REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 5 OF 2017

REPUBLIC .....PROSECUTOR

VERSUS

LAWRENCE SIAMENTO MOKOOISO .....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Akila for the State

Mr. Kimathi for the Accused

JUDGMENT

The accused was charged with the offence of Murder contrary to Section 203 of the Penal Code as punishable under Section 204 of the same code. It was alleged that between the night of 28.4.2017 and the wee hours of the morning of 29.4.2017 at Ngong Township within Kajiado North, Sub-county he murdered **Denni Sgibson Lwera**.

The accused pleaded not guilty to the charge. The prosecution initially was conducted by **Mr. Alex Akila**, a senior prosecution counsel but later taken over by **Mr. Meroka**, the principal prosecution counsel. The prosecution case comprised of fourteen witnesses set to discharge the burden of proof as stated in Section 107 (1) of the Evidence Act.

PW1 – PC Emmanuel Ekai, a gazzetted scenes of crime officer visited Chiromo mortuary where he photographed the deceased body during the postmortem examination. He produced in court the eight photographs as evidence in support of the death of the deceased. According to (PW1), he was later to visit the scene of the murder at Ngong Town where he took a second set of photographs 9 – 17. It was (PW1) testimony that the photographs captured the cartridges and bullet heads, the surrounding building and the position in which the alleged incident took place. The photographs and certificate were both admitted in evidence as to the reflections on the scene and identification of the deceased body at the mortuary.

PW2 – PC Chrispein Boit, testified as the police officer on standby at Ngong Police Station on 28.4.2017, he was asked on 29.4.2017 to proceed to Chiromo Mortuary for purposes of attending postmortem examination being carried out by Dr. Ndegwa – PW2. Further, he testified that the pathologist removed bullet head which was handed over to him to be part of the on-going investigations. He was able to positively identify the bullet head as one normally identifiable with ceska pistol. PW2 also did identify the clothing being worn by the deceased on the material day which included grey vest and green T-shirt.

PW3 – PC Festus Murio, testified that while at the police station on 28.4.2017, he received a telephone call in respect with gunshot incident at Ngong Township. According to PW3, in company of **Sergeant Nyongesa (PW8)** they proceeded to Embassy House the locus in quo of the offence where PW8 disarmed the accused person who was in possession of a ceska pistol. At the same scene, PW3 and PW8 told the court that there was a victim of the gunshot groaning in pain. The accused person was held as a suspect and the victim who later became the deceased was rushed to Nairobi Women Hospital (Rongai) for treatment. On arrival at the hospital PW3 and PW8 testified that the victim was pronounced dead. Thereafter, PW3 removed some documents from the pockets of his trouser which shows that he was an Administration police officer.

PW3 and PW8 further told the court that at the scene they collected three spent cartridges. He confirmed having collected one cartridge whereas PW8 collected the other two cartridges. The said cartridges were positively identified by PW3 and PW8 as the ones collected at the scene during their visit.

PW4 – Daniel Wanjala cousin to the deceased testified that on 29.4.2017 he was asked by the family to participate in identifying the body of the deceased during the postmortem examination at Chiromo Mortuary.

PW5 – Peter Mungambi is a member of the vigilant group within the larger community policing strategy within Ngong Town. On

28.4.2017 PW5 stated that he was with other police officers on duty on or about 10.00 pm, when he came across a man lying down at a verandah. The said person according to PW5, was in pain resulting from gunshot wounds. On this fateful hour PW5 testified that in the same conversation they realized the man, who shot the deceased was seated next to where he was lying down. In that same scene the man pointed at by the victim was also in company of a lady. When other police officers joined PW5 at the scene, it was decided that the victim be taken to the hospital. PW5, told the court that he was one of those who accompanied the victim to the hospital. On the way, PW5 alluded to the conversation between him and the victim who explained the circumstances under which he was shot at by the accused. As they proceeded towards the hospital, PW5 testified that it came to be that the victim conversation ceased. On arrival at the hospital, he was pronounced dead and they proceeded further to Chiromo Mortuary.

PW6 – APC Raphael Origa Amonde, testified as a colleague to the deceased whom they stayed with at Kibuku Training Camp. PW6 explained that the deceased on the earlier hours of 28.4.2017 did borrow his laptop which he wanted to use at Neiz club. PW6, then remained in the house as the deceased left for Neiz Club with an additional item being the handcuffs. The witness PW6 never heard anything until the following day when he was informed of the deceased death.

PW7 – PC Keya Samwel, testified to the effect that he happened to be one of those officers who accompanied PW3 and PW8 to visit the scene of the shootout at Ngong Town. The material evidence before court was in line with that of PW3 and PW8.

PW9 – Sergeant Benjamin Bitok testified as the officer incharge Kibuku Training Camp where the deceased was one of the trainees. PW9 gave evidence that on 29.4.2017 he received a message from bodaboda rider that the deceased had been shot dead. PW9, further explained that the deceased was not assigned any duties om 28.4.2017 or 29.4.2017. He also confirmed that the deceased whom on coverage and patrol duties had been assigned G3 Rifle. On the fateful day PW9 told the court that the deceased was not issued with any rifle or ammunitions. The arms register in his custody was produced as exhibit 10.

PW10 – IP Reuben Ekubu, a forensic ballistic examiner specialized on ammunitions and firearm examination gave a detailed analysis carried out in respect of the ceska pistol – serial no 197012 Pistol Magazine, twelve rounds of ammunition, three cartridges and one bullet head.

It was during the examination of the various components PW10 formed the opinion that the ceska pistol was functional, and capable of being used as a firearm, using caliber 19MM of ammunition. Thus he confirmed by testifying five rounds of ammunition from the twelve rounds forwarded to him as part of the forensic ballistic examination. Further in his analysis the empty cartridges collected at the scene were fired from the ceska pistol – an exhibit in this case. The certificate on the finings made by PW10 was produced in evidence as exhibit 11.

PW11 – Christine Wachira testified as the trained firearms dealer. PW11 confirmed that ceska serial no B197012 was sold to the accused in 2013. According to PW11 due process was followed in conjunction with the Central Firearms Bureau before selling the ceska pistol to the accused.

PW12 – Sergeant Nyongesa Jared attached to Ngong Police Station evidence is on materially similar with that of PW3, and PW8. He reiterated the observations made on arrival at the scene in regard to the deceased body lying on the floor of the verandah at Embassy House. The quick physical examination done by PW12 and his colleagues PW3 and PW8 showed gunshot wounds on the right side of the ribs. In PW12 testimony, it was at that particular moment the accused was disarmed of his ceska pistol complete with the magazine of twelve rounds of ammunitions. The laptop, charger, keys apparently property of the deceased was taken out by PW12. At that very moment PW12 told the court that the deceased was rushed to the hospital on board the station vehicle. The other exhibits, three cartridges, the ceska, magazine, bullets as crucial exhibits and the accused was placed in custody. All these items were to be produced by **PW14 CPL Agnes Chepkosgey**. The investigating officer PW14 confirmed that witness statements were recorded from various witness to the murder. Besides the witness statements, several exhibits recovered at the scene and other relevant points which formed the basis of the indictment were in her safe custody. PW14 presented before this court ceska pistol, serial no.197012, twelve rounds of ammunition, three spent cartridges, empty magazine, firearm certificate no 8855 for the pistol, safe keys, shotgun, twenty two rounds of ammunition, the vest and jacket belonging to the deceased, the marked exhibits referred exhibit – 2G- 8a, were admitted in evidence as confirmed by PW4.

PW13 – Dr. Ndegwa, account was on the postmortem examination findings. It was PW13 testimony that the deceased sustained bullet wounds which fractured the 7^{th} and 8^{th} cartridges, liver, mesenteric vessels. The left pelvic bone lodged in the muscle of the left buttocks with all these in view, PW13 opined that the cause of death of the deceased was exsanguination due to abdomen, pelvic injuries due to a single gunshot at close range. He produced the PF as exhibit 14.

The accused was placed on his defence. During the defence **DW1, Dr. Eric Mutungi,** gave evidence introducing a narrative as to what would have been the position of the assailant and the victim to produce the kind of injuries established by PW13 in his post mortem report. In his opinion, the deceased was the aggressor when he analyses the trajectory both by the ammunition, the left handed nature of the accused and the pronounce of injuries sustained by the deceased.

DW2 – Carolyne Njiri, testified as the lady who was first seen at the scene by PW3, PW8 and PW12 in company of the accused. She explained to this court that on 28.4.2017 she spent time with the accused at Steps bar and Kishurkuni both of Ngong Town. Further, DW2 stated that when it was time to leave they stepped out of the bar but without her knowledge, the accused had visited the washrooms. On arrival at the verandah, a vehicle was driven by and stopped exactly on that position she was standing waiting for the accused.

Immediately, according to DW2, a passenger in the rear seat demanded to know which direction she was going, but chose not to answer. The passenger persisted further but with nothing positive was coming out DW2 confirmed that she received a slap on the face. As this scuffle continued DW2 gave evidence that the accused happened to have arrived and wanted to know the reason for altercation with the male person. That is how a pull and push started between the two and all what she heard were gunshots. She noticed that the victim was lifeless lying on the ground. That is how they remained within the scene and after a while a police vehicle with some police officers took action of apprehending the accused.

DW2 also testified that the body of the deceased was carried away from the scene.

DW3 – Lawrence Mokooiso the accused on oath admitted that he is a firearm license holder. That on the fateful night he was in possession of ceska pistol with fifteen rounds of ammunition. Further, the accused admits to the fact that on the night of 28.4.2017 he spent sometime with his girlfriend DW2 at Steps bar where he was also meeting a business partner. It was the accused evidence that at the end of the meeting and social evening they decided to leave for home. However, he passed through the washrooms leaving the girlfriend to exit the bar when he finally caught up with her, there was another man having exchange of words, which prompted him to inquire as the nature of problem. The accused who said he did not know the man a scuffle ensued and shortly thereafter the two men inside the car came out and joined in the fight. The accused showed the court a torn jacket as a result of the fight. It was at that juncture accused told the court he was then pushed to the ground he went for his ceska pistol, shot at the assailants, who was on top of him at the time the accused further stated that apparently due to the gunshots, the other two man vanished. It was upto that moment he remained at the scene until the police arrived and commenced investigations.

He denied the offence of murder. He urged the court to also rely on the medical report by **Dr. Mutungi** to exonerate him of any culpability. Before considering whether the prosecution discharged the burden of proof of beyond reasonable doubt it's plausible to appreciate the legal perspectives by both counsels in the entire trial.

The accused submission in arguing the case Learned Counsel **Mr. Kimanthi** for the accused submitted that first and foremost the classic doctrine on the burden of proof of beyond reasonable doubt was clearly stated in **Miller v Minister of Pensions {1947} 2 ALL ER 372 – 373,** and Section 107 (1) of the Evidence Act **Woolmington v DPP AC 462** has not been discharged on any of the elements of the offence against the accused person by the state.

He further argued that the critical element of malice aforethought as defined in Section 206 of the Penal Code for one to be convicted of murder, the short of the threshold in so far as the evidence by the prosecution is concerned. In support of his submissions Learned Counsel cited the cases of **Joseph Kimani Njau v R {2014} eKLR, Nzuki v R {1993} KLR 171, Ernest Bwire Abanga Onyango v R CR Appeal No. 32 of 1990, Penube v R {1971} 124 CLR 107, R v Nilmol {1985} 20DR413**.

Learned counsel further argued and submitted that the analysis of the evidence avails the accused the defence of self as defined in Section 17 of the Penal Code. In this aspect of the defence, Learned Counsel contended that the accused that the accused fired the gunshots in circumstances which started with a scuffle from the deceased and his two accomplices who are not before court. That the assault against the accused happened at night and therefore he had reasonable believe that his life was under imminent danger. Further counsel submitted that the shoot out by the accused was a last resort available to the accused to defend himself from further attack and assailant from the three men. According to learned counsel, the prosecution did not dislodge through evidence to the standard required that the defence of self was not within the acceptable legal parameters. For this proposition Learned Counsel cited the following cases **R v Mannes 55 CR App R551, Ahmed Mohammed Omar v R {2014} eKLR, Palmer v R {1971} ALL ER 1077, R v Simon Otieno {2017} eKLR, Beck Ford v R {1967} 3 ALL ER, Ahmed Mohammed Omar & 5 Others v R Cr Appeal No. 414 of 2014, James Koitee Jalehsin v R {2014} Cr. Appeal No. 146 of 2009.**

Thus Learned counsel buttressing his submissions on the well stated principles in the above cases alluded to the nature of the attack, the number of assailants and the highly plausible position for one to fear that they were armed and ready to unleash dangerous acts likely to occasion serious harm to his life. **R v Christopher Khaemba Wangia {2015} eKLR** with regard to the prosecution overall conduct of the case, Learned counsel submitted that contrary to the arguments by the prosecution, the accused was a legally licensed firearm holder. He relied on DMFI - 4 and DMFI -5. He also defended the firearms certificate and justification by the accused to licensed as a firearm holder and user within the legal guidelines in the country. The learned counsel further argued and submitted following the investigations agitating in the manner they dealt with DW2 evidence. Thus he cited the case of **Michael Kinuthia Muturi v R Cr Appeal No. 51 of 2002.** According to Learned Counsel, he had no hesitation to take the view that the prosecution failed to discharge the burden of proof of beyond reasonable doubt hence the doubt should be resolved for the benefit of the accused.

On the other hand, Learned counsel submitted that all the circumstances of this case entitle the court to find that there was no malice aforethought. That the opportunity to use a firearm was necessitated and called for by the conduct of the deceased when he picked an altercation with the girlfriend of the accused. Thereafter, the accused on following his girlfriend at the verandah of Embassy House was met with full force by his two accomplices. According to Learned Counsel, the accused defence is consistent and its difficult to see how a reasonable man in the shoes of the accused could have reacted except to retaliate by use of force against the assailants. So thus Learned counsel cited the case of **R v Joseph Kalaba Kidaki {2016} eKLR.**

On behalf of the state, the principal prosecution counsel forcibly submitted that the evidence as presented demonstrate that the elements of the defence of murder were all proved beyond reasonable doubt. It was **Mr. Meroka** contention that perhaps the more fundamental issue is whether the evidence on record can show that the defence of self cannot be availed the accused.

On this issue **Mr. Meroka** submitted that the deceased was not armed with any offensive or dangerous weapon used against the girlfriend or the accused himself to place any one of them under imminent danger of an attack. Further, **Mr. Meroka**, argued and submitted that the defence of self is closely tied with the acts of provocation as depicted in Section 208 (1) of the Penal Code. **Mr. Meroka** contends, that there are no acts of provocation worthy to be brought within the ambit of Section 208 (1) of the Penal Code to provoke the reaction from the accused person of excessive force. **Mr. Meroka**, submitted that the prosecution case at hearing was that the attack and the use of a firearm viewed from any other angle is an act of intended to cause death or grievous harm.

Mr. Meroka maintained that contrary to the submissions by the defence an attack against the deceased was unprovoked one and it can only be concluded that the accused killed the deceased with malice aforethought.

Turning on all these issues **Mr. Meroka** cited the following cases: **Victor Githiga Kiruthu & Anor –vs- R eKLR, Duffy 1949 IALLER 932, Peter Kingeri Mwangi & 2 Others –vs- R, Stephen Kipkemoi Rotich –vs- R {2019} eKLR, Andrew Mueche Omwenga –vs- R**

{2009} eKLR, Tubere s/o Ochen {1945} EACA 63, Lucy Mueni Mutara –vs- R {2019} eKLR.

In some detail, Mr. Meroka urged this court to find that there are no discrepancies or inconsistent that would certainly impact negatively against the standard of proof of beyond reasonable doubt for the offence of murder against the accused.

The Learned principle prosecution counsel urged the court to enter a verdict of guilty and conviction for the death of the deceased contrary to Section 203 of the Penal Code.

Analysis and determination

The offence of murder contrary to Section 203 of the Penal Code is stated to be proved by the prosecution against the accused when the following elements are consistent with the evidence:

1. ***The death of the deceasefd.***
2. ***That the death of the deceased was unlawfully caused by unlawful act or omission.***
3. ***That the accused killed the deceased with malice aforethought.***
4. ***That the accused has been positively identified and placed at the scene.***

In view of the charge under the penal code some of the key characteristics the court would be taking into account are that whether the death was caused by the human hand of the accused. Secondly, whether, as provided for in Article 26 of the Constitution on the right of life the accused is culpable or his action fall within the exceptions provided in Subsection (3) which states as follows:

"A person shall not be deprived of life intentionally except to the extent authorized by the constitution or other written Law."

The classic case of **R v Guzambizi s/o Wesonga {1948} EACA 65** buttress the Law with regard and justification in homicide cases. The rationale behind this precedent setting authority is that all homicides are presumed to be unlawfully caused unless an accused person successfully rebuts the prosecution case by showing that the death was by accident, in defence of property, self or a third person or even the aforesaid death of the deceased was an act of God.

Like abbey submitted by **Mr. Kimanthi** for the accused the burden of proof in all the of the elements to be proven by the prosecution is clearly stated in the authorities cited of **Woolmington v DPP** and **Miller v Minister of Pensions (supra)** to be beyond reasonable doubt. The law of evidence provides the legal framework how facts in any proceedings are to be proven and the law places the obligation on the burden bearer.

In the instant case, the prosecution bears the burden of prove the asserted facts that the accused killed the deceased unlawfully and with malice aforethought. See Section 107 (1) of the Evidence Act. It remains therefore to consider the evidence, and submissions on the nature of the offence and responsibility of the accused in causing the death of the deceased.

Consequently the synthesis of the elements of the offence weighed alongside with the prosecution case and any defence raised by the accused would form part of the outcome of this case to find out whether he is guilty as charged or not in causing the death of the deceased.

(a). The death of the deceased as particularized in the charge sheet.

The Law underscores the principle that death may be proved by direct or circumstantial evidence that there was once a human being entitled to the right to life under Article 26 of the constitution but is now considered dead.

In other words by the creature of the Evidence Act Section 107 (1) the prosecution must lead evidence to prove the fact of death or on the other hand present evidence for the court under Section 119 to presume that from the set of circumstances. The deceased is long dead.

On this ingredient the prosecution verified the death by production of the postmortem report exhibit 14 by **Dr. Ndegwa (PW13)** who conducted the postmortem on the body of the deceased at Chiromo Mortuary was categoric that **Dennis Gibson Liveha** is dead. The police officers **PW1 Emmanuel Ekai** documented the deceased body and produced photographs admitted in evidence in reference to the deceased. His evidence was also supported with that of **PW2 – PC Boit, PW3 PC Festus, PW5 Mungambi of community policing, PW6 APC Raphael Amunde** a colleague and friend officer with the deceased residents of Kibuku Administration Police Camp, **PW7 PC Samwel Ekitela** and **PW4 Daniel Wanjala,** a cousin to the deceased all have one thread of evidence in common that **Dennis Gibson Liveha** is dead. The accused in his defence does not dispute the fact of death of the deceased. It follows therefore that the prosecution has discharged the burden of proof under Section 107 (1) of the Evidence Act on the asserted fact to proof beyond reasonable doubt the ingredient that the deceased is dead.

(b). The second limb of the offence of murder comprises of unlawful acts which the prosecution is expected to prove that the acts and omissions formed part of the criminal conduct of the accused.

"Tibamanya Mwene mushanga "Homicide and its social causes"

In the scholarly words, Law Africa Publishing (K) Ltd 2011, Nairobi observed that

> ***"a person is said to intend to commit an offence when he or she begins to put his intention into execution by means adopted to its fulfilment, and manifests his or her intention by some avert act."***

In homicide offences, the *actus reus* is the unlawful act or omission executed by the accused which results in the death of the deceased. Taking the evidence in perspective the cause of death must therefore be determined through direct or circumstantial evidence.

As propounded by predecessor of the Court of Appeal in **Rex v Enok Achila & Another {1941} 8EACA 63:**

> ***"It was held that where the cause of death of the deceased is a probable consequence of the unlawful acts of the accused, the accused should not be held liable."***

What is required of the court with regard to the offence of murder is the existence of sufficient evidence necessary to prove that the unlawful acts of the accused had a direct correlation for another person's death. In the case of **Benson Ngunyi v R Cr Appeal No. 171 of 1984 UR**, ***"the Court pointed out that medical evidence is not only usually required to prove the cause of death, but also to relate the injuries if possible to the evidence led by the prosecution."***

In accordance with Section 213 of the Penal Code the issue of Law to be borne in mind on causation and sufficiency of evidence to sustain a murder charge is that death need not be caused by the immediate unlawful act or omission of the accused person.

With all that, in the instant case the cause of death of the deceased is well document in the postmortem exhibit 14 by **Dr. Ndegwa (PW13).** In his examination notes PW13 established that the deceased suffered bullet wounds which fractured the 7^{th} & 8^{th} cartriage, laceration of the liver, mesenteric blood vessels were severed, the fracture of the pelvic bone. The other circumstantial evidence on the injuries sustained flows from the physical observations made by PW1, PW2, PW3, PW4, PW5, PW7, PW12 and PW14. The injuries inflicted which became the cause of death were from gunshot wounds penetrating through the body of the deceased.

In the persuasive authority of **Simon v R {1961- 63} ALR MAL 198**, the court stated inter alia that:

> ***"Every person is taken to have intended the natural consequences of his or her act."***

The test for ascertaining of this element is whether the prosecution managed to discharge the burden of proof that the injuries inflicted upon the deceased were in all circumstances not justified. This principle of Law is borne out by the provisions of the constitution in terms of Article 26 Subsection (3). The provisions is founded on some clear criminal defences in Law or when death is excusable for the advancement of criminal justice in an indictment which calls for a death sentence against an accused person.

Relating to these principles to the instant case, there can be absolutely no doubt that there is a direct relationship on the proximate cause on the injuries inflicted and the death of the deceased.

As would be discussed shortly in conjunction with the element on malice aforethought, the legal characteristics of this offence the prosecution desire to secure a conviction is basically grounded on prove of this ingredient beyond reasonable doubt. The cumulative effect of the evidence is such that the immediate or direct cause of the death of the deceased was the gunshot wounds from a ceska pistol in the hands of the accused.

> ***"The three element of the offence is that of malice aforethought in matters of criminal Law breaches the basic tenets of the offence are mensrea and actus reus. The court looking at the facts principally must improve and establish existence of intention and execution it through an unlawful act."***

This central ingredient for a murder charge to succeed commonly referred as malice aforethought is defined under Section 206 of the Penal Code. The Section stipulates that malice aforethought shall be deemed to be established by evidence, the prosecution proving any of the following circumstances:

> ***(a). An intention to cause the death of another person.***
>
> ***(b). Or to do grievous harm to any person whether such person is the person actually killed or not***
>
> ***(c). Knowledge that the acts or omission will cause the death of another person whether the person is the person actually killed.***
>
> ***(d). The intent to commit a felony.***
>
> ***(e). An intention to facilitate the escape from the custody of a person who has committed a felony.***

In the case of **Rex v Tubere s/o Ochun {1945} 12 EACA 63** The Court held that:

> ***"In the case of murder malice aforethought is deemed to be established inter alia by appreciating the evidence on the nature of the weapon, the manner in which it was used to inflict harm, the parts of the body targeted and the conduct of the accused prior,***

during and after the commission of the offence. It is this mental element which then must be accompanied with unlawful act to constitute the offence of murder."

The penal code under this definition in broad spectrum refers to various alternatives and circumstances that malice aforethought can implied either directly or indirectly from the sets of evidence presented by the prosecution.

There is the imputation of knowledge and foreseeability on the part of the accused that his avert act or omission would with certainty cause death or grievous harm of the deceased.

The phrases of nature of weapon, and gravity of the injuries required as part of the circumstances to establish malice aforethought in accordance with Section 206 of the Penal Code has been addressed in various cases. In the case of **Ogeto v R {2004} 2KLR** the Court of Appeal held that:

"If an accused stabs the deceased with a knife directly to his chest and the deceased dies of the stab wound, malice aforethought is deemed to be in existence to show intention to cause death or grievous harm."

In the case **Karani & 3 Others v R {1991} KLR 622** by reason of the fact that ***"the appellant inflicted serious injuries to the head of the deceased and the weapon used identified as pangas recently that pined and the deceased death was due to shock due to intracranial haemohage, the court concluded that the appellant had no other intention but to kill or to do grievous harm."*** See also **Text Book on Criminal Law 2nd Reproach Law Africa by Musyoka William at Pg 315.** See also **Ernest Asani Bwire Abanga alias Onyango v R Cr Appeal No. 32 of 1990.**

At the trial of the accused throughout his defence he maintained his innocence and the defence of alibi to rebut the entire charge of murder contrary to Section 203 of the Penal Code. It will be observed that **Mr. Kimanthi** to buttress his arguments properly so did invoke the guiding principles regarding the defence of self as stated in Section 17 of the Penal Code and admittedly in the various precedents from the comparative jurisdiction to our very own on the greater significance on the conditions to be met for one to reasonably draw from the defence against the charge of murder.

Mr. Kimanthi discussed at length the applicable Law and the rationale behind the provisions of Section 17 of the Penal Code to link the facts of the instant case with special regard to self-defence to absolve the accused from any culpability.

To **Mr. Meroka** for the prosecution, the property of self defence was vigorously and forcibly challenged to controvert the watertight case for the conviction of the accused under Section 203 of the Penal Code.

In response to **Mr. Kimanthi** submissions, on this issue **Mr. Meroka** urged the court to focus on the nature of the weapon, the unjustifiable cause to shoot at the deceased and absence of any provocation to trigger the use of excessive force.

It's the duty of this court to consolidate the views of both counsels to determine whether the defence of self dislodges both the elements of unlawful act and malice aforethought in furtherance of the final orders to be made by this court in respect of the prosecution evidence against the accused. Consideration of this ground is therefore of great significance to this matter.

The test applicable is well stated in the famous cases of **R v Manness 55 CR R551, Palmer v R {1971}, Beck Ford v R** and has locally adopted into our jurisdiction in the Court of Appeal decisions **Ahmed Omar v R (supra), Jane Koiteri v R (supra), R v Christopher Khaemba Wangila (supra)** Also of relevance on this legal principle and defence to a crime is the case of **Selemani v R {1963} EA 442**, the Court of Appeal for Eastern Africa held as follows and added its voice to the jurisprudence in this issue as follows:

"If a person whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker, the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious."

The defence of self under Section 17as read with Section 241 of the Penal Code as implicit from the object of such provisions where it exists is to be determined according to the principles of English Common Law.

The tenor of Section 17 and Section 241 of the Penal Code read as a whole if anything it indicates an act which must be deemed in Law worthy the right to the defence of property or the person.

The principle taken at its maximum as stated in the case of **R v Gachanja {2001} KLR 428**

"in Law is an absolute defence to a criminal charge which absolves an accused person of any criminal liability."

In purporting to use force to repel an attack thereby for an action done to have a binding effect the provisions of Section 207 as read in conjunction with Section 208 of the Penal Code on killing on provocation within the acts defined in Section 208 (1) of the Penal Code, the permitted legal limits to use force to repel imminent attack is only justifiable if the accused shows that he acted in a reasonable manner (See **Msiwa & Another v R {1999} 2 EA 1990** on this matter in the case of **R v Smith {1999} 1 CR Appeal R 256** the requisite test for a valid provocation in accordance with the provisions of Section 207 and 208 (1) of the Penal Code were held to constitute the following principles:

"First it requires that the accused should have killed while he lost his self-control and that something should have caused him

to lose his self-control. Secondly, the fact that something caused him to lose his self-control is not enough. The law expects people to exercise control over their emotions."

A tendency to valiant rages or childish tantrums is a defect in character rather than an excuse. The jury just thinks that the circumstances were such as to make the loss of self-control sufficiently excusable to receive the gravity of the offence from murder to manslaughter. This is entirely a question for the jury. In deciding what should count as sufficient excuse, they have to apply what they consider to be appropriate standards of behavior, on the one hand making allowance for human nature and the power to emotions but, on the other, not allowing someone to rely upon his own violence disposition. In applying these standards of behavior, the jury represents the community and decides, what degree of self-control every one is entitled to expect his fellow citizens will exercise in society today."

Similarly, in the case of **Uganda v Mbubati, {1975} 1 RB 225**, it was pointed out that if an accused becomes so provoked that it triggers defence of self the facts of the case ought to satisfy the following threshold grounds:

i. that there must be an attack on the accused.

ii. that the accused must as a result of the attack, have believed on reasonable grounds, that he was in imminent danger of death or serious bodily harm.

iii. that the accused must have believed it necessary to use force to repel the attack made upon him.

iv. that the force used by the accused must be such force as the accused believed, on reasonable grounds to have been necessary to prevent or resist the attack.

In **R v Howe {1958} 100 CLR 448, Lord Morris** had paused the question as to the defence of another:

i. "was more force used than a reasonable man would consider necessary?

ii. If so, did the accused nevertheless honestly believe that such excessive force was necessary?

In his Lordship view the defence of self is one which can be and will be readily understood by any jury. It is both good Law and good sense that a man who is attacked may defend himself. It is both good Law and good sense that he may do, but may only do what is reasonably necessary, but everything will depend upon the particular facts and circumstances, it may in some cases be only sensible and clearly possible to take some simple avoiding action, some attacks may be serious and dangerous, this may not be if there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessitates of the situation.

If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis, for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over, and no sort of peril remains, then the employment of force may be by way of revenge of punishment or by way of paying off a no score or may be pure aggression……..."

It has also been stated in no uncertain language by **Shyman on Criminal Law 6th Edition 2014:**

"That the right to protect oneself, ones family, and ones castle is a time honored right that existed before the common law and was recognized by it."

The more important point, which the court must remind itself is based on the principle in the persuasive case of **Dozier v State 709 NE 2nd 1999** where the court proclaimed:

"That for a defender to succeed under a claim of necessity he must show that the unlawful conduct was performed in order to prevent a major harm, there must have been no appropriate alternative to avoid the conduct, the injury caused as a result of the conduct was proportionate to the damage or loss sought to avoid, and the defendant must believe in good faith, that this conduct was necessary to avert a greater harm." (See also **Illa Pala S/o Ibrahim v R {1953} 20 EACA 300, Robert Kinuthia Mungai v R {1982 – 88} 1 KAR 611, Ahmmed Mohamed Omar & 5 Others v R {2014} eKLR**)

Taking the facts of this case into perspective with the principles illustrated above to determine this construe the notion of reasonableness of using a lethal force of firearm in order to repel any imminent attack at the time of the incident.

In instant case, circumstantial evidence exerted is that the accused was exiting a social club in company of a lady who later testified as (DW2). It is also not disputed that the witness (DW2) left the bar ahead of the accused.

There is a possibility that the deceased who is said to have been in company of other unknown men did confront (DW2) that on being joined by (DW1) was considered an act of provocation.

It can thus be deduced from (PW1), (pw3), (PW5) and (PW8) evidence though not present at the actual shoot out there was sufficient background information that prior to the gunshot, the accused and the deceased had engaged in a conflict.

That the pieces of evidence pieced together showed that the trigger circumstances arose as a result of the accused fearing that his life was in imminent danger that it was permissible to use his firearm to defend himself.

In reviewing the evidence the intervention by the accused when he came into contact with the deceased that tragic evening did not amount to provocation. This is from the stand point that the deceased himself was not armed with any lethal weapon to call for use of excessive force.

Taking advantage of the altercation, that something serious was about to happen to gain access to a firearm under the pretext of self-defence is not sustainable.

In the circumstances of this case, the crux of the prosecution in this issue is the proposition that the accused intention connotes a state of affairs intended to bring about the prospect of death of the deceased or to do grievous harm contrary to the defence. That his action was aroused by the reasonable belief that his life was at risk and imminent danger to injury or attack.

It should be pointed out that (**PW10) IP Reuben Ekumbu** physically examined the firearm and the essential components and the alleged unlawful act by the accused.

My view is that for the accused to be entitled to the defence of self, the whole causal chain which led to the use of force must be consistent with the following tests that in self defence:

i. That deceased threatened him with harm.

ii. That the harm by the deceased was of a particular level of gravity that required some measure of retaliation.

iii. That it was only the use of lethal force which would prevent the deceased from further attack.

iv. That if he did not use such excessive force the actual or threatened harm would occur immediately or soon thereafter without any escape.

v. That during the altercation there was no non-violence or less forceful alternatives were available to the accused to repel the attack or threat to violence.

In the circumstances of this case the burden of proof with regard to the unreasonableness of force used in self defence has been discharged by the prosecution. In pleading self defence the accused person ought to have desired preservation of the right of life of the deceased more than he did and the harmful effect of his action was the death of the deceased. The accused person actions failed to be brought within the context and legal threshold on the right to self defence in the protection of his person or property.

In accordance with the principle in the case of **Robert Mungai (supra)** the prosecution has fallen short of proof of the element on malice aforethought, to establish that the accused is guilty of murder contrary to Section 203 of the Penal Code. In my view it is evident that the accused is guilty of a lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Having the above principles in mind, I find the accused guilty of manslaughter and certainly do enter conviction pursuant to the aforesaid reasons.

It so ordered.

Judgment, written, signed by me on this 4th day of February 2020

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R. NYAKUNDI

JUDGE

DELIVERED IN OPEN COURT AT KAJIADO THIS 10TH DAY OF FEBRUARY 2020

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CHACHA MWITA

JUDGE