



**Republic v Munyalo (Criminal Case E004 of 2021)  
[2024] KEHC 16630 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16630 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E004 OF 2021  
JN ONYIEGO, J  
DECEMBER 17, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MICHAEL MUNYOKI MUNYALO ..... ACCUSED**

**JUDGMENT**

1. Michael Munyoki Munyalo the accused herein is charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. Particulars of the information are that on 16.05.2021 at Garissa Township, Garissa Township Sub County, within Garissa County he murdered Morris Kimathi Kaliunga.
2. Having pleaded not guilty to the charge, the prosecution called Nineteen (19) witnesses in support of its case.
3. PW1, Mwendwa Mnosa, a security guard at DRC club commonly known as 3D club, testified that on 15.05.2021, he was at the said club being his place of work. That the club closed at 9.00pm in obedience to the 2019 covid imposed curfew rules. That he was left behind together with one Irene, an accountant who remained behind collecting bottles. That later Dj Spencer went back with his laptop saying that Phyllis, the club manager had directed that he opens the club as there were visitors.
4. It was his evidence that after 20 minutes, Phyllis arrived with visitors being 4 men and 3 ladies who were immediately followed by another gentleman who sat on his own table. That the eight sat together as orders for drinks were made and served. He stated that in the group of eight, he recognized one Pasu and Dickens both police officers plus the OCS (accused herein).
5. He stated that after a short stay, one Dickens asked him to open the door so that he could escort his visitor out thus leaving two girls behind together with Phyllis. That upon returning, Dickens exchanged with one of the girls leading to Dickens slapping her. The accused person tried to intervene



- without success. It was then that the gentleman who had sat separately from the group also tried to intervene but Dickens told him not to as he was not part of the company. At that point, the OCS asked him to remove the said gentleman out but on return, he found all bottles down and shortly thereafter, he heard two gun shots. Later, he heard that the Meru fellow was dead.
6. PW2, Jimmy Musyoka, a DJ at the Club 3 D testified that on the material day, he played music at the club till 9 pm after which he left. That at around 11.59 p.m. he received a call from Phyllis who asked him go back to work but he refused. However, Phyllis managed to convince him to go back to the club and play music, after assuring him that she had big bosses in her company.
  7. He therefore returned to the club and continued to play music although in low volume. He stated that after sometime, Phyllis released him and only came to learn the following day that somebody had been shot dead within the club.
  8. PW3 No. 252627 PC Feizal Mohamed Omar testified that on 15.05.2021, he was within Garissa town in a parked car together with his friend by the name of Bishar chewing miraa at a place known as Ngumune Manyatta. At about midnight, Bishar said that he wanted a drink and so, they visited club 3D near Villa Park.
  9. That in as much as there was light inside, the club was closed and so, they pushed open the door and entered. In there, they found a lady at the counter. As Bishar bought some drinks, some three girls and two men entered the club. They sat and thereafter ordered for some drinks but after sometime, one of the men left with a lady and stayed for about 45 minutes before returning.
  10. That upon that man returning, a lady who was part of the group complained saying that the man had taken so long. Offended by the lady's remarks, the said man started raining slaps on the lady. Another gentleman who was also part of the group tried to intervene with no success. That the whole group left the club and so, they also left the club albeit through the back door. After a short while, they heard a sound which he later learnt emanated from the Club 3 D.
  11. He called the DCIO to make enquiries and the DCIO told him that they meet at Nomad. With the DCIO was Cpl. Mutungu and other officers who patrolled the scene, they came a close a male African lying dead.
  12. PW4, No. 238870 Inspector Dickens Ogutu in charge of Crime Garissa police station testified that on 14.05.2021, he had travelled from Homa Bay to Garissa with his girlfriend, Felicia. That Felicia wanted to see Garissa and so, they left to the CBD area and later visited 3 D club. He later met his friend by the name of Ohingo and enquired from him of Dr. Reuben. Ohingo told him that there was a possibility that Dr. Reuben was at 3 D club. Noting that he was only about 150 m away from the said club, he called Phyllis who did not pick and so, he called Dr. Reuben who told him that there was a possibility that Phyllis was at the club.
  13. He stated that he went in and found Phyllis who sought for some few minutes to freshen up before she could join them. Phyllis asked him if they could go to Almond Hotel but later changed and went to Rangers New Club at Madogo. While there, they were joined by Faith, his girlfriend's cousin and Deima who had visited the said joint for a friend's birthday. After sometime, Melicia, a student at NEP Technical joined them too.
  14. At 6.30 pm, the accused called him and enquired of his whereabouts. Accused directed him to order for chicken as he would join him later. At 7.30. p.m., Faith joined him in their table and informed him that Deima's parents are strict and that he should help by dropping her home. He thus left Felicia and Phyllis and took Deima home at Garissa Ndogo. On returning, they stayed until 10.50 hours when Phyllis suggested that they drop her at 3D where he parked at the gate.



15. Upon getting in the club, he received a call from Fred, Faith's boyfriend requesting him to take Faith to Soko Ngombe where he lived. Shortly, he left with Faith but upon reaching Co-operative Bank, he saw Fred's motor bike and so he stopped. He thereafter accompanied the duo to Soko Ngombe but upon returning to 3D club, Felicia accused him of being in a relationship with all the other girls that he had escorted. That he got annoyed and started slapping her. He stated that the accused person tried to intervene and so, Phyllis too. He stated that when the watchman opened the door for the three of them to exit, a man entered the club but thereafter, he heard glasses crush down. At that point, he saw the accused person and the man who had entered the club hold each other. That even after the accused person exited the club, the said man followed him saying that "hata kama munaenda sija malizana na wewe". That as a consequence, the accused person and the man started exchanging blows.
16. He went further to state that he was alerted by the watchman that the said person had started removing something from his waist and when he advanced towards him, he ran away. As he was leaving with the accused person, the said man tried to attack the accused person who drew his gun and shot into the air.
17. PW5 No. 236376 Inspector Lawrence Paraxedes, a police chaplain stated that on the material day, he was asked by the OCS (accused) to be the duty officer as the one on duty was absent. The night was calm as it was during the days of curfew. At around 2 am, the OCS called him on his phone informing him of a scene he had visited. The accused instructed him to go to DRC area but did not divulge further details. He thus called the patrol team and headed to the said place where they found a middle aged man lying dead. The bodaboda men told him that the issue started from 3D and the same involved a police officer and the deceased as he had an interest in a woman. He proceeded to call the DCIO Inspector Evans Osinya and briefed him of what happened and then handed over the scene.
18. PW6, Phyllis Waithera Kabugi, a business lady in Nyahururu testified that previously, she worked as a manager at 3D, a bar and restaurant. That on the material day, PW4 together with Felicia requested her to go with them to Madogo to a place known as Rangers bar and restaurant. Later in the night, OCS Munyalo of Garissa (accused) joined them and so, they left for 3D where they found PW1 who opened the gate for them. That Felicia, Dickens, another girl, herself and accused entered the club. As they entered, a person whom she did not know also entered the club. They ordered for drinks and thereafter, Dickens left with Faith as she remained with Felicia and the OCS. When Dickens returned, there arose an altercation between him and Felicia. That despite the accused person intervening, PW4 heeded not as he proceeded to beat felicia.
19. According to the witness, it was at that point that the person who had previously joined them got involved in the issue by defending felicia and therefore, as a manager, she asked them to go out and solve their differences. In the process, a physical confrontation ensued between the accused person and the said man. Suddenly, she heard a gunshot with the accused person saying that people ought not be involved in issues that don't concern them. She denied the allegation that together with PW4, they had a plan for the accused person to be attacked by the stranger.
20. PW7, No. 92792 Cpl. Charles Mutua stated that on 16.05.2021, he received a call from OCCIO Chief Inspector Evans Osiya seeking to accompany him to the scene. Alongside Cpl. Mutundu and Cpl. Abdi Aden of CSI, they went to the scene where they found a male body lying opposite KMTC Garissa campus hostels. The body had a wound on the left thigh below the pelvic bone. The scene was documented by scenes of crime officers and thereafter, the body moved to Garissa Referral Hospital. Cpl Abdi frisked the deceased's body for any weapon but none was found.
21. PW8, Irene Wangari Wairimu testified that on the very day, she was on duty at 3D club from 8 am to 11pm and that she was meant to close at 11pm. At 2 am, her manager, PW6 arrived with OCS, Dickens and 3 ladies and a man she did not know. She served them with beer and whisky but later, a



- man entered and sat alone. Dickens left with 2 ladies but came after an hour while alone. Left in the club was one man, OCS, some lady and Phyllis. After a while, an altercation arose between Dickens and the lady. As they fought, the man who had sat alone hit the accused person and a fight ensued. As they left the club, she heard a gunshot. She thus returned to the club and then closed the counter. She later found a body of a male lying dead. On cross examination, she stated that on the material day, they had closed until the manager requested that they open for there were visitors.
22. PW9, No. 236665 Cpl. Ben Mugo recalled that on the material day, he was on duty and in charge of patrol in Garissa and its environs. That they started patrol at 6 pm until midnight when they dropped Mr. Keah and further continued with the patrol. He recalled that they received a call from PW5 who requested that they pick him and thereafter, they proceeded to the DRC area toward KMTC. It was his case that they found a huge crowd which on seeing police dispersed. In the same breadth, they saw a body of a young man in blue jeans soaked in lots of blood in the pelvic area. He stated that the duty officer called the DCI officers who arrived in a short while and started processing the scene.
23. PW10 No. 240052 Inspector Abdi Aden, recalled that on 16.05.2021, he received a call from Chief Inspector acting DCIO Osinya that there was a dead body lying near ABC Garissa hostel. He proceeded there and found Chief Inspector Osinya, Cpl Muhia, Cpl Muhindi, PC Feizal all from the DCI, the duty officer and some personnel. There was also a body of an unknown male adult with a gunshot wound on the left thigh. He documented the scene and took pictures at various angles which he produced.
24. PW11, No. 67598 Cpl. Benson Mutundu testified that on the material day, he was called by the then DCIO Osinya who informed him of a scene of murder they needed to attend. He accompanied the acting DCIO, Cpl. Mutua Charles and Inspector Aden Abdi to the scene of crime where they found a body lying in a pool of blood near the KMTC gate. The scene was processed and thereafter the body taken to Garissa County hospital for preservation and post mortem. He was handed over two pistols recovered from the accused and IP Dickens for safe custody and an inventory prepared and signed by Mr. CI Munyalo, Inspector Ogutu, Mr. Noah Katuma and himself.
25. On 21.05.2021, he escorted the body of the deceased to Meru level 5 hospital for post mortem where the body was identified by two relatives and an IPOA officer from Meru. On 24.05.2021, he forwarded to Ballistic Expert the Jericho pistols previously recovered from CI Munyalo and Inspector Ogutu. The items that he forwarded being of S/Nos. 1 A1-Jericho pistol serial no. 45003190, A2 Jericho magazine previously fitted in A1, B1 – L3 ammunition, a Jericho pistol No. 44332383, C2 a Jericho magazine, D1-15 ammunition loaded in C2 wherein it was requested:
- i. The ballistic expert to ascertain whether exhibit A1 and C1 are firearms under *Firearms Act* as weapons that can fire.
  - ii. Whether A1 and C2 are components of A1 and A2 respectively.
  - iii. Whether exhibit B-1-13, D1 and D15 are live ammunitions and their calibre.
  - iv. Whether A1, A2, C1 and C2 were involved before in any criminal activity in the Republic of Kenya. The exhibits memo was received at ballistic expert school at DCI headquarter on 24<sup>th</sup> May, 2021.
26. PW12, No. 237845 Senior Superintendent of police Florence Karimi, a firearm examiner testified that on 24.05.2021, No. 67598 Cpl. Benson Mutundu from DCI Garissa submitted the following exhibits; two Jericho pistols marked as A1 and C2, 2 magazines marked as A2 and C2, 28 rounds of ammunitions marked as exhibit B1-13 and D1-D15. She test-fired each of the pistols with 3 rounds of ammunition which he picked from B1-L3 (Exhibit C1-15). On cross examination she stated that



- both guns were serviceable in as much as she was not able to determine who between the holders of the pistol fired.
27. PW13, David Kahinga, father to the deceased recalled that on 21.05.2021, he was brought to Garissa wherein he was handed over the deceased's body. The body was later taken to Meru mortuary where post mortem was done.
  28. PW14 Dr. Scolastica Nduta Kimani testified that she conducted post mortem on the body of the deceased. That on the external appearance was an entry gunshot wound on the superior right region of the left austerior measuring of 0.5 cm in diameter. There was an exit gunshot wound on the groin area of the left thigh measuring 1 cm in diameter. That multiple bruises were present on the right lower chest region, the lungs were normal while the heart valves had calcium deposits and the liver had bruises on the right side anterior. All other systems were normal. As a result of her examination, she formed the opinion that the cause of death was a gunshot wound to the left thigh leading to blood loss.
  29. PW 15, Abdinasir Ahmed Burale recalled that on that day, having taken his client to the villa Park, he parked his motor cycle at the DRC (3D club). The people therein all had women. That after 30 minutes, the accused person got out of the club while fighting another man. Noting that he was overpowered, the accused person drew a pistol and as the man was running away, shot him. On cross examination, he stated that he saw what had happened and that in as much as the same happened at night, there was enough light. According to him, the accused person was a person well known to him as he was an O.C.S.
  30. PW16, No. 20176 Senior Inspector Muslaf Mohammed Hassan testified that on 16.05.2021, he received a report of a shooting incident within Garissa township in 3 D Bar. That the report stated that there was one male who was fatally shot by police officers from Garissa Police Station. He recorded statements, carried out investigations and thereafter wrote to the County Police Commander Garissa County requesting to be forwarded documents in relation to the incident. During the investigations, he summoned police officers who were said to be at the scene of the incident and further, visited the scene. He stated that he spoke to his colleague, Mr. Mburu from the Meru office who attended the post mortem examination.
  31. After investigations, the file was forwarded to Nairobi for further action. It was his evidence that they found that the accused was responsible for the death of the deceased and therefore, recommended for his prosecution. According to him, the shooting was unjustifiable as the deceased was not armed at the time in question. In the same breadth, the deceased was shot while he was running away. He stated that he also obtained Arms movement register which showed that the accused had been issued with Jericho Pistol 11 number 45303190 with 15 rounds of ammunition 9mm issued on 15-5-2021.
  32. PW17 Patrick Muringi, a clinical officer working at Meru Teaching and Referral Hospital recalled that he knew the deceased as he was his brother in law. He stated that on 21.05.2021, the body of the deceased was transferred to Meru Hospital where he identified the same to the doctor who carried out post mortem.
  33. PW18 No. 811266 Cpl. Vincent Obure, previously an armourer at Garissa police station working as the divisional armourer recalled that on 16.05.2021, he issued a firearm to the accused person who was equally his OCS. It was his evidence that the pistol issued was a Jericho pistol of serial 45303190 (Pex.3A). That the same was loaded with one magazine containing 15 rounds of 9mm calibre (P. exhibit 3D) and 1-13 ammunition (P. exhibit 3C0 1-3). He signed in the arms movement register which captured the particulars of the issued officer and that the officer was not expected to return the pistol to the armoury on a daily basis.



34. On the other hand, pistol S/No 44332383 was issued to IP Dickens Oguta (PW4) who signed for the duties of OC crime. He was issued with one magazine which contained 15 rounds of ammunition and just like the accused person's pistol, PW4's pistol was not returned to the armoury as both pistols were deposited with the CCIO.
35. PW19, No. 233557 Peter Wahome, Deputy Criminal Investigation Officer Nyanza region recalled that previously, he was stationed at Dadaab Sub County Garissa County. That on 18.05.2021, the CCIO Garissa, Noah Gatiru directed him to investigate an alleged murder case committed within Garissa. The murder was allegedly committed by the accused person herein. Together with PC Kimathi and Cpl. Mutundu, they commenced investigations. PC Kimathi attended the post mortem while Cpl. Mutundu took internal matter for toxicology and further, forwarding the pistols for ballistic analysis.
36. He later arrested the accused and charged him with the offence herein. He also carried out investigations and found out the accused person was at the scene of the incident at the very time the offence was allegedly perpetrated. He stated that in the course of his investigations, he found out that on 16.05.2021, at 3.00 am, the accused and IP Oguta went to the club where the accused engaged in a quarrel with someone. That the deceased left the club but the accused person followed and shot him. After investigations, it was found that the accused was to blame for the offence. He stated that the alleged pistols used were also recovered. He recalled that the ballistic experts confirmed that the pistol issued to the accused person was the one that fatally injured the deceased.
37. The prosecution closed its case and the court directed that parties file their submissions on case to answer.
38. Upon being placed on his defence, the accused person gave a sworn testimony and called three witnesses. He (DW1) testified that previously, he worked as the OCS Garissa police station. Before interdiction, he had worked for 36 years and held various position. He denied killing the deceased. He stated that upon entering the dim lit 3D club, he saw PW8 and Dickens together with his girlfriend and he also saw Felicia drinking with a lady and another man.
39. After a short while, PW4, PW6 and Dickens' girlfriend left briefly but later went back and so, they started drinking. Again, Dickens left alone and took about 50 minutes to 1 hour before returning. After a short while a stranger entered and so, he asked PW1 who the man was. He said he thought they were together and so, the man continued sitting there. It was his case that he saw PW4 talk in a low tone to his girlfriend but shortly thereafter, he started beating her. Despite his efforts to intervene, PW4 who was very drunk heard none of it and proceeded to beat the lady. At that time, Phyllis approached PW4 and equally, the unknown man also approached PW4 demanding to know why PW4 was beating the lady.
40. According to him, he sensed danger and ordered PW1 to take the man out when he realized that PW4 was not happy. As PW4 resumed beating the girlfriend, they all left the club. While at the gate, he asked PW4 what was happening when he heard Phyllis in Kikuyu/Meru saying "they want to kill the OCS". When he turned, he saw the watchman grab Dickens saying "you cannot see the man has a metal bar and wants to kill the OCS". Upon seeing the man, he ordered him to leave when he murmured while advancing towards him that "sijamalizana na wewe".
41. At that time, he pulled his pistol and shot twice in the air to scare the man away. That once a Jericho is corked, it lodges the ammunition and once the trigger is still exerted, the bullets continue coming out until pressure is released. At that point, he sensed danger and scared the man when he saw him running away. He thereafter called the duty officer PW3 and told him to come to 3D club.



42. He testified that he managed to see a hammer and a knife on the ground but then left for his house. Upon going for work on the following day, he perused the OB and saw a report of shooting at 3D. He was later ordered to surrender his pistol, a direction he complied with and later on charged with the offence herein.
43. Ms. Mutemi for the accused person further sought for an order or summons to the OCS Garissa police station to produce OB for 16/5/21. The prosecution on the other hand was not opposed to the same. As a consequence, DW2, No. 84242 PC Feisal Amin confirmed OB for entry No. 4/16/5/21 at 0435 hrs for Garissa police station. He also produced OB NO 54/16/5/21 made at 1535hrs. He produced a certified copy of the OB entries of 16/5/21 as Pex. No 2 A and B. Entry No. 4 was booked by IP Lawrence Kinyua as the report was made by the OCS CIP Michael Munyalo Munyoki who reported a shooting incident. Entry No. 54 was entered to reflect recovery of a hammer and kitchen knife from the DCI. On cross examination, he stated that the report entry No. 4 was made by the OCS now the accused person. In respect of the said OB 4, there was no exhibit. OB No. 54 was made 15 hours after OB No. 4. There was no indication of person who handed over exhibits in respect of OB No. 54.
44. The defence closed its case and parties were directed to file their written submissions.
45. The prosecution in their submissions dated 16.09.2024 urged that they had proved the elements of the offence of murder as laid out in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR where the elements of murder were held to be proof that; the death of the deceased occurred, that the accused person committed the unlawful act which caused the death of the deceased and malice aforethought.
46. In this case, it was argued that death was proved by the prosecution witnesses pw5,9,11,13 and 14. On whether the accused person committed the unlawful act, it was argued that the prosecution evidence clearly pointed at the accused person as being responsible. On malice aforethought, the prosecution submitted that the accused person conceded to having fired his pistol to allegedly scare the deceased as a way of defending himself. However, the autopsy report showed that the deceased was shot at. That it was grave that the accused person, an experienced senior officer shot the deceased who was unarmed at the point in question. The court was referred to the case of Victor Nthiga Kiruthu vs Republic [2-17] eKLR, where the court held that reasonable force in self defence is a matter to be determined from evidence and the circumstances of each case.
47. That in this case, the actions of the accused person were not justified. That being a trained officer, he applied an amount of force that was not commensurate with the impending attack. To that end, this court was urged to find the accused person liable of the offence of murder.
48. The defence in their submissions dated 24.09.2024 submitted that the prosecution did not prove beyond any reasonable doubt that the accused committed the offence herein. From the outset, it was contended that the charge sheet did not disclose where the alleged murder took place and further, there was confusion as to the actual cause of death of the deceased. That the post mortem showed that the deceased had bruises on his chest cavity and his liver on the right side. That the evidence of the prosecution exhibit 5 portrayed that the deceased died due to excessive bleeding caused by a gunshot wound on his left leg. To that end, reliance was placed on the case of *Republic vs Chizi Kombo, Criminal Case No. 17 of 2010*, where Odera J. held that in a situation where the deceased sustained other injuries, examination of all the vital organs could help settle the confusion over the cause of death.
49. On whether the deceased's death was caused by the accused person, the defence argued that it was not proven that the man who attacked the accused person was the deceased. That PW8 saw both the man who attacked the accused person and the deceased and that they were two different persons. On malice aforethought, it was urged that the accused person had no motive in killing the deceased. That in as



- much as the accused person conceded that he fired twice in the air, the same was due to the nature of his pistol. To that end, it was contended that the prosecution failed to prove the essential elements of the offence of murder.
50. I have considered the evidence adduced herein by both the prosecution witnesses and the defence proffered by the accused person. I have also considered parties' rival submissions. The main issue for determination is whether the prosecution has proved its case against the accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt.
51. Accused person is charged of murder under Section 203 of the Penal Code which provides that:
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
52. For the prosecution to secure a conviction on the charge of murder, it has to prove four main elements against an accused person. In the case of *Republic v Henry Obisa Ouko (2018) eKLR*, the elements of the offence of murder were listed as follows:
- (a) that the death of the deceased occurred;
  - (b) that the death was due to an unlawful act or omission;
  - (c) that it was the accused who committed the unlawful act or omission which caused the death of the deceased; and
  - (d) that the accused had malice aforethought.
53. On whether there was proof of death and the cause of the said death, the death of the deceased was proved by the evidence of inter alia PW1, PW2 and PW17 all who testified that indeed the deceased died. PW14 on 21.03.2021 at Meru Teaching and Referral Hospital carried out post-mortem examination on the body of the deceased. As such, the element of death was proved satisfactorily.
54. As to the cause of the deceased's death, PW14, Dr. Scholastica Nduta produced a post-mortem report as PEX 1 detailing the injuries found on the body of the deceased. According to her, the deceased died as a result of a gunshot wound to the left thigh.
55. The next issue is whether the death of the deceased was caused by an unlawful act or omission. The aspect of when an act causing death can be said to be lawful has been recognized from time immemorial. Article 26 of *the Constitution* is clear that every person has the right to life and that a person shall not be deprived of life intentionally except to the extent authorized by *the constitution* or other written law. [ See *Gusambizi Wesanga vs Republic [1948] 15 EACA 65*].
56. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained due to gunshot wound to the left thigh as was detailed in PEX 1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further evidence presented before court irresistibly points to an unlawful act that led to the death of the deceased following a gun shot. Accordingly, I find and hold that the death of the deceased was caused by an unlawful act.
57. On whether the prosecution proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased, the accused has denied committing the unlawful act leading to the deceased's death. The question is, who caused the unlawful act that led to the death of the deceased?



58. From the onset, the burden of proof lies on the prosecution throughout the trial and that burden does not shift to the accused person even if the accused chose to remain silent as that is his constitutionally guaranteed right. [ See article 50(2)(a)(i) of *the Constitution* and in the case of Stephen Nguli Mulili vs Republic [2014] eKLR].
59. From the evidence on record, a review of the same clearly points out that indeed, a man lost his life. In the same breadth, the accused person has denied killing the deceased. The accused person argued that in as much as he fired his pistol, he did not kill the deceased as he fired into the air. He further argued that according to PW8, the man who attacked him and the one who attacked the deceased seemingly were different persons.
60. A review of the prosecution’s evidence and specifically PW15 who testified stated that he saw the accused person engage in a fight with a man. That the accused person was overpowered and consequently, drew a pistol and then fired at the man who already was running away. According to him, the accused person was a person well known to him as he said, the accused was their OCS. In the same breadth, he stated that in as much as the incident happened at night, there was enough light that enabled him see the incident.
61. The question is whether this evidence by PW15, one of the identifying witnesses and at night is sufficient to find the accused guilty of the offence of murder. It would appear like it was only pw15 who seems to directly point the accused as the one who shot the deceased. That being the issue here, I must examine the law on reliance on such evidence. In *Wamunga vs Republic (1989) KLR 424* the Court of Appeal stated as follows regarding the evidence of identification generally:
- “It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
62. In *Ogeto vs Republic (2004) KLR 19* the Court of Appeal held that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult. The Superior Court stated:
- “It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”
63. The Court of Appeal for East Africa discussed the danger of relying on such evidence of a single identifying witness without warning itself of such danger. In *Roria vs Republic (1967) EA 583* at page 584 the court stated:
- “A conviction resting entirely on identity invariably causes a degree of uneasiness...
- That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”



64. In the same breadth, PW18, the investigating officer also testified that from his investigations, he found that the accused was at the scene of the incident. Additionally, after the deceased and the accused engaged in a quarrel, the accused drew his pistol and shot the deceased.
65. In the instant case, it is not controverted that the accused person had a confrontation with a man resultant of which he fired his pistol. It was also not denied in as much as there was another person with a pistol in this case Ip Dickens, he did not fire his gun. Only the accused person's pistol was determined to have fired and that after the confrontation, a man was found dead having suffered gunshot wounds. Dickens (pw4) confirmed that while separating the deceased and the accused, accused shot twice. Nobody else shot at that particular moment. That is a fact admitted by the accused and one Phyllis the club manager.
66. Clearly, the irresistible inference created is that the accused person herein and no other person was the perpetrator of the offence. [ See *Sawe vs Republic* [2003] eKLR]. On the above accounts, I am convinced that the prosecution proved that the accused person committed the unlawful act.
67. Having arrived at the above conclusion, the key question is whether the act was accompanied with malice aforethought. It was upon the prosecution to establish that the accused's act against the deceased was with malice aforethought and not excusable. [ See the Court of Appeal in the case of *Joseph Kimani Njau v R* (2014) eKLR].
68. The evidence by the prosecution confirms that the deceased and the accused fought, resulting in the deceased being injured seriously with a result of death from a gunshot wound. The prosecution sought to prove through PW18 that the accused person was to blame for the death of the deceased. Additionally, that the accused person not only being a trained officer, was also a senior police officer who would have known that firing at the deceased was in excess force noting that the deceased was not armed. That he ought to be held liable for the offence as charged.
69. Although the accused never raised issues of fighting the deceased, the prosecution evidence through the testimony of pw4, pw6 and pw15 clearly show that the deceased had a fight with the accused and that the accused acted on the heat of the moment hence malice aforethought cannot be ascertained. The deceased was determined to fight the accused. He was not provoked by the accused. The deceased was seated on his table alone. He had no business defending a girl who was being beaten by a boyfriend in a bar. In the same breadth, noting that the genesis of the shooting was as a result of PW4 hitting his girlfriend, the same escalated leading to the incident whereupon the deceased was shot. As a consequence of the foregoing, this court is inclined to hold that malice aforethought was not proved hence the offence of murder was not proved beyond reasonable doubt
70. In view of the above holding, the only offence established by the prosecution, is manslaughter. Accordingly, the accused is convicted of a lesser charge of manslaughter c/s 202 as read with section 205 of the Penal Code pursuant to Section 179 of the CPC.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17<sup>TH</sup> DAY OF DECEMBER 2024**

**J. N. ONYIEGO**

**JUDGE**

