



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 66 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BENJAMIN KAHINDI CHANGAWA.....1ST ACCUSED

STANLEY OKOTI.....2ND ACCUSED

JUDGMENT

The two accused persons, Benjamin Kahindi Changawa, (1st accused), and Stanley Okoti, (2nd accused) are facing three counts of murder contrary to section 203 as read with section 204 of the Penal Code (CAP. 63 Laws of Kenya) particulars of which are as follows:

COUNT ONE

1. BENJAMIN KAHINDI CHANGAWA, 2. STANLEY OKOTI: On the 7th October 2014 at about 2.30 am at M-Club in Kangemi Township within Nairobi County, jointly murdered **JOSEPH OBONGO ONCHURU**.

COUNT TWO

1. BENJAMIN KAHINDI CHANGAWA, 2. STANLEY OKOTI: On the 7th October 2014 at about 2.30 am at M-Club in Kangemi Township within Nairobi County, jointly murdered **GEOFFREY NYABUTO MOGOL**.

COUNT THREE

1. BENJAMIN KAHINDI CHANGAWA, 2. STANLEY OKOTI: On the 7th October 2014 at about 2.30 am at M-Club in Kangemi Township within Nairobi County, jointly murdered **AMOS OKENYE MAKORI**.

Joseph Obongo Onchuru (sometimes referred to in this judgment as APC Onchuru or Onchuru), who is the deceased in Count 1, was an administration police officer attached to Hon. Joel Onyancha, Member of Parliament (MP) for Bomachoge Borabu Constituency at the time of his death. He was assigned those duties by Mr. Clement Nyawal (PW18) through a letter dated 28th May 2014 (Ex. 18). He was issued with a Ceska Pistol Serial No. F9628 with 12 rounds of 9mm calibre ammunition by CIP Francis Kimani (PW19) on 29th May 2014 as shown in the copy of the Arms Movement Book (Ex. 19). On 6th October 2014 he was on duty together with SS Anthony Macharia (PW3) in Loresho at the residence of Hon. Onyancha. SS Macharia left Onchuru on duty and returned to their camp in Kitisuru. In the evening of the same day, APC Onchuru and a driver accompanied the MP to the Jomo Kenyatta International Airport (JKIA) for a trip out of the country after which they returned to Kitisuru AP Camp. APC Onchuru informed SS Macharia that he had returned to Camp. Evidence from SS Macharia is that that APC Onchuru sought permission from CPL Mohamed who was the duty officer that night, to leave the AP Camp to go and buy airtime. This information was not confirmed by CPL Mohamed because he did not testify.

The evidence shows that APC Onchuru, in company of Geoffrey Nyabuto Mogoi (deceased in Count 2) and Amos Okenye Makori (deceased in Count 3) who are said to be his relatives and two other people, went to M-Club located in Kangemi that evening. Evidence is not clear as to the exact time the five of them arrived at the Club. What is clear to this court is that sometimes on that evening of 6th October 2014, five customers including the three deceased persons went to M-Club. They ordered for drinks. Evidence shows that not all the five ordered for drinks. According to Lydia Nkuene (PW7) one of the five customers was not drinking. This is the customer said to have gone to the back of the Club to sit alone. Lydia told the court that the man who went to sit alone at the back of the Club had a pistol. This can only mean that the custom is APC Onchuru who is the only person, among the five people, who was armed with a pistol that night. Lydia said the watchman went to find out the identity of the man but the man did not identify himself. Instead the man showed the watchman the pistol and a confrontation between man and the watchman arose. Evidence shows that the other four customers joined him and started assaulting the watchman. The watchman overpowered the group and pushed APC Onchuru inside the kitchen of the Club and locked him there. There is

mention in evidence that the waitresses assisted the watchman to subdue the attackers and lock Onchuru inside the kitchen. One Josephine, who was said to be the supervisor at M-Club, called the police. It is not clear from the evidence what information was communicated by Josephine to the police. Josephine was not one of the witnesses who testified in this case. It is also not clear which police station or police officers Josephine called. The Control Room Nairobi Area, perhaps reacting to that call, raised the duty officer at Kabete Police Station, CPL Peter Kimani (PW14). It seems that the information communicated to CPL Kimani and passed on to the team of officers patrolling Kangemi area was that there was an on-going robbery at M-Club. The officers were warned to approach the place with caution. As shown in evidence, the officers on patrol in Kangemi that night were the 1st and the 2nd accused persons in company of CPL Alex Miheso (PW12). All the three officers were attached to Kabete Police Station and their duties were to perform foot patrol and mingle with civilians in a bid to detect crime. The three officers belonged to what this court was told was Kabete Special Lock Up team as shown in Ex. 4, the Duty Roster. The time was about 1.30am – 2.00am. CPL Miheso was in charge of the team. These officers were armed. The 1st accused had been issued with AK 47 rifle Serial No. 49171120 with 30 rounds of ammunition of 7.62mm calibre on 1st October 2014 and 2nd accused with AK 47 rifle Serial No. 4915760 with 30 rounds of ammunition of 7.62mm calibre on 5th October 2014. This evidence has been confirmed by CPL James Okoth (PW9), the officer in charge of Kabete Police Station Armory, who issued them with these firearms.

The version of the evidence by the prosecution witnesses on what happened upon arrival of the three police officers at M-Club is that they found the door of the Club locked. At that time APC Onchuru was inside the kitchen where the watchman had locked him. The other two customers were inside the bar since they could not leave because the door of the Club had been locked. The watchman is said to have opened the door for the three police officers to enter the Club. The two accused persons entered the Club while CPL Miheso remained outside the Club. The watchman was told to open the kitchen door to allow the man inside to come out. The three customers were told to surrender. Two of the customers who were not armed with pistol surrendered by lying on the ground but APC Onchuru remained standing. He however lifted up his pistol which was picked by the police. Shots rang out and the three customers were all shot dead.

The version of the evidence by the two accused persons in their defense surrounding the circumstances of the shooting is different. They testified that they responded to the communication about a robbery taking place at M-Club. They said that they had been warned that the robbers were armed and therefore they should approach the place with caution. They said that they identified themselves as police officers at the door of the Club and that the watchman opened the door for them. They said the suspects had been locked inside the bar and not anywhere else. They said that they asked the suspects to surrender but the suspects did not obey the order but instead started shooting at them. They said that they returned fire and shot at the three suspects killing them instantly.

At the conclusion of the case both the prosecution and the defense submitted. I have read all the submissions, both the written and the oral submissions. I have understood the issues raised by each side. On the part of the defense, Mr. Mandala, learned counsel for the accused persons, submitted that the prosecution bears the onus of proving the ingredients of murder. He submitted that the prosecution has failed to prove that death occurred due to unlawful act or omission on the part of the accused persons and that the prosecution has failed to prove malice aforethought on the part of the accused persons. He submitted that the two accused persons were on duty on the date in issue and that they were responding to a distress call of armed robbery taking place. He submitted that the accused persons were aware that the robbers were armed and dangerous. He submitted that the accused persons identified themselves as procedure required and ordered the robbers to surrender but the robbers failed to obey the order. He submitted that the law allows the police officers to shoot in certain circumstances and therefore the accused persons used justifiable force. Counsel cited the case of *Ahmed Mohammed Omar & 5 others v. Republic [2014] eKL* to support his arguments. He further submitted that the accused persons acted in self-defense and that the test to be applied where an accused person raises the defense of self-defense is the subjective test. He submitted that the accused persons could not have used non-violent means given the circumstances facing them and urged the court to give the accused persons the benefit of doubt, find them not guilty and acquit them.

I have noted that the defense further relied on the submissions made during the stage of no-case-answer where they raised the issue of circumstantial evidence. They also cited several cases on circumstantial evidence including *R. v. Kipkering Arap Koske & Another (1949) 16 EACA 135* and *Simoni Musoke v. R [1958] EA 715*. I am alive to the applicable principles in regard to circumstantial evidence. However, it is my considered view that as regards this case, there is misapprehension of the issue because in my view circumstantial evidence may not be applicable in this case. The evidence as to the circumstances leading to the shooting of death of the three deceased persons is direct evidence. To a large extent, save for the issue of malice aforethought, the evidence in respect of how the deceased met their death is not disputed by the defense.

On the other hand the prosecution through Mr. Okeyo, learned counsel, submitted that the prosecution has proved beyond reasonable doubt that the accused persons committed the offences they are being tried for. He submitted that evidence shows that the accused persons were at the scene of the murder and that they have admitted this fact; that they shot the deceased persons who had surrendered and therefore the issue of a shoot-out between the accused persons and the deceased persons does not arise. He submitted that available evidence shows that the deceased persons were shot with a high velocity firearm similar to the ones held by the accused persons. He submitted that the killing of the deceased persons was unlawful since they had surrendered and posed no danger to the accused persons and therefore the accused persons faced no danger as to justify the shooting. Counsel further submitted that the question of self-defense did not arise since the accused persons had not been attacked. Counsel urged the court to find that the prosecution has proved beyond reasonable doubt the three counts of murder against the accused persons and convict them accordingly.

The law is clear that the prosecution must prove beyond reasonable doubt a crime like murder, the ingredients of which are found in section 203 of the Penal Code. The prosecution must prove the fact of death by unlawful means. It must prove the identity of the person who has caused that death and it must prove the element of malice aforethought on the part of the person causing that death. These are the ingredients the prosecution endeavoured to prove through the evidence of the twenty two (22) witnesses they presented before the court.

Without wasting time, I now turn to the determination of this matter by considering whether the evidence tendered by the prosecution supports their case to an extent that I am persuaded that the prosecution has discharged its mandate of proving beyond reasonable doubt the three crimes of murder against the two accused persons before the court. There are some areas of the evidence in this case that are not disputed. It is not disputed that the three deceased persons were in M-Club in Kangemi Nairobi on the night of 6th and 7th October 2014. It is not disputed that one of them, Joseph Obongo Onchuru, was a police officer from the Administration Police and that he was armed with a Ceska Pistol which was officially issued to him for use in the course of his duties. It is not disputed that Joseph Obongo Onchuru, Geoffrey

Nyabuto Mogoi and Amos Okenya Makori, were shot dead by the two accused persons while inside M-Club that night. It is not disputed that Benjamin Kahindi Changawa, force number 57974 and Stanley Okoti, force No. 75776, were police constables attached to National Police Service and attached to Kabete Police Station at the time of these crimes. It is not disputed that on the night of 6th and 7th October 2014, the two police officers were in the company of CPL Miheso on patrol within Kangemi area in Nairobi. It is not disputed that both accused persons were armed with AK 47 rifles that evening. It is not disputed that PC Benjamin Kahindi Changawa had been officially issued with AK 47 rifle Serial No. 4917120 and 30 rounds of ammunition of 7.62mm calibre on 1st October and that PC Stanley Okoti had been officially issued with AK 47 rifle Serial No. 4915760 with 30 rounds of ammunition in 7.62mm calibre on 5th October 2014. It is not in dispute that these rifles were returned on 8th October 2014 with 20 rounds of ammunition in the case of the 1st accused and on 7th October 2014 with 28 rounds of ammunition in the case of the 2nd accused. It is not in dispute that the reason the two accused persons and CPL Miheso went to M-Club that night was to answer a distress call through information circulated through police communication channels. What is disputed are the circumstances surrounding the shooting to death of the three deceased persons. According to the prosecution, the shooting was done in cold blood with the intention of killing the deceased persons. According to the accused persons they shot the deceased in self-defense. If the former is true and this court finds sufficient evidence to support the same, then this court must obey the dictates of the law and find the accused persons guilty of the three offences facing them. If the latter is true, again this court must obey the law and find the accused persons not guilty and acquit them. The issue as to whether the accused persons shot the deceased persons in cold blood with the intention of killing them or that they acted in self-defense forms the gist of this matter and it is my duty as the arbiter of this case to resolve the same.

I will address the three issues (ingredients of murder), as to whether the unlawful deaths of the three deceased persons occurred and whether the accused persons caused those deaths with malice aforethought, together. Since there is no dispute that the accused persons were present at M-Club and that they shot to death of the three deceased persons my analysis and consideration of the evidence will mainly dwell on the evidence on the circumstances surrounding that shooting. There are four prosecution witnesses who were present at the Club when the shooting occurred. These witnesses are Rosemary Laboso (PW1), Francisca Mutei Mutua (PW2), Joan Bunoro Matsitsa (PW6) and Lydia Nkuene (PW7). All the four were staff of M-Club and were on duty although it is not clear whether Francisca was on duty.

Rosemary Laboso testified that she was stationed at the counter that night performing duties of cashier. She said that she did not leave the counter even when she was told that a fight had broken out between the watchman and the five customers. Her evidence on what happened after the police arrived at the Club is recorded as follows:

“After 30 minutes some people 2 in number came in. They wore jackets and they asked, ‘Wako wapi’. I lay down flat at the counter. I heard gun shots. I thought they were shooting upwards because I could not see. I lost consciousness..... Later I saw police and people 3 in number had been killed.”

Francisca Mutei Mutua was also at the Club. In her evidence in chief she told the court that she was on duty that night but changed her evidence during cross examination to say that she was not on duty. She said that when she entered the Club at about 10.00pm she ordered for a beer. She said that she heard from her colleagues that one of the five customers who had entered the Club together had a gun. She testified that the watchman went to ask that man whether he was a police officer but the man did not respond. A disagreement arose between the watchman and the man with the gun. Francisca did not mention any fight or about the other customers joining the one with the gun to assault the watchman. She did not mention anything about the man with the gun being locked inside the kitchen. The relevant part of her evidence in respect of the shooting is as follows:

“I wanted to go out but the door was locked. I remained inside..... The door was opened and police came in holding guns..... They asked for the man with the gun. He was asked to show the gun. He showed the gun. I heard gun shots. I lay down. When I stood up I saw 3 people had been killed.”

On her part Joan Bunoro Matsitsa, another member of staff at M-Club, she was on duty that night. She said the five customers came to the Club at about 1.00am and one of them danced with her colleague she referred to as Makena. From the list of witnesses Makena is Lydia Nkuene. She stated that Makena told her and Josephine that the man had a gun and that Josephine told Makena to tell the watchman Joseph to ask the man with the gun to identify himself. She testified that a confrontation between the watchman and the man with the gun arose and that the other customers who had come with the man with the gun joined in the confrontation. She testified that the watchman pushed the man with the gun in the kitchen and locked the door and that the watchman also closed the Club door to stop the other customers from escaping. She stated that Josephine called the police. She continued in her testimony as follows:

“At 2.00am police came. I knew they were police because Josephine had called them. Police asked the two customers who they were. They did not respond. The watchman was told to open for the one locked in the kitchen. He did so. Police asked him who he was. He did not respond. They told him to remove the pistol and he did so. He gave police the pistol. I heard gun shots. I fell down at the table. When it went silent we saw the 3 customers, one who had the pistol and the other 2, had been killed.”

On being cross examined, Joan said that she could not remember whether police identified themselves or not and that two of the three customers were lying down while the one with the gun remained standing.

The last witness who was present at the scene when the events leading to this case occurred is Lydia Nkuene. She testified that she was on duty on 7th October 2014 at M-Club when five customers came. She did not say anything about her dancing with the man with the gun. She said that one of the customers, the man with the gun, went to sit at the back of the Club where construction was going on. She said she told Rose (PW1) to tell the watchman to ask the man what he was doing at the back and that when the watchman asked the customer a confrontation arose with the other 4 customers joining in the confrontation. Lydia described the fight as vicious and said that the watchman locked the man with the gun inside the kitchen. She said that Josephine called the police. She continued in her evidence as follows:

“I do not know which police officers Josephine called. I saw police with guns. They were in long jackets. I went to the place. I

heard 'Surrender' and 2 of the customers lay down. The other one lifted the pistol and it was taken by the police. He is the one of those who died. We heard gun shots..... I covered my eyes. When it got quiet I saw 3 people lying down. I was in shock. I saw blood on the floor. Other police officers came. There were lights at the Club. Many police officers came. One was examining the pistol. They took a wallet and a Tecno phone from the pocket of the man who had a gun. The word 'surrender' was uttered and immediately the police snatched the gun and shots rang out. When I opened my eyes I saw the man with the gun was down."

Lydia told the court in cross examination that one of the five customers was not drinking and identified this customer as the man with the gun.

All the four witnesses cited above did not identify the accused persons as the two police officers who entered the Club and shot at the deceased persons. All except Rosemary said that when the watchman asked the man with the gun to identify himself, the man showed him the pistol. Joan and Lydia went further to state that the man removed the pistol and told the watchman that he (watchman) was a 'small' man and that he (the man) could do as he wished with the watchman. It seems this was one of the reasons a confrontation between the watchman and that man arose.

CPL Miheso who was the leader of the team comprising the accused person did not go into the Club with the accused persons. He remained outside allegedly to keep watch for the two suspects who had escaped. He testified that he heard his colleagues identifying themselves as police officers and asking the customers to identify themselves. He said that he heard gun shots immediately after this. He said that he heard the sound of a smaller gun shooting. He said that when he entered the Club after the shooting he saw three bodies lying down facing away from the entrance and a Ceska pistol near the bodies. From his evidence it is not clear the position of the entrance and the counter. Other witnesses, specifically IP Ann Wanderi (PW4) and APC Woman Roseline Lobeki (PW13) described the bodies as lying down parallel to each other with the heads towards the counter. PC Japheth Mugambi (PW17) the scenes of crime officer who took photographs of the scene described the bodies as lying down near the counter. However all the witnesses who went to the scene before the bodies were collected described the bodies as having visible gun-shot wounds. CPL Gideon Mugambi from DCI Kabete Police Station described the scene as follows:

"Upon entering into the bar I found 3 dead bodies lying on the floor of the Club. They were soaked with blood. They had gun-shot wounds. I did not turn the bodies to observe the wounds. I could see bloodstains everywhere and clothes soaked with blood. I could see blood oozing from the head. I observed the one alleged to be an AP. He was bleeding from the head. I saw a Ceska pistol and magazine which was detached from the pistol. There was a wallet beside the body of the AP Officer's body. My view was that the magazine must have been removed from the pistol chamber and the wallet had been removed. It appeared as though someone had removed the magazine and placed it next to the body of the deceased."

To me, this evidence of CPL Mugambi gives the impression that someone interfered with the scene before investigations started. I am aware police may turn over bodies in order to document evidence by photographing the same but even if this were the case, I doubt that it was necessary to detach the magazine from the pistol. I say this because I doubt that it was APC Onchuru who detached the magazine.

The bodies of the three deceased persons were examined by Dr. Oduor Johansen on 8th October 2014. The findings of the doctor are documented in post mortem forms produced in court as exhibits 23, 24 and 25. The body of **Joseph Obongo Onchuru** had the following injuries:

- (i) Entry gun-shot wound on the right armpit 2cm in diameter with an exit wound 3cm in diameter on the right shoulder at the back.**
- (ii) Entry gun-shot wound on the right ear 2cm diameter with blackening around it with an exit wound on the left side of the head measuring 6cm by 5cm.**
- (iii) Gun-shot wound 2cm diameter at the back of the right leg 7cm from the knee joint with an exit wound 3cm diameter the inner aspect of the thigh 5cm above the knee joint.**
- (iv) Gun-shot wound 3cm diameter on the right leg on the outer aspect 10cm below the knee joint with an exit wound 2cm diameter in front below the knee 3cm below the knee. This wound fractured the tibia bone.**
- (v) Fractured and fragmented skull with bullet track.**
- (vi) Bruises at the back of the left thigh and lacerations of inner lower lip.**

The doctor formed the opinion that the cause of the death of Joseph Obongo Onchuru was multiple gun-shot wounds from a high velocity firearm and low velocity firearm. Post mortem form produced as Ex. 25. The doctor said most of the gun-shot wounds were from a low velocity firearm in his opinion.

The body of **Geoffrey Mogoi Nyabuto** (deceased in Count 2) had the following injuries:

- (i) Grazed bullet wound on the back part of the left hand at the base of the index finger measuring 5cm by 3cm.**
- (ii) Entry gun-shot wound 3cm by 4cm on the left side of the chest between the 1st and the 2nd ribs and located on 12cm from the midline with the exit 6cm by 3cm at the left armpit.**

(iii) Graze bullet wound 4cm by 2cm on the inner aspect of the upper arm.

(iv) Bullet wound 3cm by 2cm on the left upper arm outer aspect 8cm above the elbow joint with the exit wound 5cm by 2cm and located 3cm above the entry.

(v) Entry gun-shot wound 5cm by 3cm on the left side of the chin with exit wound 7cm by 3cm on the left cheek.

(vi) Graze bullet wound 4cm by 2cm on the right elbow.

(vii) Entry gun-shot wound 5cm by 3cm on the left flank (lower abdomen) with the exit wound on the right upper back between the 4th and 5th ribs.

(viii) Bruise on the knee.

(ix) Laceration on the back on the right of the head behind the ear 2cm long.

(x) A tear on the trachea.

(xi) Bleeding on the right side of the chest.

(xii) Collapsed right lung with bullet injury.

(xiii) Bullet injury on the diaphragm.

(xiv) Tears in the liver and bleeding in the abdominal cavity.

(xv) Tears in the intestines.

(xvi) Fracture of the lower jaw.

The opinion of the doctor was that the deceased died due to multiple gun-shot wounds from a high velocity firearm. The post mortem report was produced as Ex. 24.

The body of **Amos Makori Mokenye**, deceased in Count 3, had the following injuries:

(i) Gun-shot wound 2cm by 4cm on the left side of the head with an exit wound 8cm by 4cm on the back of the head on the right hand side.

(ii) Two bullet graze wounds on the right upper arm 6cm by 5cm and 6cm by 3cm.

(iii) Entry gun-shot wound 2cm on the upper right arm with exit wound 4cm by 5cm on the right shoulder above the collar bone.

(iv) Internally the head had multiple fractured fragments of the skull with inlet gun-shot on the left side and exit on the back of the head on the right side. The brain had bullet track corresponding with entry and exit wounds.

The opinion of the doctor was that the deceased died due to gun-shot wounds to the head from a high velocity firearm. The post mortem report in respect of Amos Makori Mokenye was produced as Ex. 23.

I have observed the gruesome photographs of the bodies of the deceased persons. The bodies bear the brunt of the shooting. It would be a miracle for any human being facing such numerous gunshot wounds to survive the shooting. The bodies are also close to each other as testified by various witnesses although it seems they were moved about or turned over either during the photographing or otherwise and may not be lying in their original positions.

I have compared the defense of the accused persons as against the evidence of the prosecution eye witnesses. In doing so I am alive to the legal principles that an accused person does not assume the burden of proving his innocence. The duty to prove the guilt of an accused person lies with the prosecution and does not shift. The question that must be addressed is whether the defense of self-defense is available to the accused persons. To support their case the defense has raised this defense and cited the case of *Ahmed Mohammed Omar & 5 others v. Republic* (supra). I agree with learned counsel for the accused persons that the test to be applied where the defense of self-defense is raised is the subjective test. This is the law as found in various decisions and pronouncements of the courts including the *Ahmed Mohammed case* above. Section 17 of the Penal Code affords an accused person the defense of self-defense where he acted in defense of person or property. The applicable principles for this defense, as provided under Section 17 of the Penal Code, are those of the English Common Law. In the *Ahmed Mohammed case* above, these principles have been discussed in detail and the cases cited with approval in that decision include *Palmer v. R [1971] A. C 814*; *Robert Kinuthia Mungai v. Republic (1982-88) 1 KAR 611* and *DPP v. Morgan*.

Just like in the *Ahmed Mohammed case*, in this case, the accused persons were issued with firearms and ammunition; they used some of the ammunition to shoot at the deceased person; the deceased persons died as a result of that shooting and the accused persons returned fewer rounds of ammunition than they had been issued with. Further the accused persons in this case, just like in the case under comparison, were

on official duty when the shooting occurred. In this case, the accused persons also claim that they identified themselves and ordered the deceased persons to surrender but the deceased failed to obey that order and shot at the accused persons necessitating the return of fire by the accused persons. I agree with the position that when confronted with a situation where security of the person or of property is at stake a police officer, whose duty it is to defend the person and property, cannot wait until he is struck before striking in self-defense. But I pause here to ask: Was this the situation facing the accused persons in this case? In the Ahmed Mohammed case above, the appellants were confronted with a rowdy group of attackers who are said to have defied the police order to stop and continued advancing towards the appellants.

In the present case, I have considered the evidence of the four (4) women who were on duty at M-Club on the night of the shooting. The watchman, who in my view is a crucial witness, was not called to testify. He held valuable information which this court would have benefited from in the determination of this case. However, there is the evidence of the other witnesses. Their collective evidence is that the five customers who included the three deceased persons were rowdy. APC Onchuru had a pistol and failed to identify himself to the staff of M-Club. This caused some concern on the part of staff of M-Club with the watchman approaching him to find out who he was. The resulting confrontation attracted the other customers who had arrived with APC Onchuru. However, despite that confrontation and the presence of a pistol which APC Onchuru was careless to draw out and show to the women and the watchman at M-Club, the pistol was not used. There is absolutely no evidence of any shooting by APC Onchuru. The fact that the watchman and the other staff members of M-Club confronted him and subdued him to the extent of locking him up inside the kitchen of the Club despite him having a pistol means that these witnesses did not see any threat towards them. There is evidence from the accused persons and CPL Miheso that the watchman had injuries on the head as a result of the assault by the deceased persons. This evidence was not confirmed because the watchman did not testify. Also their (accused persons and CPL Miheso) evidence kept on changing in respect to the part of the head where these injuries were located. The three (accused persons and CPL Miheso) also mentioned that one of the waitresses was injured on the finger. None of the four women testified to having been injured by either the deceased or any of the other 2 customers who are said to have escaped before the police arrived.

From the evidence of the four waitresses, specifically Joan and Lydia, APC Onchuru had surrendered the pistol to the accused persons before shooting took place. I have captured their evidence verbatim above on this issue. What comes out clearly from their evidence is that APC Onchuru whom they referred to as the man with the gun did not identify himself but he handed over the pistol to the accused persons when they challenged him and his friends to surrender. Their evidence is that the accused persons had taken the pistol from him before the shooting started. The evidence is clear that the other two deceased persons were not armed. There is also evidence on record that the other two deceased persons surrendered as ordered by the police by lying on the ground after they were ordered to surrender. Indeed with evidence that the bodies were found facing the same direction and close to each other, this court believes the evidence of the witnesses who were present at the scene that the deceased persons were killed while near each other. Had they been running away from the police or had they tried to fight back, their bodies would not have been near each other as described by witnesses and seen in the photographs. I believe the evidence that they surrendered as shown in the evidence of the witnesses who were present. With this evidence on record, I find it difficult to believe that the accused persons or any other person were under any threat to warrant that wanton shooting of the deceased persons! It is my belief that a normal human being cannot stand still and wait to be shot. They would have at least tried to escape or run away from the shooting. If that were the case, then their bodies would not have been lying parallel and close to each other. In my considered view, the deceased must have been in a helpless position such as one finds themselves when lying down. The firing was rapid and in quick succession. The firearms used are superior and the deceased persons must have been quickly killed. Indeed the 1st accused used 10 of his 30 rounds of ammunition in that shooting although he said he used 11 bullets. The 2nd accused used two rounds out of his 30 rounds.

The evidence of the accused persons seems to suggest that all the three deceased persons had been locked inside a room together. This is not what the witnesses who were present told the court. The accused persons told the court that the deceased persons shot at them first. Again there is no evidence from the prosecution witnesses who were present at the Club that the three deceased ever shot at the police officers. I find no evidence from the four women who were on duty at the Club that APC Onchuru, or the man with the gun as they referred to him, at any time shot at the police.

In considering the defense of self-defense raised by the accused persons, the following excerpt from the verbatim record of the evidence of the 1st accused is relevant. He told the court as follows:

“On arrival outside the Club we found many people with the watchman injured on the face saying he had been hit with a gun and bar maid had injury on the right hand. We asked where the robbers were. We were told 2 were inside but 2 had escaped. We asked watchman what had happened. He said that he struggled with the robbers and in the commotion he escaped outside and locked the door. We told him to take us to the scene. He opened the first door. Inside was dimly lit. As he was opening where the robbers were my colleague asked who the people were and he identified ourselves as police. We heard a gun shot. We knew it was dangerous. They refused to surrender. They were 3 people. They shot first. I was armed. Our life was in danger and I returned fire as my training requires. I could not know who was armed and who was not. I used 11 bullets. I was aiming at them. They fell down and could not shoot at us. I started shooting when I heard gun shot. I stopped when they fell down.”

The impression created in the above cited passage is that of a fierce exchange of fire between the robbers and the accused persons. As stated in this judgment this is not what was stated by the four women present at the scene when the shooting occurred.

The 2nd accused testified that he is the one who identified themselves as police officers and asked the robbers to surrender but the robbers failed to surrender but instead shot at them. He said that he fired two shots into the air to warn the robbers as procedure required but they did not surrender. Given that the 2nd accused used only two bullets, his testimony that he fired into the air would mean that he used those two bullets to fire into the air and he testified as much. This is not true according to the testimony of the investigating officer Mr. Emmanuel Lagat (PW21). This witness visited the scene and collected a bullet jacketing (Ex. 22). When the bullet jacketing was examined by SSP Lawrence Nthiwa (PW15) it was found to be a component of a calibre 7.62mm rifle bullet that had been fired in AK 47 rifle S?N 4915760. This is the rifle issued to the 2nd accused and it is the rifle he had used on 7th October 2014. The bullet jacketing had been recovered from the floor of the Club next to the counter by Mr. Emmanuel Lagat. Further evidence by Lagat shows that the bullet recovered from the body of the Geoffrey Nyabuto Mogoi (Ex. 3) was confirmed by the Firearms Examiner to have been fired from the AK 47 rifle S/N 4917120. This is the rifle issued to the 1st accused and was in his possession that evening. This evidence confirms to me that the accused persons shot at the

deceased persons and that none of them shot into the air to warn the deceased persons as they testified. Indeed the bullet jacketing was collected imbedded in the floor near the counter where the bodies of the deceased persons had been lying.

The evidence by the accused persons, specifically what was stated by the 1st accused and captured in the evidence cited above, would have afforded the accused persons the defense of self-defense as stated in the ***Ahmed Mohammed case*** if it were true. The gist of the defense of self-defense is that the person raising it must reasonably believe that his/her life or that of another person was in danger as the time he acted in self-defence even if that person acted under a mistake as to the facts. Such a person should be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake was reasonable. The test of self-defense is that a person could use such force in the defense of himself or another as was reasonable in the circumstances as he honestly believed them to be.

It is my belief, going by the evidence of the witnesses who were present at the scene, that the accused persons were not in any danger given that after they ordered the deceased persons to surrender two of them lay on the ground in surrender and one lifted the pistol and handed the pistol to the police (accused persons) before shooting started. In my view this action by APC Onchurue was an act of surrender. To my mind, the present case is therefore distinguishable from the ***Ahmed Mohammed case*** cited above. In that case the deceased defied a police order to stop and confronted the police. In this case, I believe the available evidence that the deceased persons surrendered. It should be noted that the three deceased did not shoot the watchman and the four women working in the Club when a confrontation occurred before the police were called in. They had been subdued to the extent that the armed one (Onchuru) had been locked inside the kitchen. In the ***Ahmed Mohammed case***, the police did all they could to warn the deceased persons including shooting in the air. In the case before me, this was not the case.

The Constitution under Article 244 mandates the National Police Service, *inter alia*, to strive for the highest standards of professionalism and discipline among its members; to comply with constitutional standards of human rights and fundamental freedoms and to train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity. Some of the rights recognized in the Constitution are the right to life under Article 26 and human dignity under Article 28. The Constitution is clear under Article 26 that every person has a right to life and that a person shall not be deprived of life intentionally, except to the extent by the Constitution or other written law. It is also clear under Article 28 that every person has inherent dignity and the right to have that dignity respected and protected. Police officers, in the performance of their very difficult and sometimes life threatening duties are allowed by the law to use firearms but in a very controlled manner. Under **Section 61 of the National Police Service Act (No. 11A of 2011)** the police are authorized by the law to use firearms in the following manner:

(1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by the Constitution and this Act by use of non-violent means.

(2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.

The Sixth Schedule of this Act provides more specifically instances when police officers may use force. Part A of the Schedule in (1) and (2) states that a police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result and that the force used shall be proportionate to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.

Part B of the Sixth Schedule gives the conditions to be met in the use of firearms. I have reproduced the relevant parts of Part B here below for emphasis:

(1) Firearms may only be used when less extreme means are inadequate and for the following purposes –

(a) Saving or protecting the life of the officer or other person;

(b) in self-defence or in defence of other person against imminent threat of life or serious injury;

(c) protection of life and property through justifiable use of force;

(d) preventing a person charged with a felony from escaping lawful custody; and

(e) preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.

(2) An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed, except (a) where doing so would place the officer or other person at risk of death or serious harm; or (b) if it would be clearly inappropriate or pointless in the circumstances.

My careful consideration of all the evidence before me and the applicable law leads me to the conclusion that the accused persons acted outside the law. Given the evidence, which this court believes, that the deceased persons had surrendered as ordered by the accused persons, it is my view that the accused should have used non-violent means to arrest the deceased persons because this would have served the purpose. It is my view too that the accused persons used force that was not proportionate to the objective to be achieved, that is, arresting the deceased persons. Much as I commend police for the difficult job they do in order to save life, limb and property, I am not able to reconcile myself to the fact that the two accused persons under trial shot and killed the three deceased persons even when the three had surrendered and posed no danger to the two accused persons, any other person at the scene or to any property. I believe the evidence that the three deceased persons had surrendered, the two without the pistol had lain on the floor in surrender and APC Onchuru surrendered the pistol to the accused persons before he was fatally shot. The numerous gun-hot wounds suffered by the deceased persons is proof enough of the manner they were

killed. The accused persons were not trying to immobilize the deceased persons. If this were the case they would have used non-violent means and if not successful, they would have shot them on the parts of the body that would have made them harmless to anyone and then call for reinforcements if that was necessary. They shot and used a total of twelve bullets, 10 of them from the rifle being used by the 1st accused and 2 from the rifle being used by the 2nd accused. The wounds were serious ones. Each of the deceased persons had gun shots on the head among other sensitive parts of the body including the chest and abdomen. The intention of the accused persons, given the nature of the wounds inflicted on the deceased persons and the part of the body shot, can only have been to kill the deceased or to the very least to maim them. I am unable to agree with the defense that the force used by the accused persons was justifiable in the circumstances.

One issue keeps bothering me: who used the pistol issued to APC Onchuru? If I were to believe the accused persons, it is deceased persons who shot at them. Of course it is only Onchuru who was armed with a pistol. Did he use that pistol to shoot at the accused persons? I have stated that there is no evidence to prove that was the case. Even if it were so, would Onchuru have shot himself using his own pistol? There is evidence from Dr. Oduor that Onchuru had gun-shot wounds from high and low velocity firearms. This means that he was shot with both the pistol and the AK 47 rifle. I doubt that Onchuru shot himself and the only logical conclusion I can draw is that one of the accused persons who took the pistol from Onchuru used the same gun on Onchuru as well as the AK 47 rifle in his possession. This is the only conclusion I can arrive at based on circumstances surrounding that shooting.

In considering whether the accused persons had malice aforethought this court has taken into account all the surrounding circumstances of this case. In *N M W v. Republic [2018] eKLR* the Court of Appeal, citing with approval the case of *Bonaya Tutu Ipu & another v. Republic [2015] eKLR* stated that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit v. Uganda, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

I am satisfied that the prosecution has proved beyond reasonable doubt all the ingredients of murder in the three counts jointly facing the accused persons. I find sufficient evidence to prove that the deceased persons died as shown in the three counts of murder and that their deaths are unlawful. I find sufficient evidence to prove that the accused persons acted outside the law in performing their duties and shot to death the three deceased persons with malice aforethought. I reject their respective defences and find that the defense of self-defense is not available to them jointly or to any of them individually. I find and I so order that the prosecution has proved beyond reasonable doubt all the three ingredients of murder against each of the accused persons. Consequently, I find that Benjamin Kahindi Changawa and Stanley Okoti jointly killed Joseph Obongo Onchuru, Geoffrey Nyabuto Mogoï and Amos Okenye Makori on 7th October 2014 as charged and enter conviction for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code against each of them in all the three counts. Orders shall issue accordingly. I thank both counsel for diligently arguing their cases.

Delivered in open court, signed and dated this 1st day of November 2018.

S. N. Mutuku

Judge