



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 138 of 2003

REPUBLICPROSECUTOR

-VERSUS-

DAVID MUGAO KAJIITA.....ACCUSED

JUDGEMENT

I. THE BACKGROUND TO THE TRIAL ON A MURDER CHARGE

In the charge information from the office of the Attorney-General, dated 28th August, 2003 the offence in question is stated as murder contrary to section 203 as read with section 204 of the Penal Code (Cap.63). The particulars are that *David Mugao Kajiita* (the accused), on 18th December, 2002 along Kabiria Road, Riruta within Nairobi Province, murdered *David Mukuria Ngige* (the deceased).

Plea was taken before *Osiemo, J* on 29th September, 2003; the accused pleaded not guilty. The matter was thereafter mentioned several times: before *Ombija, J* on 3rd November, 2003, again on 4th November, 2003, again on 5th November, 2003; before *Rawal, J* on 11th February, 2004; before *Osiemo, J* on 16th February, 2004; before *Rawal, J* on 10th May, 2004, and again on 11th May, 2004; before *Ombija, J* on 16th September, 2004. On 30th September, 2004 hearing began before *Ombija, J* who took the entire testimony of the first prosecution witness. The learned Judge after a mention on 26th January, 2005 proceeded to hear the testimony of PW2 on 27th January, 2005. He also heard PW3 and PW4. It then turned out, at this stage, that the accused had made an application (Miscellaneous Application No. 309 of 2005), which was heard and, in the outcome, the proceedings so far recorded in the instant matter were declared a mistrial. There were mentions before *Ombija, J* on 28th June, 2005; before *Rawal, J* on 28th July, 2005; before *Mugo, J* on 4th August, 2005; before *Rawal, J* on 23rd November, 2005; and before *Apondi, J* on 18th January, 2006 and 19th January, 2006.

The matter came up before me on 15th February, 2006, for trial *de novo*; and on that occasion I named as the assessors *Ms. Peninah Maluli*; *Mr. Peter M. Wanda*; and *Mr. Christopher N. Weru*.

Hearing began on 15th February, 2006 with PW1, *Michael Ndung'u Ngige* who was sworn and, so far as is material, testified as follows.

II. TESTIMONIES OF PROSECUTION WITNESSES

PW1, who was brother to the deceased, is a lorry driver, and lives at **Waithaka**. At 10.00 pm he was at his home, in the company of a friend, one **Paul Ng'ang'a** (PW4). He then escorted **Paul Ng'ang'a** up to Kabiria Road, and at that point the two saw somebody walking along towards them, and this unknown person was carrying a carton on his shoulders. He approached the two more closely, as the two were now standing at the gate – which appears to be on Kabiria Road, and it is the entry point into PW1's residential compound. There is a neighbouring residential compound separated by another road from the compound where PW1 lived, and the gates to the two compounds, from PW1's evidence, are close to each other.

It was PW1's testimony that when the stranger got quite close to him and **Paul Ng'ang'a** he (the stranger) turned to urinate "next to our fence." PW1 demanded to know why the stranger was using that particular spot as if it were a latrine. PW1 knew, of this stranger, that "his home was next to ours": this would suggest some familiarity with at least the appearance of this "stranger". How did the "stranger" respond? In PW1's words: "He said we wait while he was completing the act of relieving himself." What then happened? There is conflicting evidence on this point; which suggests that in this scenario, there is, concealed, a fundamental fact to be determined – which will inform the judgement of the Court.

PW1 averred: "I waited for him to finish [relieving himself]. Then he got into his house, which he had rented. He came out with a bow and arrows. He was saying he would kill somebody. He was very angry. He came close to us. We asked him in what way we had annoyed him."

Then what happened, according to PW1? In his words:

"We all began making noises as we asked questions. His wife came out to see. The two of them went back into the house. Neighbours came out because of the noises. We began talking to the neighbours. After some ten minutes, while we were at the road-side, we heard my brother [deceased] screaming in pain. [And] when we checked, we found that an arrow had been shot into him, I think it was on the right side."

And then, what action did PW1 take? In his own words:

"Later we began to take action. But the man with arrows chased everyone away. The people went away. My brother was lying down. The man with the arrows disappeared."

A neighbour helped out in taking the injured man to hospital; PW1, however, remained behind to work with others in tracing the one who had assaulted his brother. How did the search go? Again in the words of PW1:

"We did not find him. So we went to Riruta Satellite Police Station. But on our way there, we met three Police officers at work, together with the one who assaulted my brother, **David Mugao**."

It was PW1's testimony that the Police officers had returned to the scene of the incident with the whole crowd. The officers made observations, and later arrested **David Mugao**, and took him to the Police Station. At this moment, PW1 testified, he was in the company of his friend **Paul Ng'ang'a** (PW4) **George Kambo** (PW2) and one **Patrick Kariuki** (not called as a witness). Later, at about 3.00a.m. PW1 and his friends received word that **David Mukuria Ngige** had died in hospital.

PW1 testified that he had known the accused for some six months. Although the incident had taken place at 10.00 pm, there was some lighting around – moonlight, as well as security lights. He testified that when the deceased screamed in pain, he heard the accused order everyone to disperse, as he would strike another person with an arrow.

PW1 testified that "no other person had any weapon at the place where the incident occurred; but **David Mugao** had an arrow, with a metal head and a wooden shaft." He said he had seen the arrow first when the accused came along with it, and that the arrow together with a bow were hidden next to the road. It was several arrows, though PW1 did not know how many they were. PW1 testified that the accused was carrying the arrows in one hand, and the bow in the other hand. He said: "If I saw the arrow

I would be able to identify it”; he was shown a bow which he identified as the one (marked MFI 1).

PW1 testified that one of the arrows had been shot into the body of the deceased, and that he, PW1, is the one who pulled it out of the body of the deceased, and when he did this, the metal arrow-head did not come out. He identified one arrow with its head missing, as the one he had pulled out of the deceased’s stomach. (This was marked MFI 2).

PW1 testified that the deceased had not been in his company, and only came to the scene, with other people, during the altercation which took place at the entrance to the two compounds, along Kaberia Road. It was his testimony that the deceased was unarmed. He averred that he knew of no reason why the assault on his brother took place.

What did PW1 have to say when cross-examined by learned counsel **Mr. Mwaura**? He said it was only some 30 – 40 metres from his house to the gate, on Kaberia Road, where he had escorted his friend **Paul Ng’ang’a** (PW4). The accused was coming from PW1’s right hand side, and PW1 and PW4 had hoped he would go straight ahead, as they had intended to turn to their left, along Kaberia Road; they stood to enable the accused to pass, as they were concerned with their own security. PW1 recognized the accused as he got closer, and he then stopped and relieved himself by the fence, facing PW1 and PW4 as he did so.

PW1 testified that there was no warning displayed, prohibiting urinating along the fence in question. PW1 testified:

“When we asked him why he was urinating on [our] fence, he said we should wait, he would be back. It took him some five minutes to go into his house and come back. His house was only 7 – 10 metres from the place where we were standing.”

According to PW1, the accused then returned, “ready to shoot; his equipment was being tested and readied for action.” At that time, the scene attracted a crowd; in PW1’s words: “There were many people who came out, I could not have known all of them.” In that crowd was the deceased, whom PW1 and **Paul Ng’ang’a** (PW4) had left at home. It is during the altercation, that PW1 saw the deceased at the scene.

PW1 testified that he did not himself see the shooting take place. At one moment, when the deceased had already been shot, PW1 could see the accused in front of him, and the deceased was lying on PW1’s right-hand side; it is at this moment that he pulled the arrow from the body of his brother.

Learned counsel reminded PW1 of his statement recorded with the Police, thus: “He [presumably the deceased] approached the accused person from behind; and he was shot with an arrow.” That statement, PW1 told the Court, was inaccurate.

PW1 testified that the distance from the scene of shooting to the house of the deceased was five metres. The witness went on to testify:

“The shooting took place within the compound of the accused. We had to get in [i.e. into the accused’s compound] so that we could follow up on [the complaints in the altercation]. The house of the accused is next to the road.”

How did PW1 and his group get into the compound where the accused’s house was situate? In PW1’s words:

“We got into his compound after his wife came along and took him [the accused] into his compound. We followed the accused into the compound.”

After pulling the arrow-stick from the body of the deceased, he had placed it “close to where the shooting took place, some seven metres from the house”, and he is the one who showed the Police officers where

this item had been kept. He had also told the Police officers that the accused had disappeared after the shooting. But then he contradicted himself when he said: “When I met the Police [officers] they had the accused person already. He was not carrying anything. The Police were armed.”

Learned counsel **Mr. Bifwoli**, for the prosecution, elected not to re-examine PW1, for the purpose of clarifying any aspect of the testimony which might appear as a contradiction.

PW2, **George Kambo Waithaka** was sworn and testified that he is 21 years old, is a student at Kiwan College, and lives at Kabiria in Dagoretti. When the incident leading to this trial took place, on 18th December, 2002 at 10.00 a.m. he was 18 years old. At that moment PW2 had left his home and, just to have a walk, went 20 metres away, to the road- Kabiria Road. At that moment the accused passed in front of him, along the road, and turned to the fence and urinated. PW1 (**Michael Ndung’u Ngige**) inquired of the accused why he was relieving himself at that place. PW2, at that time, was in the company of both PW1 and PW4. The accused’s response was: “Wait for two minutes”; and he ran into his house which was some 10 metres away; he came out with a bow and arrows, towards the road. An altercation ensued; accused’s wife sought to know where he was going; neighbours converged at the scene; the deceased also came to the scene.

What followed? In the words of PW2:

“...I did not see it; but I heard that he [the deceased] had been hit with an arrow. The deceased was shot while he was on the road.”

Here is a clear contradiction between the testimony of PW1 and that of PW2. PW1 said the deceased was shot inside the accused’s compound; PW2 now says he was shot while he was on the road-presumably Kabiria Road.

PW2 saw the deceased lying down, blood oozing from his stomach. At the time he saw the body (which must be after PW1 saw it), the arrow had been pulled out. PW2 says: “I did not see the removal action for the arrow; I only heard that his brother had removed it.”

Did PW2 see the accused? Did he, by any of his senses, perceive the accused’s role in the injury to the deceased? In his words:

“I did not see the accused after the incident. He had run and entered his house; I saw him returning to his house; he was running.”

There is a clear fallacy in this testimony. PW2 never saw the accused fire the fatal arrow. When did he see the accused running and entering his house? And what did he see the accused running away from, if he is certain he did not see the accused shoot the arrow? Was it PW2’s perception that the shooting of the arrow had taken place outside in the open, in the presence of the crowd of neighbours? If there will be no reliable evidence to corroborate PW2’s words “He had run and entered his house; I saw him running into his house”, then they will be lacking veracity.

After finding the deceased injured, PW2 ran back home and got his father, one **Peter Waithaka**, to bring his motor vehicle and take the injured to Kenyatta National Hospital, and upon arrival at the hospital, he was pronounced dead. The doctor asked **Peter Waithaka** and his party (which included PW2) to report to the Riruta Satellite Police Station; and there, PW2 saw the accused, his bow and arrows being now with the Police officers.

At the *locus in quo*, at the material time, there had been security lights, and PW2 had no difficulty identifying the accused, whom he had known for several months since the accused came to live in that neighbourhood.

PW2 testified, as PW1 too had done, that there had been no known enmity between the accused and the deceased, and so there was no apparent reason for the accused to have shot the deceased with an arrow.

On cross-examination by learned counsel **Mr. Mwaura**, PW2 testified that the fence where the accused had urinated was the property of the family of the deceased; and that this was the reason for the quarrel which took place at 10.00 pm, and which attracted many neighbours to the scene.

PW2, just like PW1, testified that the deceased had not been at the scene when the altercation began; indeed, in PW2's words, "the first time I saw the deceased, he was lying on the ground."

PW2 again contradicted the testimony of PW1 on the exact scene of the altercation and of the shooting. He said:

"The deceased was lying along the minor road [i.e. outside the accused's compound]. All things took place outside the compound. Injury [took place] along the road, outside the compound."

PW2 confirmed that he was at all material times around the place where the altercation had arisen, but he never saw the shooting of the deceased take place – notwithstanding the good state of lighting which obtained. In his words:

"When I saw the deceased, he was lying face upwards. I had not left the scene between the time he was shot and the time I saw his body."

But, does PW2 know the time the deceased was shot? From his own evidence, the answer is no. Therefore when he says he never left the place between the time of shooting and the time he saw the deceased lying down, he misdirects himself and fails to say the truth: the truth can only be that, from the time he witnessed the accused relieving himself on the fence, to the time he saw the deceased lying down, he had constantly been present at the scene. And this raises a significant point, for later consideration: what made it so difficult to see the normally tell-tale action of shooting an arrow at a human being? Did he even hear any cries of agony from the dying person?

Notwithstanding the unclear issues emerging from PW2's testimony, learned State Counsel, **Mr. Bifwoli** opted not to re-examine.

PW3, **Dr. Jane Wasike Simiyu** is a pathologist at the National Public Health Laboratories, and is deployed at the Nairobi City Mortuary. She had conducted the autopsy on the body of the deceased. The body, she testified, was that of a 26-year-old African male, of good physical and nutritional status. On external examination, PW3 found the body to have a penetrating abdominal wound, on the right hypochondrion; and there were torn intestines at the site of the penetrating wound. On internal examination, PW3 found injuries to the digestive system, with a tear on the intestine. She found a metal arrow-head, measuring two inches in length, lodged in the spine, at the level of thoracic spine number 12 and lumbar spine number 1. She extracted it and handed it over to **Police Constable Samuel Wambugu** (PW9). PW3 found that the arrow-head had entered the body of the deceased from the right-hand side. She formed the opinion that the cause of death was abdominal and spinal injury due to a penetrating sharp object. She testified that the arrow-head she had recovered from the body of the deceased, was similar to the one in Court (marked MFI4). PW3 took blood samples from the body of the deceased, and filled in and signed the post-mortem examination form, and prepared a report which she duly signed (Prosecution exhibit No.5). For post-mortem examination purposes, the body had been identified to PW3 by **George Ngige Mukuria** (PW6) and one **Eliud Ndichu Thabira** (not called as a witness), in the presence of **Police Constable Samuel Wambugu** (PW9).

On cross-examination, PW3 testified that the arrow-head she had extracted from the body of the deceased was about two inches long, but was a continuation of a longer metal strip which in total measured about 6 inches. She could say that the arrow-head had hit the deceased from the right-hand side, though she was not certain as to the angle of the arrow at the point of impact. She could not also ascertain the velocity at which the arrow-head had hit the deceased; but she was certain it had pierced through bone, and lodged itself in soft tissue.

PW4, **Paul Ng'ang'a**, was sworn and testified that he lived at Kabiria Road, Dagoretti. At about 8.00

pm on 18th December, 2002 he went to visit PW1, who is his neighbour. They stayed together until they had supper, and then at 10.00 pm, PW1 escorted him up to the road (Kabiria Road). PW4's testimony coincides with that of PW1, that upon reaching the road, the two saw somebody coming towards them, along the road, and carrying a carton. As this person came closer, he stopped, and relieved himself on the fence. The man got angry when PW1 demanded to know why he was urinating in that place. When PW1 told the man that he could not be allowed to urinate on the fence, he asked PW2 and PW4 to "wait for two minutes". The man went, but returned with a bow and arrows, and tested them, as if he was going to shoot. And what did PW4 and his colleague do? In PW4's words: "We felt threatened. We ran away. At that moment there was a commotion; people heard noises, and they came out. The deceased was among them."

PW4's evidence is in some measure inconsistent with PW2's evidence. Although PW1, PW2 and PW4 are three people who PW2 says challenged the accused together as he urinated in the fence, it is only PW4 who now says the accused returned with so much threat, that they ran away. PW2 had testified that he and his colleagues – who must include PW1 and PW4 – remained at the scene of altercation on Kabiria Road, all-consistently until the time they now saw the deceased lying down. PW4 also does not (at first) say, as PW1 does, that the irate accused who came threatening PW1, PW2 and PW4 with a bow and arrows, was pacified by his own wife who took him back into the house; so the impression PW4 leaves is that the accused continued with his threats, chased PW1, PW2 and PW4 away and remained at large, and in this condition came across the deceased and shot him with an arrow. Is this true? This will become clear in the course of this judgement.

According to PW4, the deceased was shot near the gate of the plot next to PW1's gate, in his words "eight-to-ten metres from where we were." This is not a clear statement on whether the deceased was shot in the compound where the accused lived, or outside. PW2 had testified that the accused's house was some 10 metres from the gate on Kabiria Road; the picture emerging from PW4's testimony would be that the shooting of the deceased was right at the site of the accused's house; this, moreover, would be consistent with PW1's evidence – which is quite clear, that the shooting took place right within the compound where the accused lived.

Did PW4 see the shooting take place? He does not say so unequivocally. But his testimony on this point should be quoted:

"When the shooting took place, we feared we might be shot. For some time we did not know who had been shot... I believe it is the accused who shot the deceased."

I have to conclude on this point, that PW4 is not being a truthful witness. For he earlier said that he and his friends had run away; and only later did they find that the deceased had been shot. Now he says "when the shooting took place, we feared...." Is he claiming he saw the shooting take place, and then he developed fear? His evidence on this matter lacks the plainness which is the eternal distinguishing mark of *truth*. I find that his account on that question is not truthful.

All the same, PW4 has other testimony which merits noting. He says there was a crowd at the scene; though he is not saying whether this is a crowd that formed only *after* the shooting, or it is the crowd testified to by both PW1 and PW2 – which formed at an earlier stage, soon after the altercation started following PW1's challenge to the accused who was urinating into the fence. I would take judicial notice that, in only a short span of time, the large crowd that had come along to the gate on Kabiria Road, would not have dispersed; and since events from then progressed fast, to the shooting of the deceased, it must be that same crowd, which had to deal with the consequences of the shooting. So, this must be the crowd PW4 has in mind when he testifies:

"A crowd gathered at the scene. The people went to the house of the man who [had brandished] arrows before the shooting. There was a hole [on the wall]. The arrow [was shot] from the house. The hole was near the window – on the covering metal sheets. The hole was made by the crowd. The arrow came from the house through the hole."

PW4 is clearly saying something new, and important, and which probably contradicts some of his averments already referred to. He is saying that a crowd went up to the accused's house, and cut a hole on the accused's metal-sheet walling; and this act on their part, occasioned the reaction of the occupant, by firing an arrow through the very same hole which a member of the crowd had cut, and this arrow careered into the body of the deceased. This will obviously be a material fact, in the overall assessment of the evidence in this case.

How did the deceased happen to be in the proximity of the hole on the metal-sheet wall cut by a member of the crowd? These are PW4's words: "The deceased came with the crowd. I was seeing him. We were standing by the gate. We were on the inside."

PW4 is saying that he and his friends (presumably PW1 and PW2) remained close to the gate, on Kabiria Road; but a crowd, which included the deceased, reached the accused's house (obviously by going through the compound gate); that this crowd attacked the accused's house and cut a slit on the wall metal-sheeting; and that this crowd was met with a fired arrow which exited through that same hole, and struck the deceased fatally.

So, was the accused inside his house, or outside? PW4 has testified that he and his friends had run away, fearing that the accused would shoot them with arrows. Was there truly such a fear? Was the accused inside his house, or was he on the prowl outside, with bow and arrows, seeking potential victims?

PW4 says there was a crowd, in effect, making an assault on the accused, well *before* the incident in question. Was PW4 able to scrutinize what all the members of the crowd held in their hands? That is most unlikely; but PW4 says – just as do PW1 and PW2:

"the accused had come with a bow and arrows. No other person had any weapon. He came out with the bow and arrow, and aimed; but he did not shoot."

PW4 is sure that the accused never shot an arrow at anyone while he was outside his house; he testifies:

"He came out with the arms, and aimed. He did not shoot. A woman – I think his wife – held him and took him into the house. I never saw him outside."

PW4 relates these events as he reiterates that he, indeed, saw what was happening on the material night. Just as (partly) with PW1 and PW2, PW4 testifies:

"The accused was inside the house when he shot. I did know the accused. He rented a house belonging to [PW1's] grandfather. I had been seeing him around for some three months or so. When he came out with a bow and arrows, I saw him. There were security lights and moonlight. With the bow and arrows, he came about seven metres from us."

It was PW4's evidence that he never saw the accused again after his wife took him away to his house; "he never came out again."

On 21st February, 2006 learned counsel **Mr. Mwaura** cross-examined PW4, who further testified as follows. When, on the material night, the accused met him on Kabiria Road, he (PW4) was in the company of PW1 alone; he did not see PW2 (**George Kambo Waithaka**) until the time of the rowdy altercation which drew crowds, ahead of the arrow-shooting incident. This is not entirely consistent with the evidence of PW2, who testified that he went to Kabiria Road and found PW1 and PW4 together, and that it is *then* that PW1 challenged the accused who came along and urinated by the fence. PW4 said:

"**Ndung'u** (PW1), the accused, and I had a severe altercation; the accused told us to wait for two minutes."

What would this *severe altercation* have been? Is this incident, something that attracted crowds and resulted in a major confrontation, at all reasonable grounds for a physical attack on the house of the

accused, which ended up having its metal-sheet wall being sheared open – all on account of the accused having urinated by the fence, outside any residential compound and along Kabiria Road?

In the cross-examination, PW4 remained steady, as to the exact spot where the deceased was shot: “When I saw the deceased shot, he was lying next to the gate, inside the compound.” PW4 also restated:

“I had said the accused was inside the house when the deceased was shot. I did not see the arrow shooting the deceased. Members of the house were hitting at the house of the deceased. I don’t know what they were using. It was a crowd of about 30 people.”

PW4’s testimony is not always consistent, and in certain respects contradicted his own statement made to the Police officers. He had testified that upon the accused brandishing and testing his bow and arrow, directed at those at the gate, he and PW1 and PW2 ran away, to avoid harm. But in his statement to the Police, which learned counsel put to him in cross-examination, he had said:

“The suspect locked himself inside his house. **Ndung’u** [PW1] started banging the metal-sheet house. **Ndung’u** was banging the house, but I don’t know what he was using...After the arrow-shot, the deceased fell upon **Ndung’u** [PW1]. I saw the arrow. **Ndung’u** [PW1] is the one who removed the arrow from the body of the deceased. I was at the gate.”

PW4, during cross-examination, maintained that on the material evening, nobody, out of the large crowd of 30 who were attacking the accused’s house, was armed; only the accused was; and he added: “There was light. I saw nobody else armed.”

PW4 had recorded in his statement to the Police that when the deceased was shot, he (the deceased) fell on **Ndung’u** (PW1). PW4 testified that: “I saw **Ndung’u** (PW1) removing the arrow.” This can only mean that PW4 was not as far away from the scene of the shooting as he claims to have been; if the shooting, as it appears in PW4’s testimony, took place through the hole cut open on the accused’s wall by somebody in the crowd, then both the deceased and **Ndung’u** (PW1) must have been *just next* to the accused’s house, within the accused’s compound; and PW4 too must have been right there, for him to notice that the deceased had been shot and had fallen on **Ndung’u** (PW1) who then removed the arrow. This, precisely, is the picture which would emerge from the following testimony of PW4:

“The body [of the deceased] was inside the landlord’s compound. The arrow [removed by PW1] was dropped inside that compound; the body of the accused lay 4 – 8 metres from the house of the accused.”

Upon re-examination by learned State Counsel **Mr. Bifwoli**, PW4 reaffirmed that “the deceased was shot within the compound [in which the accused lived].”

PW5, No. 65323 **Police Constable Shem Ondiek Mogaka** was sworn and gave his testimony on 21st February, 2006. He testified that he is a scenes-of-crime officer attached to the C.I.D. Headquarters. On 20th December, 2002 at 11.00 a.m. he had met **Police Constable Wambugu** (PW9) at the Nairobi City Mortuary, where PW9 showed him the body of the deceased; the body had a stomach injury, and was dressed in white trousers and a red T-shirt. PW9 requested the witness to take photographs of the deceased, who was believed to have been murdered. PW5 took the following photographs: photo No.1 – general view of the deceased; photo No. 2 – close-up view of the stomach injury; photo No. 3 – very close-up view of the stomach injury; photo. No. 4 – close-up facial view of the deceased; photo.No.5 – close-up view of the tag bearing mortuary admission number, 3342 attached to the foot of the deceased. The witness thereafter proceeded to the *locus in quo* – Kabiria in the Riruta area of Nairobi; for the Investigating Officer had represented that the shooting had taken place at that place. The Investigating Officer (PW9) led PW5 to the metal-sheet houses set in one compound, at Kabiria; the perimeter fence of the compound was constructed of wooden off-cuts. PW5 found in one of the houses a cut on the metal-sheet wall – and this was on the bedroom side. Closer to the door to this house, on the metal-sheet walling, there were significant dents. At this house, PW9 took the following photographs: photo. No. 6 – general view of the accused’s home, and where the incident occurred; photo. No. 7 – close-up view of the compound where the incident occurred; photos. No. 8 and No.9 – close-up view of the bedroom side

where the metal-sheet walling had been cut, leaving a loose, open flap; this photograph was taken because the allegation brought to PW5 was that “the person who shot the deceased was inside that bedroom”; photo. No. 10 – close-up view of the cut on the metal-sheet walling of bedroom-side; photo. No.11 – close-up view of the damaged metal-sheet walling at the side of the main door; photo.No.12 – very close-up view of the damage to the wall metal-sheeting next to main door. PW5 later supervised the processing and printing of the twelve photographs; and he prepared his report (prosecution exhibit No.7) (photo No. 9 – exhibit No.6; all the other photographs – exhibit No.8).

Learned counsel **Mr. Mwaura** cross-examined PW5, who then gave further evidence as follows. The facial view of the deceased had blood stains; and there were old scars on the face. The Investigating Officer showed PW5 the place in Kabiria where the incident had taken place, but did not pinpoint the spot where the body of the deceased had been found. PW5 would not say how the several cuts on the metal-sheet walling on the accused’s house had been made. PW5 found on the bedroom side, not dents, but a straight cut on the wall sheeting; and it was not clear to him whether this cut had been made from the inside, or from the outside; it was a new cut, as the edges of the metal flap were fresh. Next to the door, the metal-sheet wall had dents, but no hole; and the dents had been made from the outside. These dents had been made with blunt objects, and some of them bore slight cuts. The cut on the bedroom walling left a significant flap which could be pulled back, to enable one to have a clear view. The dents on the front walling appeared to be about one metre from ground-level, and they were freshly made.

PW6, **George Ngige Mukuria**, was sworn and gave his testimony on 21st February, 2006. He is a farmer in the Dagoretti-Waithaka area of Nairobi, and the deceased was his son. He did not know the accused. At about 10.00 pm on 18th December, 2002 he was awakened by loud noises, as he slept. When he inquired, he was told that one of his children, **David Mukuria Ngige** had been shot with an arrow, and had at this time, already been taken to hospital. Those who took the deceased to hospital returned at about 3.00 am, and informed PW6 that his son had died on the way to hospital. PW6 went to the Nairobi City Mortuary on 23rd December, 2002 when the post-mortem examination was being conducted on the deceased. He identified the body of the deceased to the pathologist, who then conducted the autopsy, recovering an arrow-head from the body.

On cross-examination by learned counsel **Mr. Mwaura**, PW6 testified that on the material night there had been *screams* and *yells* at the scene of the shooting, which woke him up as he slept. Many people, including PW6’s wife and children were screaming. By the amount of noise, PW6 had concluded that there was a *large crowd* at the gate; and in the circumstances, he decided not to go out, as he awaited reports from the hospital. At the mortuary, on 23rd December, 2002 PW6 saw the arrow-head which had been recovered from the body of the deceased; it was kept in an envelope. The witness did not see the whole arrow.

On 21st February, 2006 PW7, **Anne Wanjiru Kinyanjui** was sworn and gave her testimony. PW7 is the wife of PW1, and the deceased was her brother-in-law. She had been in her house with her husband and with PW4; and at about 10.00 pm, PW1 escorted PW4 towards the gate of the compound. At that moment PW7 left the house, to go to toilets – which apparently were not part of the house. As she was at the toilets, she heard a *noisy quarrel* – only some 20 metres away. The deceased was at that moment asleep in his house; and because of the noises, PW7 woke him up, by calling his name out loudly. The deceased dressed up, and joined PW7 – and they approached Kabiria Road, running. She left the deceased going up to the road; she returned to the house to fetch a torch: it was her evidence, “I didn’t know why I went for this torch. I found I was running back for a torch; somebody had mentioned a torch. I found a torch and returned to the road. I found him lying down, blood oozing from his body.”

PW7 reported this matter to her family; and screams began – and this may be precisely what awakened PW6 in his sleep. It is PW7 who conveyed the bad news to the family – that “**David** had fallen, and blood was gushing from his body.” She joined the group looking for transport to take deceased to hospital; they ultimately got transport from PW2’s father, (the late) **Peter Waithaka**.

PW7 did not go with the deceased to hospital; she remained with the crowd at the gate, on Kabiria

Road. From that position, PW7 made an important observation; in her words: “Later I saw **Kajiita** [the accused] going with the Police. They were carrying a bow and arrows.”

Of the accused, PW7 testified:

“**Kajiita** had rented a house from my granny. I had met him and I knew him. I think I had known him for months before the incident.”

Where did PW7 find the body of the deceased, when she saw it only a few minutes after the deceased had left her as he went to the scene of altercation? In her words:

“When I returned with the torch, I found the deceased down. The body was near the gate – on the outside. The gate belonged to **Waithaka**. The house of the accused is inside the compound to which that gate leads.”

So, again, there is an inconsistency on the *place* where the deceased fell, in relation to the testimonies of other witnesses – notably PW4.

On cross-examination by learned counsel **Mr. Mwaura**, Pw7 testified that from the time her husband (PW1) had left to escort PW4, she never saw him again, until after the shooting of the deceased with an arrow. When she heard the querulous noises from the gate, as she was in the toilet, PW1 had not returned to the house. She had left with the deceased to see the cause of the uproar, and she thought it was the deceased who had asked for a torch; she brought it, but as fate would have it, she never spoke to the deceased again. PW7 confirmed the testimony of other witnesses who were at the scene, that the scene was close to the road, where there was electrical lighting, and visibility was good. In her words: “When I got to the scene, I saw [the deceased] lying down. There was enough light....He was lying face upwards.” She said she knew the house of the deceased, and that it was located just next to the gate which is on the minor road. In her words: “There is a fence, separating the [accused’s house] from the gate – a wooden fence. The deceased was lying outside the wooden fence.” The effect of this affirmation is that the body of the deceased was lying *inside* the gate, though outside the wooden fence.

Notwithstanding the apparent inconsistencies in the testimony of PW7, especially with regard to the spot where the deceased was found lying, following the arrow-shooting incident, learned State Counsel **Mr. Bifwoli** elected not to re-examine.

PW8, **Jeremiah Kavita Munguti** was sworn and gave his testimony on 29th May, 2006. The witness has 25 years of experience as an analyst with the Government Chemist, and holds the BSc. Degree of the University of Nairobi. On 23rd December, 2002 he had received from No. 67228 **Corporal Jacob Longojine** (not called as a witness) of Riruta Police Station several items, for analysis: (i) Item X-1 – blood sample of the deceased, labelled **David Mukuria Ngige**; (ii) Item Y1 – an arrow-head; (iii) Item Y2 – four complete arrows; (iv) Item Y3 – an arrow-stick; (iv) Item Y4 – a rusty *panga*; and (v) Item Y5 – a bow with white string. These items were to be examined for blood stains, and for comparison of blood samples with the blood profile of the deceased.

PW8’s findings were as follows: (i) the blood sample of the deceased (Item X-1) was of the Group A category; (ii) the slightly-stained arrow-head (Item Y1) bore human blood, Group A; (iii) there were no blood stains on the four complete arrows; on the arrowstick; or on the bow. From these findings PW8 gave an opinion as follows: (i) the blood stains on the arrow-head (Y1) matched in group profile the blood sample of the deceased; (ii) this blood stain could have come from the deceased, after the injury which he sustained. PW8 prepared his report which he duly signed (prosecution exhibit No.8). The items for analysis had come to him together with an exhibit memo form.

PW9, No. 71136 **Police Constable Samuel Wambugu** was sworn and gave his testimony on 29th May, 2006. In December, 2002 he had been attached to the Riruta Police Station. He was on duty on 18th December, 2002, having reported at 7.00 a.m. He was doing crime stand-by duty, working with a

colleague, **Cpl. Jacob Longojine** who was the station Duty Officer for that day. The two were doing foot patrol at 10.00 pm that evening, and were somewhere along Kabiria Road, in the Riruta area. Also in their company was **P.C. Andrew Mukuyu** (not called as a witness), who would have operated as the Police driver for the station. They had come from Kabiria Village, and were on patrol along Kabiria Road, as they went towards the Riruta Police Station. As they walked along, they met a young man, the accused herein. He was carrying a small carton. PW9 and his colleagues stopped the accused, and asked him certain questions. The accused told them he had been selling queen cakes, and he was now returning home. The policemen were satisfied with the answers, and the accused proceeded towards his residence. Some 30 minutes later, PW9 and colleagues were still walking along Kabiria Road, heading towards the Police Station. Then they spotted the accused running back towards them; he was returning from the direction of Kabiria Village. When the accused saw PW9 and his colleagues, he came up to them. He told them that, as he was walking towards his residence a short while earlier, he had been confronted at the gate by unknown thugs; and he had shot one of them with an arrow. The Police officers upon hearing this account, asked the accused to accompany them back to Kabiria Village. They walked together for some time, and met about 10 villagers who had been at the scene of the incident; they were coming to report that the accused – whom they found with the Police officers and duly identified – had shot a neighbour of theirs who was now in serious condition; and they had been endeavouring to get to the Police Station, for the purpose of reporting this matter.

The Police officers calmed the agitated group whom they met, and asked them all to return with them (the officers) to the scene of the incident. Even as the whole group now walked together towards the scene, the accused recovered, on the roadside, a set of four complete arrows with a bow; he himself had hidden the same as he proceeded on foot towards the Police Station, following the arrow-shooting incident. The Police officers took the bow and the arrows into their custody. PW9 identified the said bow and four complete arrows in Court (prosecution exhibits Nos.1A, 1B, 1C, 1D). The officers and the villagers and the accused went up to the plot of one **Waithaka Kambo**, along Kabiria Road. They found no security lights at the accused's residence. They came to know the name of the deceased as **David Mukuria Ngige**; and that the landlord, **Waithaka Kambo** and relatives, had already taken **David Mukuria Ngige** to hospital.

PW9 and his colleagues found that the accused's house had been damaged on the metal-sheet walling. Inside the accused's house, the officers found: (i) a wooden arrow-stick; and (ii) a *panga*. The arrow-stick had no arrow-head. PW9 identified the arrow-stick recovered (prosecution exhibit No.2) and the wooden-handled *panga* (prosecution exhibit No.9). The metal-sheet walling of the accused's house was cut open at one point; and the accused informed them it was the neighbours who damaged the house. The front face of the house's walling was also damaged, by denting inwards from the outside; and the corner of the walling had been cut with a sharp object. The flap from the cut walling was fresh.

PW9 and his colleagues arrested the accused for further investigations; and the whole crowd joined them as they walked along to the Riruta Police Station. When they arrived at the station, at about 11.30 pm, they found the deceased's relatives there, who informed them that the deceased had died while on the way to hospital. These relatives had come to the Police Station with the body of the deceased. PW9 and his colleagues examined the corpse; it had an injury on the stomach. The deceased's relatives told the Police officers that he had been shot in the stomach by the deceased.

PW9 and his fellow officers interrogated the accused, and detained him in the cells pending further investigation, with a view to bringing a murder charge. They then took the body to the mortuary.

On 20th December, 2002 PW9 was accompanied to the Nairobi City Mortuary by relatives of the deceased, who identified the body, and it was photographed by **P.C. Mogaka** (PW5) of the Scenes-of-Crime office. PW9 led PW5 to the scene of the incident, on Kabiria Road; and they found the accused's house well preserved, as they had earlier requested the landlord that it be; and now PW5 took all the necessary photographs of the house.

PW9 testified that the accused and the deceased were neighbours; a distance of some 50 metres separated the house of the accused from that of the deceased, and both houses were located along Kabiria

Road, the main road.

On 23rd December, 2002 PW9, along with **Corporal Jacob Longojine** (not called as a witness) carried the recovered exhibits to the Nairobi City Mortuary, where the post-mortem examination was conducted by the pathologist, **Dr. Wasike** (PW3). Relatives of the deceased identified the body, to enable the pathologist to conduct the examination which culminated in the recovery of a metallic arrow-head from the stomach of the deceased. PW3 handed over this arrow-head, together with blood samples, to PW9 as exhibits. PW9 now identified the said arrow-head (prosecution exhibit No.4) in Court. PW9 and his colleague duly prepared an exhibit memo form, and escorted the items to the Government Chemist (to PW8) for analysis. The exhibit memo form was duly signed by the pathologist and by the Government Chemist's Analyst (prosecution exhibit No.10).

On cross-examination by learned counsel **Mr. Mwaura**, PW9 testified further as follows. When he and his colleagues had first met the accused along Kaberia Road, he was walking to his house, and had a carton which contained the remainder of the queen cakes which he had been selling; and the Police officers had been satisfied with his explanation. When, 30 minutes later, the accused returned to PW9 and his colleagues he no longer had the queen cakes; and he was coming in the direction of the Police Station.

PW9 testified that after he and his fellow-officers returned with the accused and the villagers to the scene, they found that:

“the accused person had not been attacked by thugs. We found that the people he was referring to as thugs were his neighbours. One was the son of his landlord. We found they knew one another. Initially he denied knowing them. But at the scene, we found that they had quarrelled.”

PW9 testified, in one respect, in a manner that is contradicted by other evidence, particularly that of PW4 and that of PW5. PW9 said:

“After the accused had shot the deceased from inside the plot, the accused disappeared; neighbours thought he was locked in. So they damaged the house, looking for him.”

Of course, PW9 did not see what happened; and so his evidence here is only that of an investigating officer. I think he has no basis for testifying that within the compound where the accused lived, and while outside his house, he shot the deceased, and then went into hiding in his house; had that been the case, then at least one member of the crowd, said to have comprised as many as 30 people, would probably have seen him. But there is no evidence at all, that anybody saw the accused shoot the deceased; and this would be more consistent with the testimony of both PW4 and PW5, that the fatal arrow was fired by an *unseen person*, through the hole which members of the crowd had cut on the bedroom-side metal-sheet walling. It is also more consistent with the evidence of PW4 that the accused's wife had restrained him and taken him into the house, and he never came out again to fire his arrow from outside the house; and, therefore, the crowd which had attacked and damaged his house, contrary to the testimony of PW9, had conducted their assault *before* the fatal arrow was fired by the accused.

When PW9 and his fellow officers and the accused met the crowd, as they returned to the scene along Kabiria Road, the disposition of the crowd was as described by PW9:

“We decided the people were unruly; we calmed them, all of us as a team, to go to the scene together. They were angry with the accused's conduct; they intended to attack him.”

PW9 testified that the accused, following the arrow-shooting incident, had carried his bow and arrows, and had hidden them alongside the road some 100 metres from the scene of the shooting. He also testified that the inquires he conducted at the scene showed that “the deceased was found inside the plot of **Peter Waithaka Kambo** [the accused's landlord].” PW9 and his fellow officers had been shown the exact place where the deceased had been when he was shot; but subsequently, “the body was moved to the outside of **Kambo's** compound, so that it could be taken in a motor-vehicle”. In the words of PW9:

“My information is that the deceased was shot while inside the compound of **Peter Waithaka Kambo.**”

Where did the accused go after the deceased was shot? PW9 said that his information was that by the time PW1 pulled the arrow-stick from the body of the deceased, the accused had already left his house. In his words: “We found that after the accused shot at the deceased, he escaped – ran away.” Again, PW9 did not personally perceive what happened; and his account in this respect is clearly unreliable; in particular it glosses over a crucial question which must be answered. The question is this: did the fatal arrow emanate from inside the house, or from outside the house? And as I have noted already, there is more clear-minded evidence from both PW4 and PW5 (and more particularly PW4) which states that the origin of the arrow which landed on the deceased, was the *interior* of the accused’s house; and if that is the case, then the suggestion that the accused took off as soon as the deceased was shot, is probably untrue. Most probably, the arrow was shot not from the outside, but from inside the house; for with a crowd milling on the outside, somebody would have seen the arrow being discharged in the direction of the deceased.

PW9 testified that the headless arrow-stick had been found in the accused’s house. From his investigations, he believed that the arrow-stick could have been taken into the house of the accused by the deceased’s relatives, when they gained access into that house following the arrow-shooting. These relatives of the deceased, PW9 testified, had found the accused’s door locked from inside; but later the accused’s wife opened it, and they searched for the accused but did not find him.

PW9 restated his belief, on the position from which the deceased was shot: “He was outside his house when he shot the deceased.” When PW9 and his colleague searched the accused’s house, they found a *panga* on a table; but he was unable to ascertain the owner of that item. It was on the same table on which the headless arrow-stick was found. PW9 and his fellow officers did not think the *panga* belonged to the accused; they suspected it to have been brought into the accused house by the neighbours who entered that house after the arrow-shooting. He considered it unusual that both the *panga* and the headless arrow-stick should be on a table in the accused’s house.

PW10, **Dr. Zephaniah Mwangi Kamau** was sworn and gave his testimony on 19th June, 2006. The accused herein had been brought before him by the Police officers at the Riruta Police Station, so that he may assess age, mental status, and conduct a general examination of the accused’s body. He assessed the accused’s age to be 29 years, and found him to be of sound mind. He then completed and signed a P3 Form (Prosecution exhibit No.11). The witness testified that he is a holder of the MB.Ch.B. degree of the University of Nairobi, and he is the Police Surgeon at the Nairobi Area Police Headquarters, holding the rank of Assistant Commissioner of Police.

III. NO CASE TO ANSWER: PRELIMINARY SUBMISSIONS FOR

THE ACCUSED

After the prosecution closed their case, on 19th June, 2006 learned counsel **Mr. Mwaura** secured a date for preliminary submissions; and on 2nd October he urged that the prosecution had not made a *prima facie* case that would justify putting the accused to his defence. He relied on the authority, **Bhatt v. Republic** [1957] E.A. 332 for the principle that a *prima facie* case, in a criminal case, was one in which a reasonable tribunal applying its mind to the evidence and the law, could convict if no proper explanation came from the accused; he underlined inconsistencies apparent in the evidence of some of the prosecution witnesses; he urged that the more reliable evidence was that the fatal incident had taken place while the accused was right inside his house.

Learned counsel **Mr. Bifwoli**, by contrast, urged that the prosecution had made out a *prima facie* case against the accused: the deceased had been killed by the arrow-head which was discharged into his stomach, and the testimonies of PW1, PW2, PW4 and PW9 had identified the fatal arrow as emanating from the accused’s quiver; only the accused had the opportunity, the means and the reason to shoot the deceased. **Mr. Bifwoli** admitted that there were contradictions in some of the testimonies, but maintained that these were immaterial.

IV. RULING ON THE PRELIMINARY SUBMISSIONS

After hearing the detailed submissions of counsel, and assessing it in the light of the evidence adduced, I gave a ruling as follows.

“After the hearing of the prosecution witnesses, learned counsel have made their submissions. The relevant point of law at this juncture is that if there is a prima facie case disclosed, then the accused is to be called upon to defend. The reason is that a prima facie case, if examined in more detail, may be found to carry the required elements of proof-beyond-reasonable-doubt. Therefore, the moment I draw the conclusion that a prima facie case against the accused exists, I am required by law to invite the accused to take a choice regarding possible explanations, or lines of defence.

“On the facts, it has been proved that the deceased was killed in the night, by an arrow that was shot into his body. From all the evidence placed before the Court, the accused was the person most closely associated with the handling of a bow and arrows at the material time, and an arrow-head was found in the body of the deceased which bore a likeness to other arrows whose location had been known to the accused.

“From the circumstances in which the Police officers on patrol met the accused soon after the incident, from what he showed and told the police, and from the photographic exhibits showing the location and character of the accused’s house and its situation at the material time or thereabouts, it is clear to my mind that the accused must be put to his defence; and it is at the end of this process that the Court can determine the matter with finality.

“I therefore now rule that the accused has a case to answer, and accordingly put him to his defence.”

After I had given directions consequential on my ruling, learned counsel **Mr. Mwaura** duly consulted with the accused, and informed the Court that the accused would give sworn evidence and would be cross-examined, in the conduct of his defence.

V. THE DEFENCE CASE: TESTIMONY

David Mugao Kajiita, the accused, took oath on 31st January, 2007 and took the witness box as DW1. He testified that he is 33 years old, married and has one child, born in 2000 and is now seven years old.

As at the material date, 18th December, 2000 the accused was an employee of Grange Park Mineral Water; he was at first a casual labourer, and his work was to transport and distribute the mineral water. Later on he was given permanent employment. Running in parallel with his formal employment, the accused and his wife operated a bakery at home, and they would make queen cakes, pancakes and other related products. The accused sold such items in different parts of Nairobi, and also in the areas close to his residence. His wife did the preparation of the products when he was away, and he would transport and sell them when he was not at his place of employment.

On 18th December, 2002 at about 9.00 pm, the accused was at Kawangware, where he had delivered cakes. This was in the neighbourhood of Riruta, some five kilometers from his house at Kabiria Village. While at Kawangware he also collected outstanding debts from his customers. He then took a Nissan *matatu* up to Kabiria Road, the terminus. He then started walking, a distance of 1 km to his house. He had barely walked 20 paces when he met policemen on patrol. He was carrying a carton with queen cakes. The policemen stopped him, searched him, finding only the cakes; and they released him to proceed home. He went up to the gate, along Kabiria Road; and close to his place, there were three people standing, under a tree. These people were on his right-hand side; he got into his compound on the left-hand side. There was only moonlight at that point, and DW1 did not know who the three people were. With the aid of the full moon, the accused could see the three people, but could not identify them. He got in through the gate, went into his house, and laid his carton down. He found his wife, his child and his sister-in-law at home; and he was with them for just five minutes, before leaving to return to the

gate. He had gone out there to relieve himself; and it was his testimony that this was common practice among the local residents. As he relieved himself, one of the three men he had left at the gate demanded to know why he was urinating at that place. He could not identify the speaker, from the voice. The man ordered him: “Don’t return to the house, wait there for me”; and the three were now walking towards him. The accused did not stop; he found his way back into his house. The setting at that scene, it was the accused’s evidence, “looked confrontational.” After he got into the house, he and his family locked the door with two bolts – one at the bottom edge of the shutter, and the other in the middle of the shutter. The accused testified that he used other devices as well to secure the entrance to his house, which was constructed of metal- sheeting, on the walls and the roof. It was his testimony that even as he entered his house, the three men who had accosted him were following, and by the time he went through his door, these men were now some 8 – 10 metres behind. As they gave chase they were calling out: “*Simama, tunakuambia usimame na unakimbia*” (“*Stop, don’t run away when we demand you stop*”). The accused testified that he had not responded, but he had called out to his wife to open quickly; and she responded promptly.

The accused testified that he had been put in fear, particularly because the locality had in recent times been invaded by thieves; in October, 2001 thieves had invaded the accused’s house at about 2.00 am while he slept. These thieves did not succeed in entering the house, but caused a rumpus by banging the metal-sheet walls and issuing threats: “This time you will not escape”. Then in October, 2002 the accused was again attacked in the same house; and it took Police officers on patrol to rescue him. He made a report of that attack to the Police Station on 17th October, 2002.

The accused testified that when the three men chased him into his house on 18th December, 2002 he apprehended that this would be the third attack staged against him by thugs. The three men who had followed him began hitting his house with things which sounded like stones and sticks. The accused and his family, and in particular his wife and his sister-in-law, began to scream. The rattling of the house structure, the accused testified, disrupted the lighting in the house, and the sitting room electric bulb sustained a short-circuit and burned out. The house had a security light on the outside which, however, was still working. Its switch was in the exclusive control of the landlord, and it was not affected by the physical impacts on the house. It was the accused’s evidence that those who were hitting his house from the outside, even cut through the wall sheeting, at a place close to his sofa set. He believed the cut in the metal sheet to have been made by a *panga* (or cleaver), as it fell down through the sliced area of the wall; and then, in the accused’s testimony, he saw a hand pulling out the metal flap which had been sliced. He was in the darkness, and so those outside could not see him, but he saw them, as the security light was working – through the hole which had been cut open.

It was the accused’s evidence that he resorted to his bow and arrows which were in the house. The testimony reads thus:

“I took the bow and arrow, and armed myself to protect my wife and household. [A person on the outside] was swinging the cleaver through the hole cut on the wall. I was armed, but they couldn’t see me. I released the arrow; and immediately the cleaver fell on the sofa set; and nobody was pulling the sliced wall metal-flap anymore. All of them left. They left the fallen one inside the compound. He had fallen just about a metre from the metal wall.”

The accused’s door was opened by neighbours from the outside; and he remembered one of those who opened for him as one ***Omolo Onyango*** (not called as a witness). The accused, by his testimony, then got out of the house, and saw the fallen man lying close to his house. What did he then do? In his words: “I went straight to Riruta Police Station to report.”

What did he do with his weapon? In his words: “When I got to the shopping centre at Kabiria, I left the bow and arrows on the side of the road. I was going to the Police Station. I didn’t want to go there with the bow and arrows, so I left them together.”

When the accused reached Nyuki’s Bar, just before the Riruta Police Station, he caught up with one of those same Police officers he had met as they were on patrol and he was heading towards his house, only

some tens of minutes back. This is what he told the Police officer:

“I told them I had met three young men who had chased me into my house; they attacked my house; I shot one of them; the rest fled.”

The Police officer he spoke to now called his two other colleagues; and the three officers, accompanied by the accused, turned back and started walking back to the scene. On the way they met a crowd of people proceeding towards the Police Station, along the same Kabiria Road, for the purpose of reporting the shooting incident. The crowd also turned back and accompanied the Police officers and the accused; and as they went on towards the scene, the accused retrieved his bow and arrows from the road-side, and handed these over to the officers. At the scene, they found that the deceased had already been taken away. The time was about 12.00 midnight.

The Police officers talked to those at the scene, took statements, and later returned with the accused to the Police Station where an occurrence Book entry was duly made. At 2.00 p.m. the vehicle which had taken the deceased to hospital, was driven into Riruta Police Station, and its occupants brought the report that the accused had died, whereupon the Police detained the accused, and he was later charged with the offence of murder.

The accused was cross-examined by learned State Counsel **Mr. Bifwoli**, and he thus further testified. He had struck the deceased with an arrow from the interior of his house; and he had voluntarily handed over the bow and arrows used to the Police officers.

The accused testified that prior to the shooting incident, he had already passed PW1, PW2 and PW4 twice, at the gate; and after he passed them for the second time, they – in his words - “invaded my house.”

The accused explained the circumstances in which he got out of his house, after arriving there with his carton of queen cakes only some five minutes earlier – and how he came to see PW1, PW2 and PW4 for the second time on the material night. The landlord’s compound has pit-latrines, but they are somewhat removed from tenants’ housing units; they are located some 30 metres from the accused’s house. On this account, during late hours tenants used to go for short calls outside the gate, over a place that was planted with grass, just alongside the minor road separating the two landlords’ compounds. The accused testified that throughout his stay at Kabiria, covering 2001 and 2002, he had not known the proprietor of the grass patch on which he had gone to relieve himself; and there had been no warning notice on that grass-patch, regarding those who might want to relieve themselves there. He testified that he could not access the latrines, at that time of night:

“The latrines were on the landlord’s area, which was already shut. The landlord leaves the key with a particular person, so anyone who has to use the latrines at that time, must find that custodian.”

The accused said he had not been found doing anything unusual:

“At that time I thought going out there for a short call was normal. This is what people generally did...It was normal for people to relieve themselves there. It was not on **Kambo’s** plot [i.e., the family of PW2 which probably claimed to be aggrieved] that people were going for short calls. **Kambo** himself [PW2] had also relieved himself there.”

The accused had a final word about the fatal arrow in this case; in his words:

“I never shot the arrow from outside; I did from inside the house. I am certain of that.”

VI. A DEFENCE FOUNDED ON SELF-DEFENCE: SUBMISSIONS FOR THE ACCUSED

On the basis of the testimony given on both sides, learned counsel **Mr. Mwaura** submitted that the accused had not been proved guilty as charged. Counsel began from the provision in s.203 of the Penal

Code (Cap.63):

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

So, counsel urged, quite correctly, with respect, that the prosecution must, in the very first place, prove certain things: (i) that the accused did cause the death in question; (ii) that there was malice aforethought; and (iii) that the act causing death was unlawful. And the burden of proving those three elements, which is known as proof beyond reasonable doubt, rested entirely upon the prosecution. The governing principle of law is found in classical common law jurisprudence, as exemplified by the English House of Lords case, **Woolmington v. Director of Public Prosecutions** [1935] A.C. 462; and the relevant passage is from the judgement by **Viscount Sankey, L.C.** (pp.481 – 482):

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to ...the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given...the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.”

Mr. Mwaura submitted that the prosecution had not, in the instant case, discharged that enhanced burden of proof which is a precondition to achieving a conviction. For a start, counsel urged, the prosecution did not succeed in proving the basic desiderata for a conviction, as specified in s.203 of the Penal Code; and then, beyond that, the operative terms of criminal jurisprudence, well understood at common law, had not been complied with.

Counsel submitted that the circumstances in which **David Mukuria Ngige** met his death, as these emerge from the evidence, would not show malice aforethought, or unlawful killing on the part of the accused, quite apart from other short-falls in the proof being tendered by the prosecution.

On evidence, learned counsel submitted that the testimony of **Michael Ndungu Ngige** (PW1) who claimed to have been at the scene, was unreliable – because this witness was in many respects inconsistent. Counsel questions the *bona fides* of PW1 and PW4 when (as they say they did) they saw an unknown person (who is the accused) coming towards them, along Kabiria Road, and then they decided to wait for such a person.

Learned counsel remarked a clear contradiction in the testimonies of PW1 and PW4 who, however, both testify that they had been together at the incident-scene at the material time: PW1 said there was a major altercation at the gate, occasioned by the accused’s act of relieving himself near the fence, and as a result, the accused issued threats, went into his house and returned with a bow and arrows which he then aimed out threateningly; but PW4’s testimony was different: he was clear that the accused’s wife had ushered him back into his house, and he did not come out again, and even the shooting of the deceased took place when the accused was locked up right inside his own house.

Counsel noted yet another contradiction in the prosecution evidence: PW1 testified that the deceased died while in the compound in which the accused had his house; but PW2, who is said to have been in

PW1's company, testified that he was not at the scene when the deceased was shot.

Learned counsel, quite properly, in my view, wondered how come none of the many people said to have been at the scene, witnessed the accused fire the fatal shot.

These inconsistencies in basic evidence about the core question which has led to this criminal case, led learned counsel to express the concern that the truth was not coming out, and that the key prosecution witnesses were not being truthful.

Mr. Mwaura carefully analyzed the evidence adduced on oath by the accused, in the light of the prosecution testimonies. He noted that the accused, who originally comes from Meru, lived on Kabiria Road with his wife, **Faith Muthoni** and their baby-girl. Coming from distribution work for pasta which his family made, the accused had lawfully returned to his house, on the way catching up with Police officers who duly cleared him. He went right into his house, before coming out to relieve himself, and this is when he is accosted by some of the prosecution witnesses. Counsel urged that the accused had tried to avoid personal hardship, by disappearing into his house, where he – in the words of counsel – “literally barricaded himself.”

Counsel urged, quite meritoriously, in my view, that it is true the accused locked himself up in his house; for this is corroborated by the testimony of PW4 (**Paul Ng'ang'a**), that the accused did not again come out of his house; and that, for certain, the fatal arrow was shot from the interior of the house.

Counsel urged that the accused had given a truthful account on the assault mounted against his house during the time he was locked in there: his house, constructed of metal sheets on wall and roof, was hit repeatedly by a crowd on the outside; and the wall was sliced open with a cleaver of sorts; and this disruption disconnected the interior lighting system, so that the accused and his wife, daughter and sister-in-law were now in the dark, petrified at the assault on their abode. His wife and his sister-in-law were so scared, they screamed out for help. This evidence, counsel urged, corroborates the testimony of both P1 and PW4: that many people had entered the accused's compound at that time of night.

Counsel submitted that it was amidst the commotion and damage taking place; and amidst the screams of the women in his household, with darkness prevailing inside the house, that the accused saw a hand from the outside thrusting a cleaver (or *panga*) into the house, through a flap-opening already cut. This evidence, counsel submitted, is corroborated by the testimony of PW5, **Police Constable Shem Ondiek Mogaka** who produced photographs in Court showing the fresh slicing on the wall of the accused's house, bearing an elongated flap which could easily be tugged open from the outside.

In those circumstances which emerge from the evidence, counsel submitted, the accused “felt that his life, the life of his wife, and the life of their young child were under imminent threat, and especially so because those who invaded the house were menacing on the outside, ‘Today is your day.’” It was at this point, counsel urged, that the accused took bow and arrow, and shot “the one who was waving a *panga* into the house; and thereupon, the *panga* just dropped into the house.” **Mr. Mwaura** submitted that this aspect of the accused's evidence well agrees with the testimony of PW9, **Police Constable Samuel Wambugu** (the arresting officer) who testified that the *panga* was, indeed, found inside the accused's house. Counsel submitted that the accused, following the shooting incident, had taken all the right courses of action in respect of compliance with the law: “he immediately set out for the Police Station, to report what had happened”; and he also handed over his bow and arrows to the Police officers who visited the scene.

From such a state of evidence, learned counsel submitted, the prosecution cannot begin to argue that the offence of murder has been committed by the accused. On the terms of s.203 of the Penal Code (Cap.63), one of the conditions for finding the accused to have committed murder, is that by firing out the fatal arrow he acted unlawfully. The test of lawfulness is better understood from the case law, than from the bare provision of statute; and counsel relied on the English Court of Criminal Appeal decision in **R. v. Hussey** (1924) 18 Cr. App. R. 160, in which **Hewart, L.C.J.** thus stated the position (p.161):

“No sufficient notice had been given to [the] appellant to quit his room, and therefore he was in the position of a man who was defending his house. In Archbold’s Criminal Pleading, Evidence and Practice, 26th ed. p.887, it appears that: ‘In defence of a man’s house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his home he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary.’ That is still the law...”

Mr. Mwaura submitted that the *Hussey* case had set out the common law position on self-defence; and on the pertinent principles, he urged that in the instant case, the accused was defending his property (his house), his own life, the life of his wife, the life of their baby-girl.

Learned counsel drew the Court’s attention to the distinguished work, *Elliott & Woods Casebook on Criminal Law*, 5th ed. by D.W. Elliott and Michael J. Allen (London: Sweet & Maxwell, 1989) on the rationale for the law of self-defence as it was recognized at common law (p.329):

“At any rate, for present English law private defence is clearly a matter of justification, not merely of according mercy to a defender...If the choice is between injury to an aggressor and injury to a defender, it is better that the injury be suffered by the aggressor, for two reasons. First, it is the aggressor who is the prime cause of the mischief. Secondly, a rule allowing defensive action tends to inhibit aggression, or at least to restrain its continuance, as a rule forbidding defensive action would tend to promote it. It follows that if a person acts against a wrongdoer in the actual necessity of private defence, no one who assists him should be guilty as brining about a wrongful act, whatever may have been the reason why he lent his assistance.”

This fundamental logic behind sustaining a person’s rights to private defence, learned counsel urged, had been applied and upheld in actual judicial-redress motions, in the English Privy Council decision in *Beckford v. R* [1987] 3 All E.R. 425 (an appeal from the Court of Appeal of Jamaica). The relevant passage appears in the judgement delivered by Lord Griffiths (p.431):

“The common law recognizes that there are many circumstances in which one person may inflict violence on another without committing a crime, as for instance in sporting contests, surgical operations or, in the most extreme example, judicial execution. The common law has always recognized as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed. Furthermore, 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 [emphasis added].”

In that case the Judicial Board of the Privy Council went further and considered how the prosecution must proceed, in order to prove the commission of murder where the accused was relying on the defence of self-defence (p.431):

“It is because it is an essential element of all crimes of violence that the 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 [emphasis added].”

On the basis of these principles, learned counsel submitted that the prosecution had failed to prove the essential ingredients of murder; and in particular, the prosecution had not discharged the duty to show that the accused did not act in self-defence, given the evidence on record that he had so acted.

Counsel urged that the accused had gone beyond what the law required of him: “he retreated into his house when confronted by unlawful and unjustified actions by PW1 and PW2. He even locked himself up from inside. Only when, in the manner in which he perceived the situation it seemed intruders would

enter the house, did he take the decisive action he did.” In these circumstances, it was urged, the act of the accused was not unlawful. Counsel invited the Court to find that the prosecution had not discharged their burden of proof, and to acquit the accused. Since the prosecution had a legal duty to prove their case beyond reasonable doubt, counsel urged, “if any defence was put up by the accused — as indeed he did — then there was a burden resting on the prosecution to disprove the same, and do so beyond any reasonable doubt.

VII. IS BURDEN OF PROOF DISCHARGED? IS SELF-DEFENCE RULED OUT? — SUBMISSIONS FOR THE PROSECUTION

As the accused ended up giving testimony on oath, but without calling any witness, it followed that the prosecution strictly had no rights to respond after final submissions had been made on his behalf (s.161, Criminal Procedure Code (Cap.75)). I considered it, however, desirable to accord the prosecution counsel an opportunity to respond to the weighty submissions which learned counsel **Mr. Mwaure** had made; and I would in these circumstances allow the accused to have the last word.

Learned counsel **Mr. Bifwoli** contended that the prosecution had discharged the burden of proof resting upon them: for they had established the *actus reus* – the fatal arrow-shooting; they had produced a post-mortem examination report showing the arrow-head as the cause of death; they had proved malice aforethought, resting on testimonies to the effect that the fatal arrow had been shot at the deceased “who was not armed.”

Mr. Bifwoli urged that there was only one other matter, in respect of which the prosecution had to acquit themselves; “Whether the accused was justified to act in self-defence.” Learned counsel argued that “self-defence was not necessary”, because “the accused and his family were not under any danger, as to warrant the accused claiming self-defence.”

Learned counsel **Mr. Bifwoli** relied on rather tenuous evidence coming from the prosecution side, which in its thrust, is that the accused was the aggressor in the first place; in his words:

“Only after the accused urinated on the fence, did the three witnesses – PW1, PW2 and PW4 – question him as to why he was doing that. Instead of apologizing, the accused proceeded to his house, and promised to be back...Following the altercation other members of the public came to the scene, and among them was the deceased. It is at this time that the deceased was shot.”

The problem with such a submission is that it confounds a critical question in the determination of lines of liability. **Mr. Bifwoli** is clearly glossing over the question, where was the accused, when he shot the lethal arrow? Was he at the place of the altercation? If so, how come, none of the witnesses would say they saw the arrow being discharged? How come, nobody saw the accused firing the arrow? Wouldn't it appear closer to reality that the accused was not seen shooting, because he was shooting from the interior of his house? Was there no circumstance which would give the accused cause to shoot outwards through the wall of his house? Failure to address these questions amounts to failure to respond to the *self-defence* claim; and if that claim is not answered by the prosecution, then it will follow, perforce, that proof of guilt of murder beyond-reasonable-doubt will not have been achieved. This point will be taken up further on, in a closer analysis of the evidence on record.

Although the law relating to proof of a murder charge is clear in the first place from the terms of s.203 of the Penal Code (Cap.63), and in the second place from the clear-minded jurisprudence developed at common law over the years, **Mr. Bifwoli**, though acknowledging the relevance of the case relied on by the accused, **Woolmington v. Director of Public Prosecutions** [1935] A.C. 462, sought to distinguish **R. v. Hussey** (1924) 18 Cr. App. R. 160 which unequivocally recognizes a person's right to strike a trespasser who attacks his home. Counsel's basis for distinguishing **Hussey** was itself founded on a controversial perception of the evidence in this case: that “it is the accused who was the aggressor.” He also contends that: “The accused and his family were not under any danger.”

Mr. Bifwoli thought that ss.203 and 204 of the Penal Code (Cap.63) were by themselves a sufficient

basis for proving the accused guilty, and that the principles established at common law, such as were invoked in favour of the accused, were not relevant. I would not, with much respect, view such a submission as right, in law; for, firstly, even on the basis of s.203 of the Penal Code alone, the prosecution has to prove that the accused acted *unlawfully* in firing out the fatal arrow; but more importantly, the said statute has been enacted such that it is subject to judicial interpretation, construction and application on the basis of recognized schemes of jurisprudence; and for this country, the applicable body of interpretative law is the common law jurisprudence. It is not, therefore, possible to construe the said statute outside the juristic framework evolved in the common law tradition.

Learned counsel *Mr. Mwaura* replied to the claim that there was aggression, or provocation on the part of the accused, who had been at the centre of the altercation, because he had relieved himself on a certain patch of grass. This was an irrelevant issue, counsel urged: because no evidence had even been adduced that the patch of grass in question was the property of those who precipitated the confrontation which degenerated to fatality.

VIII. MURDER, MANSLAUGHTER, JUSTIFIED KILLING: HAS THE PROSECUTION DISCHARGED THE LEGAL BURDEN OF PROOF? — SUMMING-UP TO THE ASSESSORS

On 19th March, 2007 I gave a summing-up to the assessors, specifying their task, outlining the relevant points of law, and giving directions on points of evidence. I now set out in full the content of the summing-up.

“[I] WHAT IS EXPECTED OF THE ASSESSORS?”

- (1) Trial on a charge of murder, such as this one, is required by law to be conducted by a Judge, with the assistance of assessors.
- (2) The task of the assessors is to assist the Judge in determining whether, on the basis of the testimonies given in Court, the accused is **guilty** or **not guilty**.

(3) Whether the accused is **guilty** or **not guilty** depends firstly on the *evidence* given in Court, and secondly, on the *applicable points of law*.

“[II] WHAT IS THE CASE NOW BEFORE THE COURT?”

- (1) The State’s case which has been heard in this Court is that, **David Mugao Kajiita** (the accused), on 18th December, 2002 along Kabiria Road, Riruta within Nairobi Province, murdered **David Mukuria Ngige** (the deceased).
- (2) Your role as assessors is to take a *lay person’s common-sense position*, looking with clear sights, at the *evidence* which has been placed before this Court – and then to tell the Court whether you believe **David Mugao Kajiita**, the accused, is, or is not, the person who caused the death of **David Mukuria Ngige** on the night of 18th December, 2002; and, if you find that, indeed, the accused is the one who caused the death of the deceased, then you must further consider **three things** before saying he is guilty or not guilty. Those three things have been defined by law; and therefore, apart from the evidence, i.e. the testimony of the several witnesses, you must take into account certain **points of law** which I will now explain to you in very simple terms.

“[III]. WHAT ARE THE POINTS OF LAW TO GUIDE THE ASSESSORS?”

- (1) The points of law which I am about to state are enough to guide you; and there will be no need for you to seek out any further legal material. The focus of your contribution will rest on the *factual evidence*, which has been placed before the Court in the form of *witness testimonies*.
- (2) You recall that the charge brought against the accused is one of **murder**. Please note that causing the death of a person *sometimes* amounts to **murder**; *sometimes* it amounts to **manslaughter**; *sometimes* it

amounts to **justified killing**. If the killing of a person is held to have been justified, then, in that case, *no offence* has been committed and the accused is to be set free immediately.

(3) **Murder** is a serious offence, for which there is only one penalty, namely, death.

(4) But if an accused person kills somebody, in conditions in which the requirements for **murder** do exist – but then it is found that the accused was provoked, or that he did it when he was *defending* himself against attack — that killing ceases to be **murder**; and the killing may in those circumstances become either **manslaughter** or **justified killing**.

(5) Under the law, a person cannot be held to be guilty of murder if he has not **intentionally** caused the death in question; for him to be found guilty of murder, he must have: (i) expressly or impliedly had the intention to kill; or (ii) been actuated by malice; or (iii) been reckless and not caring at all whether his act or omission would lead to the death in question.

(6) A person who kills another while defending himself, his family, his home from a dangerous attack, has *not* committed murder; he will benefit from the defence of **self-defence**; and he will be held to have been *justified* in committing that killing, unless it is shown that he used far more force than was necessary. If he is found to have used *excessive force* in defending himself against the attack, then he will be guilty of **manslaughter**, but not **murder**.

(7) **Manslaughter** is a lesser offence than murder, and the maximum penalty for it is life-imprisonment, though the Court is likely to decide the matter with a free hand depending on the circumstances of each case.

(8) Proof that an accused person killed another intentionally, and thus committed **murder**, can be done in *two* ways: (i) by *direct evidence* – i.e., the testimony of one who perceived the killing with one of his or her five senses (such as hearing, seeing or feeling); or (ii) by **indirect** or **circumstantial** evidence. When proof is done by circumstantial evidence, it means that there is no person who saw, heard or felt the killing, but there is evidence of different acts which when *put together*, clearly point to the hands of the accused in the execution of the killing.

(9) Whether proof of the intentional killing of a person is done through direct, or circumstantial evidence, it is the *exclusive task* of the State (i.e., the Prosecution) to discharge it. The accused does not have to prove anything, and may, indeed, even elect to remain silent. The State must prove **guilt**, leaving no doubts at all in your minds, that nobody other than the accused caused the death of the deceased, and that the death, in the manner in which it was caused, is **murder**, and not **manslaughter**, and not **justified killing**. If there remains in your mind even a single doubt, as to who killed the deceased, or as to whether the killing amounted to **murder**, then you must find the accused not guilty of **murder**.

(10) Since the task of proving guilt of **murder** is the singular task of the Prosecution, any time the accused claims to have acted in self-defence and so the killing was **justified killing**, the Prosecution **must** prove that that is *not* the case; and if the Prosecution fails to rule out the claim of self-defence, then there is a doubt as to whether proof of murder has been achieved – and it must then be held that the accused is not guilty of **murder**.

“[IV]. *CONSIDERING THE TESTIMONIES OF WITNESSES GIVEN IN THIS COURT*

(1) Evidence has come from the 10 Prosecution witnesses, and also from the accused. Now: do you believe these witnesses to have said the truth? Did any of them give untrue accounts?

(2) Which ones of these **witnesses** are the most crucial, in terms of shedding light on how **David Mukuria Ngige** was killed? What did such important witnesses say?

(3) The accused has admitted in his evidence that he fired out of his house the arrow that ended up killing the deceased. He has testified as to the circumstances that led to an attack upon his house, so that

he and his family felt threatened. He has testified that he fired the arrow at a person who had cut a significant opening on the side of his metal-sheet-walled house and was brandishing a cleaver, or *panga* menacingly into the inside of the house; and that person, who happened to be the deceased, fell very close to the accused's house, right within the compound in which the accused lived. So he asserts that he acted in self-defence, and in the defence of family and house. And so, he is claiming **justified killing**, which would not be punishable under the law.

(4) On those facts, whom do you believe to be telling the truth – the accused, or PW1 and PW2 and PW4 and PW9?

(5) Learned counsel for the defence has submitted that the Prosecution failed to show that the accused had had the *intention* to kill the deceased; and that the Prosecution has failed to prove the presence of *malice aforethought*, in the accused.

(6) Learned counsel **Mr. Mwaura** submitted that the Prosecution has failed to prove that the killing of the deceased, by the fatal arrow, was **unlawful**.

(7) Learned counsel has also urged that the Prosecution has failed to prove a **murder** case against the accused – because the accused pleaded **self-defence**, and gave evidence that he was defending his house, his family and himself, but the Prosecution has produced no evidence to contradict him, in his plea of *self-defence*.

(8) Now consider some aspects of the *evidence adduced* in Court –

(a) Remember that PW2 said he went to the Kabiria Road gate at 10.00p.m. and found PW1 and PW4 there; but PW4 denies having seen PW2 at the time of the quarrel when the accused had relieved himself by the fence. *Who* is lying, who is being truthful.

(b) Is it true, as PW1, PW2 and PW4 claim, that the accused came down Kabiria Road, and straight-away started urinating by the fence? Remember, the accused says he first took his queen cakes into his house, and stayed with his family for a short while, before returning to the gate to relieve himself.

(c) When PW1, PW2 and PW4 confronted the accused, is it true that he issued a threat, and fetched a bow and arrows from his house and returned to rattle these and to mock-aim an arrow at those three witnesses? Remember that the accused says he meekly headed straight to his house as he was being pursued, and called out to his wife who quickly opened for him, and the family locked themselves in completely, right inside the house.

(d) Is it the case that the accused had come out with a bow and arrows, and then his wife followed him outside and prevailed upon him to return to the house, and that thereafter, as PW4 testified, the family locked themselves inside completely?

(e) If, truly, the accused and his family so completely locked themselves up inside the house, did he ever come out of the house and shoot the deceased while he was outside his house?

(f) If, as some Prosecution witnesses claim, the accused came outside to shoot the deceased with an arrow, how come not a single member of the crowd saw him shoot? Where is the truth to be found? For the accused, as well as PW4 and PW5, have spoken very clearly on one point: saying the accused shot the arrow from the interior of his house?

(g) Some Prosecution witnesses say the body of the deceased lay *outside* the accused's landlord's compound; but the accused himself is clear: that the body was found just next to his house – as the shooting took place from the inside of his house, while the deceased was in the course of brandishing a *panga* into the house through a sliced hole on the wall's metal sheeting. Where is the truth?

(h) Where were PW1, PW2 and PW4 at the time the deceased was shot? How does it come about that

they never saw anything? The accused is clear, that when he shot his arrow through the sliced hole-in-the wall, all the attackers gathered around his house ran away – and so they never saw clearly what happened. Where is the truth?

(i) Remember, the accused has pleaded having struck the fatal arrow in *self-defence*. Should it emerge from your appraisal of facts, that the accused and his family and household were genuinely threatened, and that this is the reason for the firing of the fatal arrow, then you will have to reach the conclusion that it was a case of **justified killing**. But if you find that the accused had indeed acted in self-defence, but used excessive force, then it would be a case of **manslaughter**. Alternatively if you find that the Prosecution has proved all the ingredients of **murder**, and has successfully **disproved** the claim of self-defence, then you would have to reach the conclusion that **murder** has been committed.

“[V]. HOW ARE THE ASSESSORS TO EXPRESS THEIR OPINION?”

(1) It is required that each assessor shall render his or her *separate opinion* orally in Court. If, however, the three assessors all find themselves in agreement, then their opinion may be presented in Court by **one** of their number; but in that case, each of the other assessors must personally express his or her agreement with the common conclusion.

(2) I now adjourn these proceedings, to allow the assessors to sit together as they consider their opinion, which they shall then deliver in Court at the appointed time.”

IX. SHOOTING WAS OCCASIONED BY ATTACK ON ACCUSED’S HOUSE, SO THIS WAS LAWFUL SELF-DEFENCE: OPINION OF THE ASSESSORS

The three assessors gave a unanimous opinion on 21st March, 2007: that the accused is not guilty of murder nor manslaughter. The following are the points which guided the assessors in thus forming their opinion:

(a) *according to PW1 the accused, when confronted by PW1 as he relieved himself by the fence, endeavoured to meet the challenge by showing bow-and-arrows; but his wife prevailed upon him and they went back into the house; it is about that time that an uproar broke out and crowds came out; and at that time the fatal arrow had not yet been fired;*

(b) *according to PW2 the accused relieved himself at the fence, went into his house, and came out with bow-and-arrows; neighbours at this stage came out including the deceased; PW2 then suddenly heard that the deceased had been shot – which means he never saw the shooting take place;*

(c) *according to PW9, he had seen the accused earlier, and then the accused returned and caught up with him for the purpose of reporting the arrow-shooting incident; PW9 went back with the accused and found the accused’s house to have been damaged and a slice of metal-sheet cut in one part of the walling;*

(d) *PW1, PW2 and PW4 had given inconsistent testimonies in important matters of detail, and it was apparent none of them saw the arrow-shooting take place;*

(e) *The evidence adduced showed that the accused had shot the arrow “purely [for] self-defence for himself and [his] family after being provoked. When he was provoked near the gate he ran to his house and locked himself and [his] wife [inside]. The [hitting] of [his] house led to [electric] failure and there was no light in the house. The wall [of] his house was cut with a **panga** and [this] was a great threat to them.”*

The assessors have expressed the opinion that the incident which has led to the charge of murder brought against the accused, was one of **justified killing**, on the basis of the accused’s right of **self-defence**.

The opinion of the assessors is well vindicated by the following analysis, from which it emerges that this was indeed a case of justified killing, so that the accused did not thereby commit murder or manslaughter.

X. APPRAISAL OF THE EVIDENCE

(i) Who caused the Road-side Confrontation, and How did it come to envelope the Accused's House which was tucked away in its own Perimeter Fence?

Two categories of testimony have been given on the events of the night, which culminated in the fatal shooting which is the basis of the prosecution case.

Firstly there is the testimony of eye witnesses, PW1, PW2, PW4, PW7 and the accused himself; then there is the testimony of those who were not at the scene, notably PW5 and PW9 (officers of the Police Force).

Some of the evidence of the prosecution witnesses coincides with, and corroborates the testimony of the accused (which was given under oath): at about 10.00 pm the accused, who had been selling his bakery products in neighbouring villages, was returning home carrying a carton with remainder-queen-cakes. He came down along Kabiria Road, and then approached the gate of his landlord's compound, which led to his metal-sheet house set within the perimeter fence.

According to the accused, when he approached the gate, there were three men standing under a tree, by the gate, on Kabiria Road. He passed the three men, apparently without speaking to them, and went into his house, where he deposited his carton of queen cakes, and spent about five minutes with his wife, his baby-girl, and his sister-in-law. He needed to relieve himself, whereas the access to the landlord's latrines was at this time restricted; and so he returned to the gate, and urinated on a grass patch adjoining the fence, along Kabiria Road. As he went through the gate, he passed the three men he had left standing by the gate, in that same place. Now while he was in the course of relieving himself, one of the three men (from prosecution evidence, this was PW1) challenged him, demanding to know why he was urinating at that place.

No better evidence than that recounted above, has been brought forth by the prosecution. For PW4 insists that he never saw PW2 at that stage; and both PW1 and PW4 say the accused came down along Kabiria Road, and straight-away went to relieve himself where he did it, and that it was at that moment that PW1 challenged him. In whose company was PW1 when he challenged the accused? PW1 says he was with PW4; and PW4 says he never saw PW2 at all. PW9 says the challenge to the accused when he went to relieve himself came from *three* men; and in the light of all the evidence adduced, I must draw the conclusion that PW1, PW2 and PW4 were together as they challenged the accused, and that this was the immediate cause of what PW4 calls a *severe altercation*, and PW7 describes as a major outburst of noise in the neighbourhood, which aroused virtually the whole village, so that, according to PW4, as many as 30 villagers (including the deceased, as testified by PW7 and PW9) came out and laid siege to the accused's house, right inside his landlord's perimeter fence.

Upto this point, who is not saying the truth? Why would PW4 say he never saw PW2? Why would PW1 and PW4 say the accused went straight to urinate on their fence, as he came down Kabiria Road? Why would PW1 provoke such a huge brawl over the fact that the accused had relieved himself on a grass patch outside the two neighbouring residential compounds, especially when, as PW1 himself testified, there was no warning posted at that spot prohibiting people coming to urinate there; and particularly when, as it emerges from the accused's evidence, villagers habitually did relieve themselves at that place notably during night time? In all those circumstances, would the accused's act of relieving himself where he did, reasonably have led to a mighty brawl in the night, critically disrupting the peace of the village? I don't think so; and so, from the very beginning, it is apparent that the three persons who sparked off the disturbance, namely PW1, PW2 and PW4 had not conducted themselves *lawfully*, and may very well have had ulterior purposes, such as criminal intent, when they confronted the accused at the gate, along Kabiria Road.

(ii) Did the resulting Rumpus in the Night pose Serious Threats to Accused's Home and Family? What did he do?

PW4 has testified that as many as 30 villagers surrounded the accused's house, within its perimeter fence, soon after the noisy quarrel of the night was sparked off. But neither PW1 nor PW2 nor PW4 has spoken with certainty or credibility, as to how the confrontation which began at the gate on Kabiria Road, spilled over into the compound in which the accused had his house. PW1, PW2 and PW4 have strived to give the impression that the three of them were continuously at the gate along Kabiria Road, even as *villagers* entered the compound in which the accused lived. PW1 claims that after he and his friends had challenged the accused who had been relieving himself by the gate, the three were now the helpless victims of an accused who dashed into his house, fetched a bow and arrows, and mock-aimed one arrow at them menacingly. But none of the three (PW1, PW2 and PW4) told the Court that the accused *did* unleash any of those arrows on them; they gave the impression that the accused's threats forced them to *run away*. If that is the case, then they obviously would not have seen the accused shoot the deceased; indeed, they never testified that they did. Their evidence is hazy on this question, notwithstanding their testimonies (which coincide with those of the accused and of PW7) that visibility at the scene was good, as there was electrical lighting.

So, on the question, how was the deceased shot with an arrow, the Prosecution's key witnesses have not said the truth. And this failure to tell the truth is most puzzling, since there are prosecution witnesses (notably PW4 and PW5) who are quite positive, that the fatal arrow was fired not from the outside, but from the *interior* of the house, through a cleaver-cut hole on the metal-sheet wall. Both PW1 and PW4 said there was a time when the accused had left his house, charging outwards, bow-and-arrows in hand, before the fatal shooting took place; but, notwithstanding the vague claims by PW1 and PW2 that the shooting took place outside, PW4 affirmed that the accused's wife had taken him into the house, and they locked themselves up there and he never came out, and that it is while they were so locked up that the fatal shooting took place.

The accused testified (and this perfectly agrees with the testimony of PW4 and PW5) that a large crowd of people had entered the compound where his house was located, and they uttered menacing words, and lodged a physical assault on the house, so scaring his family that his wife and his sister-in-law burst out screaming for help. It was the accused's evidence that it was at that moment of attack, that a member of the crowd cut open the wall of the house, and that man's hand was brandishing a cleaver, thrust in through the hole-in-the-wall. The accused felt so threatened, and was so concerned for the safety of his family and himself, that he took an arrow from its quiver, and set it to his bow, firing at the attacker; and the attacker was instantly struck, falling only a very short distance from the wall of the accused's house, and wholly within the compound in which the accused lived. It was the accused's testimony that this incident so scared the attackers, they all ran away. And at that moment a good neighbour opened the accused's door from the outside; he saw the body lying next to his wall; and he promptly took his bow and arrows and made off towards the Police Station, for the purpose of reporting that he had shot an attacker. This evidence appears truthful, as it is well corroborated by the testimonies of PW5 and PW9. The accused had left his bow and arrows by the roadside as he proceeded towards the Police Station; he later recovered it and handed it over to the Police officers who were returning with him to the scene – a position not contested by any of the witnesses for the prosecution.

PW1 was not a truthful witness. He said little about the invasion of the accused's house; yet his friend PW4 testified that it was he, PW1, who initiated the attack on the accused's house while the accused was locked up inside. PW4 himself blows hot and cold, in his profile of credibility; he also says he saw the deceased fall, after the shooting; and that the deceased fell on PW1; which of course means both PW1 and PW4 were *inside* the compound where the accused lived, and they were *part* of the gang of attackers. It is not surprising they never saw the accused fire out the arrow – as the accused was right inside his own house. PW4 testified that there were some 30 people hitting the deceased's house, at the time the fatal arrow was fired; and this means there was a major attack on the accused's abode, while he and his family were locked inside the house. PW1 testified that he was at the roadside with his friends when he heard his brother (the deceased) screaming in pain. This I find to be false testimony, for PW1, as well as *the deceased* were certainly part of the gang unleashing a major attack on the residence of the accused.

PW1 has not told the truth. He claims that “the man with arrows chased everyone away.” *Everyone* (including PW1), obviously, had laid siege around the accused's house. The deceased was now shot, but

PW1 did not know where the shot came from. He cannot rightly say the accused chased them away; they ran away from their scene of night crime, after his brother fell; and the Court would believe the accused's evidence – that he was able thereafter to leave his house and promptly get to the Police Station, for the purpose of reporting the incident.

The main prosecution witnesses merit censure for coming to Court to give untrue testimony. PW2 claimed that the accused shot the deceased, and then ran away to his house; and that the shooting took place out along the road. This runs against the more credible evidence coming from the accused, from PW4 and from PW5. PW2 also claims that he saw the accused run away after shooting the deceased; and PW4 pretends that he never saw PW2 as the two of them participated in the night assault on the accused's residence. But PW4 is quite clear, that the night gang had cut a hole in the accused's metal-sheet wall, and that the fatal arrow came out through that hole. In many respects, if there is one prosecution witness who especially corroborates the accused's testimony, and vindicates his claim of self-defence, it is PW4 – and he could not have taken that position unless it was true. PW4 is quite clear on how the deceased came along and joined in the assault on the deceased's house; he says: "The deceased came with the crowd. I was seeing him. We were standing by the gate. We were on the inside." So, in effect, PW4 admits that he and his fellow-attackers were indeed inside the compound in which the accused lived; and PW1 had also testified that they had *followed the accused* into his compound to sort out the grievance raised by the accused's act in relieving himself on a grass patch outside the gate.

PW1, PW2 and PW4 consistently maintained that on the material evening, the aggressor was none but the accused – for being the only person who was armed. I would not accept this as true testimony: for if there were about 30 persons at the scene, involved in a brawl and attacks on the accused, it wasn't possible for those witnesses to know if they were armed. Secondly, there is no credible evidence which shows the accused to have flaunted his bow and arrows in public.

The claim by certain prosecution witnesses that the accused had shot the deceased and then disappeared, is not true, as it appears from the testimonies of PW5, PW7 and PW9. And from the testimony of PW5, the fresh cut on the metal-sheet walling of the accused's house, through which the accused shot the fatal arrow, appeared on the bedroom side of the house.

PW9, who in certain respects gave testimony corroborative of the accused's evidence, averred that the accused had known the night attackers, as they were fellow-villagers. In my assessment, that would be untrue evidence. There was no way, I would take judicial notice, in which the accused would know the identities of some 30 people unleashing terror upon his house in the middle of the night.

XI. APPLICATION OF THE LAW

What has come up before this Court is a **murder** charge. At a basic level, the law relating to murder is defined in s.203 of the Penal Code (Cap.63):

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

Clearly, there are two elements to be established, for an accused person to be found guilty of murder, namely, (i) *malice aforethought*; and (ii) *unlawfulness* of the impugned course of conduct. The meaning of malice aforethought is clear from the content of s.206 of the Penal Code:

“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 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.”

Did the prosecution, by the evidence of their ten witnesses, prove that the accused when he shot the fatal arrow through the hole in the wall of his house, had any of the *intentions* enumerated in s.206 of the Penal Code? When he released the arrow, quite clearly, he would have known it might kill, or cause grievous harm to somebody out there. On this account, the terms of the definition of malice aforethought in s.206(a) and (b) would be covered; but would he have been actuated by the “intent to commit a felony”? From the facts of this case, the accused could not have been actuated by the intent to commit a felony; he perceived himself as doing what he must do, in protection of himself, his wife and his child, against an imminent threat of destruction by unknown and numerous intruders, right in the middle of the night.

But perhaps more unequivocally in favour of the accused’s position is the question whether his act was *unlawful*. The word *lawful* is defined in the *Concise Oxford English Dictionary*, 11th ed. (2004) as: “conforming to, permitted by, or recognized by law or rules.” The accused’s position is that he had done nothing *unlawful* by shooting out the fatal arrow; indeed, as he perceives it, he did the only lawful and proper thing, when his family and residence were assailed by a violent crowd of lawless individuals who were cutting his house down, even as his family, who were locked inside the house, screamed for help. The accused maintains that he had exercised his right of self-defence, which is well recognized as the legal right of every individual.

It is not possible to fault the accused’s reasoning; and it then follows that the prosecution has not brought before the Court evidence of the commission by the accused of the specific elements required in a proper murder charge.

Such a failing in terms of proof leads to a wider conclusion: that proof *beyond reasonable doubt*, as required by law, has not been achieved. Consequently the accused is held not to have committed murder.

When this Court tries an accused person on a murder charge, in all cases there will be a *residual*, possible offence, namely **manslaughter**. If the accused did not commit murder, did he commit manslaughter?

S.202(1) is the basic statement of the law in respect of manslaughter; it thus stipulates:

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.”

It is clear that, just as with murder, *unlawfulness* is a precondition in the proof of manslaughter. Manslaughter which may result even though the charge before the Court is murder, is known as “voluntary manslaughter” – because the accused has the relevant *mens rea*, but for some well-recognized category of cause, the offence of murder is reduced to manslaughter. This principle is well explained in *Blackstone’s Criminal Practice 2002*, 12th ed:

“Voluntary manslaughter is not an offence one can be indicted for, but rather is a verdict which can result from an initial indictment of murder. The actual verdict, however, will be simply ‘manslaughter’ without the label ‘voluntary.’”

The condition of *unlawfulness* is excluded where there is a true claim of self-defence – as is the case in the instant matter; it is the obligation of the prosecution to disprove the accused’s claim in such a case, and to establish that the offence of manslaughter has been committed.

It emerges from the analysis herein, that all the credible evidence points to an act of *defence of self, family, and home* – on the part of the accused. The prosecution did not even begin to show that *excessive force* had been applied by the accused in that defensive undertaking. It follows that the prosecution has neither displaced the accused's defence, nor, indeed, proved a case *beyond reasonable doubt*, whether in respect of murder or manslaughter.

That leaves only **justified killing** as the legal category under which the death of the deceased can be set. And it follows that the accused's defence is to be upheld, and the prosecution case rejected.

In the verdict, therefore, I now find the accused **not guilty**, acquit him accordingly, and order that he shall be set at liberty forthwith, unless he is otherwise lawfully held.

I uphold the opinion of the assessors, thank them for their contribution, and discharge them henceforth.

Orders accordingly.

DATED and DELIVERED at Nairobi this 30th day of April, 2007.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndung'u

For the Prosecution: Mr. Bifwoli

For the Defence: Mr. Mwaura