REPUBLIC……..…….PROSECUTOR

VERSUS

ANDREW MUECHE OMWENGA…….……...…ACCUSED

J U D G M E N T

ANDREW MOECHE OMENGA (the Accused) in this case is charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 31st January, 2008 at West Indies Estate in Uasin Gishu District within Rift Valley Province, he murdered DAVID KIMUTAI TOO (David) and EUNICE CHEPKWONY(Eunice).

The prosecution case as can be gleaned from the evidence of 23 witnesses who testified against him is that at about 10.00 a.m. on 31st January, 2008 the Accused followed both the deceased to West Indies Estate in Eldoret Town where he shot them and fled on the GK motor bike he had to the DO's camp at Turbo where he surrendered himself and was arrested. Members of the public who heard gunshots ran to the scene and found David dead. Though Eunice was still alive, she was not talking. With the police who also rushed there on receiving information, they rushed Eunice to Moi Referral Hospital where she died while undergoing treatment. Accused was later handed over to police and escorted to Nakuru where he was charged with the murder of the two deceased persons.

What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim—*actus non facit reum, nisi mens sit rea*—"the act itself does not constitute guilt unless done with a guilty mind," encapsulates this principle.

With these two important elements of crime in mind, I can now define murder as the unlawful homicide committed with "malice aforethought." Homicide of course is the killing of a human being by another. Murder is therefore the killing of a human being by another with malice aforethought.

Section 203 of the Penal Code under which the Accused is charged defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. It reads:-

"Any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder."

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

In the first element, there must be evidence proving that the death of a human being (the deceased) actually occurred. The evidence required to prove the death is usually the autopsy reports given by pathologists. But there are circumstances where the cause of death is too obvious to require medical evidence like where the deceased person was stabbed through the heart or where he is decapitated or his head is crashed. Stating this principle in Ndungu Vs Republic [1985] KLR 487 the Court of Appeal stated at p. 493 that:-

"…in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crashed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."

The death of the two deceased persons in this case is not in dispute. It is also not in dispute that they died of gunshot wounds. The evidence of the pathologist, Dr. Njue PW20, makes that quite clear. That disposes of the first ingredient.

On the second ingredient, the Accused himself admitted that he shot David. I do not accept his contention that Eunice accidentally shot herself as he struggled to wrestle David's gun from her. The evidence of Ag. SSP Johnson Mwongela, PW19, that only Accused's Ceska pistol Serial No. A050468 Ex. 4 was fired at the scene and that the finger-ring he examined had a circular bullet hole as well as the evidence of Dr. Njue that Eunice was shot in a standing position while defending her self, leaves me in no doubt that the Accused shot her also.

In order to satisfy the second ingredient that the accused committed the unlawful act which caused the death of the deceased, we need to determine whether or not the Accused's act of shooting both of them was an unlawful act. I will deal with this aspect of the second ingredient along with the third ingredient which is whether or not the Accused killed the two deceased persons with malice aforethought.

What is "malice aforethought? Malice aforethought describes the *mens rea* or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If 'malice aforethought' is lacking the unlawful homicide will be manslaughter.

Section 206 of the Penal Code gives the instances when malice aforethought is established. It states that:-

"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."

It is clear from this definition that there are three broad elements of 'malice aforethought'. They are express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought.

There is no evidence that the Accused shot the deceased persons in an attempt to arrest them. So the last instance of Section 206 of the Penal Code is not relevant to this case.

Even when any or all of the other instances are proved, it will not be murder if the accused person is shown to have been provoked and/or to have acted in self-defence. Mrs. Ndeda for the Accused has submitted that the Accused shot the two deceased persons out of provocation and in self defence. What is provocation? What is self defence and when do the two defences arise?

Black's Law Dictionary, 7th Edition defines the term "provocation" as "Something (such as words or actions) that arouses anger or animosity in another, causing that person to respond in the heat of passion." In as much as it is relevant to this case, Section 208 of the Penal Code explains what constitutes provocation:-

"S.208 (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult

of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

Self defence on the other hand, as the term itself suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one's family or one's property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

The law generally abhors the use of force or violence. There are, however, instances where the use of reasonable force is justified. For instance, an accused charged with an offence may seek to plead that he acted as he did to protect himself, or his property or others from attack or to prevent a crime or to effect a lawful arrest. Such pleas when successfully raised provide a justification for the accused's conduct thereby rendering his act lawful. Since the use of lawful force is not an offence, the accused will be acquitted of the offence as the element of *actus reus* (the unlawful act) will be missing.

A person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it. This defence therefore turns on two requirements: one, that the force must be necessary and secondly that it must be reasonable.

It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it. In Beckford Vs R [1988] AC 130 Lord Griffiths stated (at p.144) that "a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike." The danger the accused apprehends, however, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means.

In Mokwa Vs Republic, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force. In Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 243 the English House of Lords held:-

"The defence of self defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict may be one of manslaughter."

What is reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. In the words of Lord Morris of Borth-y-Gest in the said English case of Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in John Njoroge Vs Republic, Cr. App. No. 186 of 1987:-

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances… It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation….If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction."

I should here point out that like in all other criminal cases, where accused raises the defences of self defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. Where the accused raises defences of self defence or provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was not provoked or that he did not act in self defence. In other words the prosecution must disprove the defences of provocation and self defence and it must discharge this burden beyond reasonable doubt—Joseph Kimanzi Munywoki Vs Republic, Cr. App. No. 31 of 2003 CA Nairobi), [2006] eKLR. In the said case of Beckford Vs R [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-

"It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."

As I have said, the Accused in this case has raised the defences of provocation and self defence. Did the circumstances of this case justify his act of shooting both the deceased persons? In other words was the Accused in imminent danger himself that he had to take the lives of the two deceased persons to save his? Put in another way, has the prosecution in this case disproved the defence of self defence? To determine this, I need to consider in detail the evidence of the alleged love affair between the Accused and Eunice and that of the shooting incident as related by the prosecution witnesses on the one part and the Accused on the other.

Although most of the police witnesses denied that Accused had any love affair with Eunice, under cross examination, PC Daniel Gaiko, PW6, admitted that this was a crime of passion. In examination in chief CI Virginia Kadenge, PW12, also denied knowledge of any love affair between Eunice and the Accused, but in cross-examination she admitted that from investigations they learnt that the cause of the shooting was a love triangle. This appears to have been common knowledge because even the Investigating Officer, Josphat Kisingu, PW23, admitted that even the OCPD gave the love triangle as the cause of the shooting.

In his defence, the Accused testified on oath that he met Eunice in 2000 at the Kenya Police College Kiganjo. They became lovers and agreed to marry. After passing out, however, they were posted to different stations and did not meet until 2006 when they found themselves at the Eldoret Traffic Office. Eunice informed him that she had been married and he told her he was also married. They got to know their respective couples and became family friends.

After Eunice's husband's death in June 2007 they renewed their love and in August 2007 they agreed to marry. When Accused's wife knew of his infidelity and having heard rumuors that Eunice's husband had died of HIV and AIDS, she wanted to cause trouble but to assuage her fears Accused and Eunice took an HIV test in October, 2007. He produced the certificates as Ex. D1(a) and (b) which Accused's wife Edna Kerubo, DW3, also identified and corroborated Accused's evidence that at her request, Accused and Eunice took an HIV test. In October, 2007, as Justus Nyaberi Nyaboga, DW2, also testified, Accused took Eunice to his home in Nyamira and introduced her to his parents and his siblings as a woman he wanted to marry as his second wife. Accused's father had no objection to that. He said Accused was an adult who knew what he was doing. Later Accused gave Eunice Kshs. 300,000/= from the proceeds of the sale of his matatu KAQ 401C to which she added Kshs.100,000/- and bought a Toyotta Karina Maroon in colour. They both used the vehicle as they were together most of the time and at times he could keep it. This is the vehicle the deceased had when they were shot.

It was also the evidence of Accused's former matatu driver Jared Atuya, DW1, that one day, prior to Accused selling his matatu, he took Accused to Eunice's house and left him there with the matatu. When he went for the matatu the following morning, Accused came out of Eunice's house in a vest with a lesso around his waist.

Taking all this evidence into account, I am satisfied that the Accused and Eunice renewed their love affair after Eunice's husband's death and that they were in the process of marrying.

On the shooting incident, May Busienga Amasimbi, PW1, a resident of West Indies Estate in Eldoret Town, testified that on 31.1.2008 at about 10.22 am, as she was going to her friend's house, she saw a man in smart casual attire standing besides a maroon car in serious discussion with a woman. She did not pay much attention to them as she thought they were perhaps buying building sand. So she passed and went her way.

She did not find her friend. As she talked to someone to find out the whereabouts of her friend, she heard a woman screaming and she ran to where the screams were coming from. The woman turned out to be the one she had seen with a man. She was kneeling pleading in Kiswahili with a man in police uniform, "Mogaka usiniue" (Mogaka do not kill me) while the man she was with was seated in the car. The policeman then slapped her several times before firing a shot which missed her but the second and third shots caught her on the ribs and thigh. The policeman then went and shot the man in the car on the head through the window several times after which he took off on a motor bike.

With several other people from that estate who had been attracted by the gunshots, this witness moved close and found the woman still breathing. She identified her as the police officer by the name Eunice who was also her customer. She called another police officer, one Ngetich, whose number she had and soon thereafter police went to the scene and rushed the woman to hospital. The man Eunice was with had already died. In cross-examination, she denied seeing Eunice holding a pistol. She said she saw it on her waist when she had fallen down. She also denied that the man in the car talked with the policeman or in any way struggled with him.

Eric Igadwa Mbogani, PW2, also lives in West Indies Estate. He testified that while in his house in the estate on 31.1.2008, at about 10.10 a.m., he heard 5 to 6 gunshots from the rear of his house. He peeped through the window and saw a policeman on a GK motor bike take off in high speed and people including PW1 running to where the gunshots were heard. He also got out and rushed to the scene. There he saw a man in a grey suit collapsed on the

steering wheel of a maroon car. He was profusely bleeding from the mouth. Outside the passenger side of the vehicle, about 3 metres away, he saw a woman lying down on the grass. When he got near, he could hardly feel the man's pulse. He pulled him out of the vehicle but for fear of tampering with evidence, he decided against rushing the woman who was still alive to hospital in the same vehicle. Because the woman's dress had fallen off, she was exposed and he decided to cover her nakedness. That is when he saw a pistol strapped to her waist and took possession of it. He then called Mwangi, a police friend of his who sent a police vehicle and two policemen to the scene. He handed the pistol to one of them and assisted them carry the woman into the vehicle and rushed her to Moi Referral hospital. In cross-examination, he denied seeing any other gun at the scene.

The other prosecution witnesses went to the scene after the shooting incident.

In his sworn testimony, Accused stated that on 31.1.2008, while on patrol, he saw Eunice standing at the rear of her car in an open space near West Indies Estate. He found that odd as the nearest living quarters were about 20 metres away. Eunice beckoned him and he went there thinking she had a problem with the car. When he got near her he saw that she was in a foul mood. He nevertheless stretched his hand to greet her, but before she made any move, a man came out of the car and asked her "Huyu ndiyo yule mjinga amekwaribia jina" (Is this the fool who has disparaged your reputation?). Then Eunice immediately demanded to know why the Accused was scandalizing her that she had HIV and AIDS. When he turned to the man he found a gun trained at him and the man asked why the Accused was spoiling his wife's name. Accused jumped and held Eunice for cover. He then heard two gunshots and realizing he was in danger, he shot the man who fell as he held his head and then got up and sat on the driver's seat. Eunice dashed for that man's gun as the Accused also dashed for it. She got it and held it onto her stomach. In the course of the struggle he heard two gunshots and Eunice fell down. He assumed she had accidentally shot herself.

I have already discounted the Accused's contention that Eunice accidentally shot herself. The issue now is whether in the circumstances of this case the Accused acted in self defence and if so whether or not he used excessive force.

In view of the pathologist's evidence that Eunice was in an upright position and defending herself when she was shot and also the evidence of the ballistic expert, Ag. SSP Johnson Mwongela, PW19, that the finger-ring recovered from Eunice's body had a circular bullet hole with an upward trajectory, I reject PW1's evidence that Eunice was shot in a kneeling position. In the same vein I also reject her evidence that David did not come out of the vehicle and that he was shot through the window while he was seated in the car. If that was the case, with no bullet holes found on the car as IP Isaiah Ngetich, PW15, and IP Josphat Kisingu, PW23 said, David could only have been found with bullet wounds on the head and not with others on the shoulder, chest and especially on pelvis as CI Virginia Kadenge, PW12, said.

In any case it was not normal for David to have remained in the car when Eunice was pleading with the Accused to spare her live and continue sitting there and wait to be shot after Eunice had been shot. I agree with PC Peter Ngetich, PW17, that PW1 told him that the woman who was shot also had a gun. His concession that he did not concern himself with that gun is proof of the direction the police investigations took after the shooting incident in this case.

As the other witnesses went to the scene after the shooting incident, other than the evidence of PW1, we only have the Accused's account of that incident. That leaves me with no option but to make reasonable deductions from the available circumstantial evidence and as I do that, I have taken into consideration the fact that the Accused being an interested party may have lied to safe himself.

As we know from Republic – Vs – Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20 "Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."

There is no evidence that Accused armed himself to kill or even do grievous harm to either of the deceased persons. He was issued with a firearm for use in the course of his normal duties in event of need. He had no problem with Eunice. There is also no evidence that he knew David or had even heard of him previously. As he said, he learnt much later that day that the man he had shot was David Too, the MP for Ainamoi Constituency. In the circumstances, I find that Accused had no reason to kill either of them. I also find neither Eunice nor David had any intention of killing or even doing grievous harm to the Accused. They were simply annoyed by the rumuors that they attributed to the Accused that Eunice had contracted HIV and AIDS from her late husband and wanted to scare him off from further spreading them. That is why neither of them fired even one shot.

But why did the Accused shoot the deceased persons?

As I have said, I do not agree with the Accused that Eunice accidentally shot herself while he was struggling to wrestle David's gun from her. The evidence of Ag SSP Johnson Mwongela that only Accused's gun was fired at the scene, demolishes that contention. From the evidence on record what I find happened is that Accused's fellow police rider who Accused said called him, informed him that he had seen Eunice in her car with a man. Accused who was already betrothed to her and had even bought that car jointly with her became jealous and followed them to West Indies as PW2 told PW6. They stopped and Eunice came out of the car. Accused then rode there but she refused to greet him. Instead she whipped out her gun that PW1 told PW 17 she saw her with and demanded to know why the Accused was scandalizing her that she had HIV and AIDs. Before he could even respond, David came out of the car with a gun and asked Eunice if the Accused was the fool who had been scandalizing her. Accused shot both of them both of them before either of them fired any shot.

As Accused said, David then entered the car and Accused, fearing that he may have gone for a weapon, shot him again in the car and he collapsed on the steering wheel, a position that PW2 found him in. That also explains the bullet marks and the cartridges that IP Isaiah Ngetich, PW15, the Scenes of Crime Officer who took photographs at the scene, found in the car and the drenching with blood that he saw on the driver's seat. The evidence of PC Philip Mutisya, PW10, that he saw a pistol on Eunice's waist when they were putting her into their vehicle to rush her to hospital and that he is the one who removed it from her waist at the hospital and handed it to PC Ndungu cannot be true. Equally untrue is PW2's account that he removed a gun from Eunice's waist and gave it to police officers at the scene. The true position is that, as the Investigating Officer, Josphat Kisingu, PW23 said, PW2 recovered a gun at the scene which he gave to the police and PW10 recovered Eunice's gun also at the scene.

As I have said, PW 17, PC Peter Ngetich's concession that he did not concern himself with the gun that PW1 told him Eunice had, tells us a lot about the investigations the police carried out with regard to the number of guns that were at the scene. I agree with Accused's counsel that Eunice had two guns at the scene, the pistol Ex. 4 and the G3 rifle she had been issued with on 29th January, 2008 which must have been in her car. As there is no evidence that David had a gun of his own, I find that the gun he came out of the car with when he heard Eunice shouting at the Accused is the is the same G3 rifle. It was recovered from the scene but the police realizing the blunder they had made of issuing Eunice with two guns, they hid it. Otherwise why would the police have wanted to tamper with the entry, in the Firearms Register, relating to the date when the G3 rifle was returned as PW23 conceded if that were not the case?

The sum total of all this evidence is that faced with two armed people, who he thought wanted to kill him, I find that Accused was justified in thinking that he was in imminent danger and was provoked to shoot both the deceased in self defence.

Adequate provocation, especially when coupled with self defence, can reduce a murder charge to manslaughter- Mbugua Kariuki Vs Republic, [1976-80] 1KLR 1085 and Republic Vs Gachanja, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words:-

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

In Mancini Vs Director of Public Prosecutions, [1941] All ER 272 the English House of Lords held that not every kind of provocation, however, will reduce murder to manslaughter. To have that effect the provocation must be such as to temporarily deprive the person provoked of the power of self control, as a result of which he commits the act which causes the death. The test to be applied therefore is that of the effect the provocation would have on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary and reasonable person to act as he did. And before provocation becomes an operative factor in a murder trial, however, the prosecution must have proved beyond reasonable doubt, that murder, provocation apart, had been committed by the accused—Stingel Vs R. [1991] LRC Crim) 639.

In this case, as I have said, faced with two armed people I find that Accused was temporarily deprived of the power of self control as a result of which he shot them. However, considering the fact that accused is the one who followed the deceased to West Indies Estate and that neither of the deceased fired even one shot, I find that Accused should have shot them on the arms or legs to disarm them and not on the head, chest and abdomen as he did. In the circumstance I find that Accused used excessive force in shooting them on the said spots.

For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the Accused of the charge of murder but convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED and delivered this 29th day of October, 2009.

D. K. MARAGA

JUDGE.