **PW 6**. I say so because it has not been shown to me, that there was a need to have him undergo either further examination-in-chief or cross-examination.

Having watched the video caption, I saw a man dressed in a jungle jacket and also wearing a helmet. He was carrying a gun in his hands. He appeared from behind some make-shift structures. The words of **PW 12**, Lucy Hannan, perhaps best describe the scene captured on the video caption. This is what she said;

**“I saw one officer in camouflage, with helmet, running- stalking with his gun, ready to fire. He was of average height not heavy built. I was watching him as he moved towards his target. We filmed him coming, then he shot. I saw 2 young men who were laughing and taunting. I was focusing on the Police Officer. He then shot the two young men. Then he went and booted one of them when he was on the ground. The young man he kicked was still alive.”**

**PW 12** noted that the two young men were not armed. That fact comes out very clearly in the video footage.

Given those circumstances, the police officer's life was not in any danger from the two young men. He was therefore not at all justified in shooting the said young men.

And as if it was not bad enough that he shot the young men, the officer demonstrated his callous nature by kicking one of the young men who was on the ground! By so doing, the police officer demonstrated that he did not deserve to belong to the disciplined forces.

The next question that needs to be addressed is the identity of the two young men who were the victims of the said shooting. That issue arises from the fact that the accused did testify that William Onyango was actually shot at Arina Estate, not Kondele.

Although it is the responsibility of the prosecution to prove the guilt of the accused; and even though the accused has no obligation to prove his innocence, it is trite law that he who asserts ought to prove his assertion. Therefore, the accused should have demonstrated that

when **PW 2** was sending a signal to Police Headquarters, on 16<sup>th</sup> January 2008, he stated that William Onyango was shot at Arina Estate. He failed to discharge that obligation.

In any event, a comparison of the photograph of William Onyango, as shown in Exhibit 13, (the photo taken in the mortuary); and the pictures appearing in the video caption, show that the said William Onyango was shot at Kondele. Therefore, even if **PW 2** had sent a signal to indicate that William Onyango was shot at Arina Estate, that would not have changed the fact that he was shot at Kondele.

Meanwhile, **PW 1** testified that he was with Ismail Chacha, alias Jomba, at Kondele. When Ismail was shot, **PW 1** was present.

In the light of that evidence, there can be no merit at all, in the assertion by the accused that William Onyango was not shot at Kondele. I find that George William Onyango and Ismail Chacha were both shot at Kondele.

***Who is it that shot the two young men? Is it the accused, as asserted by the prosecution?***

The accused said that he was wearing the regular blue uniform, of the Kenya Police Force. He also said that he was not at the scene of the shooting incident. **DW 2** supported him in those contentions.

But **PW 1**, who was with the two young men, testified that he positively identified the accused as the person who shot the 2 young men. **PW 1** said that although he was well aware that there were two police officers named Kirui, based at the Kondele Police Station, it is the accused who fired the fatal bullet.

Could **PW 1** have meant that the person who shot the bullet that caused the deaths in issue herein, was **DW 2**, Eric Kirui?

**PW 1** was categorical that he had known the accused even prior to the material date. He said;

**“I know 2 Kiruis at Kondele. The accused is the one I saw and I know him. When I saw Jomba on the ground. As the askari came I was lying aside. I asked him “Je Bwana unatuua” Then he opened his helmet. Then I saw him.”**

But, can **PW 1** be considered a reliable witness?

**DW 2** testified that **PW 1** was an accused person in a criminal case, which was pending before the Magistrate’s Court, at Winam. **DW 2** indicated that **PW 1** approached him on 18<sup>th</sup> January 2008, requesting him to terminate the criminal case.

As **DW 2** was the Investigating Officer in that criminal case, and because he said so himself; that confirms that he and the accused knew each other.

**DW 2** declined to terminate the case against the accused. In my considered opinion, if **PW 1** was going to hold a grudge against **DW 2**, for his refusal to terminate the criminal case, he would have had reason to incriminate **DW 2**. But he did not.

Instead, he made it clear that the Kirui, whose face he identified at the scene of the shooting, was the accused. And he did not identify the person by his name. He did so by way of his facial appearance, when the accused lifted up the frontal cover of his helmet.

Before the officer lifted his helmet, **PW 1** did not identify him, notwithstanding the fact that the officer was “very close”.

It is only when the helmet was raised that **PW 1** identified the officer, as the accused herein.

Although **PW 1** had already known the accused, as well as all the other police officers stationed at Kondele Police Station, the accused testified that he had not known **PW 1**. Therefore, there would have been no reason why **PW 1** would have wanted to implicate the accused in something he was not involved in.

Meanwhile, when **PW 2** viewed the video footage, he was initially unable to identify the officer captured on film. He was only able

to do so later, after he had watched the caption severally.

Given those facts, it is evident that it was not easy to identify the officer who was shown on the video caption, as he shot the two victims.

**PW 2** was able to identify the officer, as the accused herein, because;

**“Pc Kirui had a unique walking style.**

- **His body structure is quite different from the other two officers from my station who were moving towards that direction doing the shooting.**
- **While moving from the scene, he was wearing a helmet with the glass. He lifted it.”**

Those factors would not have been within the exclusive knowledge of **PW 2** alone. Both **PW 4** and **PW 5** had also been working with the accused. Therefore, it should have been possible for them to also identify the officer in the caption, as being the accused herein, if his walking style and body structure was so unique.

Similarly, both **PW 4** and **PW 5** did see the officer in the caption, when he raised the frontal cover of his helmet. But they were unable to identify him.

In the event, had the officer been only identified by **PW 2**, I would have been very uncomfortable in finding such identification as reliable. In my considered view, such identification could have been honest, yet with a possibility of error.

***In those circumstances, should there not have been an Identification Parade, so as to give the alleged identifying witnesses an opportunity to pick out the suspect?***

Ordinarily, an Identification Parade provides those who are investigating a crime, with an opportunity to establish if the suspect who had been arrested was identified by any of the persons who saw the criminal or criminals who committed the offence. It is for that reason that members of a parade are required to have generally similar physique, including height and weight; skin colour; and hair on the head etc.

And it is also because it is a genuine attempt to ensure that the suspect is not prejudiced, that there is a requirement that if he has any unique or outstanding feature, such feature is not so glaring as to make the suspect stand out like a sore thumb.

The idea is to conduct a test on the abilities of the identifying witness, to pick out the suspect from amongst a group of persons who were not dissimilar from the said suspect.

In this case the two “identifying witnesses”, if they can be so-called, were **PW 1** and **PW 2**. Both of them said that they had known the accused even before the shooting incident. Therefore, if they had seen the accused, they would have recognized him, rather than identified him.

When a suspect was known to a witness prior to the incident giving rise to the arrest of the suspect, there is no need, in law, for the police to conduct an Identification parade, because the witness will simply pick-out the suspect.

It is only if the suspect was not previously known by the witness that an Identification parade would be necessary.

In this case, therefore, an Identification parade would not have served any meaningful purpose, if the identifying witnesses remained **PW 1** and **PW 2**.

After the two victims passed away, Dr. Margaret Oduor (**PW 11**) conducted post mortem examinations on their respective bodies. But how did the doctor know the identities of the victims?

In the case of George William Onyango, the post mortem report indicates that the body was to be identified to the doctor by John

Olaro, a paternal cousin, and Philip Adundo, another paternal cousin. Neither of those paternal cousins testified before the court.

PC John Bosco Mulei (**PW 16**) was the police officer who accompanied the relatives of George William Onyango, to the mortuary, for the purposes of the post mortem. He testified that the body of Onyango was identified by his cousins.

We can therefore safely conclude that there was nothing amiss about the identification of the body, although it may have been better to have had at least one of the two cousins confirming the role they played in the identification of the body.

Meanwhile, as regards Ismail Chacha, the post mortem report shows that the body was identified by Benta Achieng and Zaituni Monyani. Those two ladies did not give evidence at the trial. Secondly, it is not apparent, from the information on the face of the Post Mortem Form, how, if at all, they are related to Chacha.

Had that been the only piece of evidence on the issue of identification, there may have been some possible question marks regarding whether or not the body on which the doctor carried out the post mortem examination was that of Ismail Chacha.

But there is also the evidence of **PW 1**, who testified that he did identify the body of Ismail Chacha. He did so before the post mortem.

Later, on 23<sup>rd</sup> January 2008, the younger brother of Ismail Chacha arrived in Kisumu, from Tanzania. By the time he reached the mortuary, the post mortem had already been conducted. However, he too, did identify the body as that of his brother, Ismail Chacha. Therefore, there is no doubt that the doctor carried out post mortem examinations on the correct bodies.

#### ***What were the causes of death of the victims?***

Dr. Margaret Oduor found that George William Onyango was an African male, of about 25 years in age. He was well built and had good nutritional status.

The doctor found a gun-shot wound through his back, around the spinal cord. The bullet had gone through the chest, tearing the left lung. It emerged through the 3<sup>rd</sup> rib on the left side, and lodged in the muscles on the upper left side of the chest.

The doctor retrieved the bullet head from the muscles.

After carrying out the requisite examination, the doctor arrived at the considered conclusion that death was due to haemorrhage, secondary to chest injury which was as a result of a gun shot.

As for Ismail Chacha, the doctor found him to be an African male, who was 30-40 years old. He had a good physique and a good nutritional status.

The doctor found that the body had a gunshot wound at the back, at the 10<sup>th</sup> thoracic spine: That was the point through which the bullet entered.

The bullet perforated the diaphragm on the left side, with fractures of the 7<sup>th</sup> and 8<sup>th</sup> ribs. The right hand lobe of the liver was also torn, with bleeding into the abdominal cavity.

The bullet exited the body through the chest, at the 8<sup>th</sup> thoracic spine.

Having analysed the findings, the doctor formed the considered opinion that Chacha died of hemorrhage from the lacerated liver, as a result of a gunshot.

In effect, the prosecution has proved, beyond any reasonable doubt that the two victims died due to massive loss of blood, arising from gunshots.

In the light of the fact that the victims were shot on their upper bodies, there can be no doubt that the person who fired at them

intended to either kill them or to cause them grievous harm.

Murder is defined at section 203 of the Penal Code, as follows;

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

It is thus not enough that the prosecution should prove that the unlawful act or omission of an accused person has caused the death of another person. The prosecution must also prove that the accused had malice aforethought. If they fail to prove the malice aforethought, the accused may only be convicted for manslaughter, as defined in section 202 (1) of the Penal Code.

***What is malice aforethought?***

The answer is provided, in very clear terms, at section 206 of the Penal Code, which reads 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 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 this case, the person who shot the two victims must have intended to either kill or to cause grievous bodily harm to either one or the other, or both the victims.

But even if he did not have such an intention, he knew or ought to have known that by shooting the victims on the part of the bodies at which he aimed his gun, would probably cause death or grievous bodily harm.

If on the other hand, he was indifferent whether the shot or shots he fired would kill or cause grievous bodily harm, he would still be deemed to have had malice aforethought.

In other words, I do find that the offence committed herein was murder.

The only question that remains to be answered is whether or not it is the accused herein who committed the said murders.

I have already made a finding that **PW 1**, David Wafula Manyonge, positively identified the accused as the person who was at the scene of the shooting incident. That being the case, it should follow that the bullet which was retrieved by the pathologist, from the body of George William Onyango, should be traced back to the gun which the accused had at the material time.

The accused has testified that he was issued with an AK 47 rifle **“of body parts Number 08378”**.

He added that the serial number of his said firearm was **23008378**.

The OCS, Kondele Police Station, Chief Inspector Hansent Kaloki, confirmed that the firearm which the DCIO recovered from the accused on 19<sup>th</sup> January 2008 was No. 08378.

**PW 8**, Sergeant Isack Serem, was in-charge of the armoury at the Kondele Police Station, at the material time.

He testified that the firearm he issued to the accused was an AK 47, serial Number **23008378**. He confirmed that fact, first by

reference to the Arms Movement Register, which he used to maintain at the police station, and also when was shown the said firearm, in court.

**PW 8** further explained that there are two numbers on rifles. And in respect to the firearm issued to the accused, the said two numbers were 08378 and 23008378.

However, when the Firearms Examiner, Acting Senior Superintendent Johnstone Musyoki Mwangera, (**PW 9**) testified, he said that the firearm which he was asked to examine was one which bore the **serial No. 3008378**.

As that number is close to that on the gun which the accused said he was issued with, (being **No. 2008378**), I carefully perused the original hand-written record of the proceedings, with a view to ascertaining if there might have been a typographical error.

From the hand-written record, I verified that **PW 9** made reference to serial No. 3008378.

I also perused the Exhibit Memo, (Exhibit 8a). That is the document which accompanied the gun and the ammunition which were given to the Firearms Examiner, for his analysis. On that Exhibit Memo, it is shown that the **PW 9** was given;

**“an AK 47 rifle S/NO 3008378”**

Having examined the particular gun, **PW 9** prepared his own report, dated 29<sup>th</sup> January 2008. The said report is Exhibit 8 (b). And in it, **PW 9** reiterates that the assault rifle he received from Inspector Gikunda, (**PW 21**), was **Serial No. 3008378**.

Having carried out microscopic examination of the bullet head which was recovered from the body of George William Onyango; in conjunction with the six (6) bullets test-fired from the rifle serial Number 3008378, the firearms examiner formed the opinion that the bullet head was fired from that rifle.

During cross-examination, the Firearms Examiner did explain that firearms transfer unique characteristics to the bullets fired from them. Therefore it is possible for an expert to tell exactly which gun fired a particular bullet.

That being the position, it means that the fatal bullet was fired from the AK 47 rifle serial number 3008378. The prosecution did not produce before this court, the rifle serial number 3008378, nor did they make any attempt to link that firearm to the accused.

In **ERIC AKEYO OTIENO Vs REPUBLIC, CRIMINAL APPEAL NO. 10 of 2008**, (At Nyeri), the Court of Appeal dealt with an issue in which the trial judge had held that there had been an honest and reasonable error in recording the serial number of the gun. The said error resulted in the G3 rifle being cited as having the serial number **369369**, whereas the G3 rifle which had been issued to the accused was number **359359**.

Having concluded that there was simply an error in the recording of the serial number of the gun, the trial court convicted the accused.

However, the Court of Appeal held that the difference in the serial numbers of the gun issued to the accused, from the one examined by the Firearms Examiner, did give rise to a reasonable doubt about whether or not it is the gun issued to the accused which was found to have been used to shoot the victim.

On the basis of that legal authority, which is binding on me, I have no alternative but to find, as I now hereby do, that the prosecution has failed to prove that the fatal bullet was fired from the gun which had been issued to the accused. He was issued with an AK 47 rifle, serial number 2008378.

It is that gun that was recovered from the accused. However, when Inspector Patrick Gikunda (**PW 21**) prepared the Exhibit Memo which he handed over to the firearms Examiner (**PW 9**), he cited the serial number of the gun as 3008378.

The inevitable question is;

**“Did Inspector Gikunda or any other police officer**

**replace the gun which had been recovered from  
the accused, with another one?"**

If not, where did the rifle serial number 3008378 come from?

And if there was a change of guns, who did it, at what stage, and for what reason?

But if there was no change of guns, why are there two different serial numbers?

In the light of those questions, even though all the other evidence adduced shows that the accused was positively identified at the scene of the shooting incident, (by **PW 1**); and even though he was captured on film as he appeared to shoot the two victims; this court is unable to reconcile those facts with the finding by the Firearms Examiner who concluded that the fatal bullet was discharged from a gun that was different from the one which the accused had.

In the event, I have no alternative but to give to the accused, the benefit of doubt, because it is possible that the fatal bullet was not discharged from his gun.

I thus find the accused, Not Guilty. He is therefore acquitted. I order that he be set at liberty forthwith unless he is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi, this 21st day of June, 2010.**

.....  
**FRED A. OCHIENG**  
**JUDGE**