REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NUMBER 35 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MAINA WANGUI.....1ST ACCUSED

JOSEPH KIRERO SEPI.....2ND ACCUSED

JUDGEMENT

Background

Jackson Maina Wangui, hereinafter "the 1st accused," was charged jointly with Joseph Kirero Sepi, hereinafter "the 2nd accused," for the murder of Kevin Oduor Onyango, hereinafter, "the deceased" contrary to Section 203 as read with Section 204 of the Penal Code . The particulars of the charge show that the offence was committed on the night of 7th and 8th May 2012 at Click Club along Baricho Road in Industrial Area Nairobi. Both denied committing the offence. The 2nd accused was acquitted by this court after the court found that he had no case to answer. The 1st accused was placed on his defence. In the ruling of this court delivered on 28th July 2016 reasons for acquitting the 2nd accused were reserved until this judgement.

Evidence

Click Club operated on Baricho Road in Industrial Area Nairobi from 2009 until sometime in 2013. Its operations ceased in mid-2013. It was located on the 2nd floor of the building. Its kitchen was located on the 4th floor of the same building. The Club was co-owned by four directors. The accused was one of the directors. It was licensed to sell alcoholic drinks and play music up to 3.00am. It also served fast food. The Club was open and operating Monday, the 7th May 2012. Monday nights were popular to the patrons because the Club played reggae music. By 1.30am on 8th May 2012 the Club was "completely full," in the words of Mercy Njoki Chege, PW8 (Mercy). Mercy was the head waitress. She placed the number of the patrons that night at about 200. George Kimani Gathogo, PW10, (George) the night supervisor and manager on 7th/8th May 2012, estimated the number of patrons to be 300 or 450. He described the Club as having been crowded. The 1st accused person testified that the Club that night was full, estimating the number to have been between 350 and 400. He however said it was not crowded since its full capacity was about 600 to 700 people.

Mercy and George were on duty at the Club at the time of the incident leading to this offence. The 1st accused was the director on duty that night. The 2nd accused was one of the bouncers on duty as well.

Mercy and George testified that a fight broke out between some customers. It is not clear how many people took part in that fight. Mercy said one regular customer by the name of Wafula was fighting with another customer who was not identified. Evidence points to the deceased as one of the people fighting. It was the practice of the Club that whenever a fight or commotion arose inside the Club, the bouncers would remove from the Club those involved in the fight or commotion and take them outside. The cause of this fight, as evidence shows, was an allegation that the deceased had stolen a cell phone from another customer. The customer whose phone was stolen was not identified.

The 1st accused intervened in the fight and asked the 2nd accused to take the fighting customers outside the Club. The 1st accused joined 2nd accused in escorting them outside the Club. They took the deceased to the fourth floor of the building housing the Club. It was explained by the defence that the 1st accused and 2nd accused were taking the deceased to the fourth floor to rescue him from a hostile crowd that wanted to assault him. Evidence shows that two other customers followed them to the fourth floor. The 1st accused instructed the 2nd accused to escort the two people downstairs. The 1st accused was left on fourth floor with the deceased.

What happened thereafter can only be gathered from circumstantial evidence and the testimony of the 1st accused. He told the court that a struggle between him and the deceased ensued after the deceased grabbed him and attempted to grab his gun and that in the struggle the deceased was shot on the head. He said that he went downstairs to the second floor immediately and found the 2nd accused at the entrance of the Club. He informed the 2nd accused what had happened and asked the 2nd accused to accompany him to Industrial Area Police Station to report the matter.

At the Report Office at Industrial Area Police Station they were directed to CPL Edward Kamau (PW1). The time was 3.00am. The 1st accused reported to CPL Kamau that he had shot a customer dead. The 1st accused was a licensed firearm holder. CPL Kamau confiscated from the 1st accused the latter's firearm, a Ceska Pistol Serial Number A785987 and the Firearm Certificate Number 7086. CPL Kamau reported to his superiors and in company of the OCS and other officers CPL Kamau visited the scene directed by the 1st accused. The police confirmed that the deceased was dead. The identity of the deceased was confirmed through the assistance of the National Registration Bureau as Kelvin Oduor Onyango as testified by Barrack Nyadero (PW7). The body of the deceased was removed from the scene and taken to the City Mortuary where the same was examined by Dr. Dorothy Njeru (PW4). It was identified to the doctor by his father Andrew Onyango Otieno (PW2) and brother Jackson Ochieng Onyango (PW3). Dr. Njeru confirmed that the death of the deceased had occurred due to gun-shot wound on the left front-temporal region of the head.

Submissions

Mr. Bowry counsel for the 1st accused in his submissions after the close of the defence case took the court through the provisions of Sections 203 (that defines the offence of murder) and 206 (that defines malice aforethought) of the Penal Code. He submitted that the prosecution must prove beyond reasonable doubt the two main ingredients of murder, *actus reus* and *mens rea*, that is a *guilty act* and a *guilty mind* respectively.

He further submitted that Section 3 of the Penal Code, which allowed the interpretation of the Code in accordance with the principles obtaining in England, was repealed on 25th July 2003 by Section 2 of the Statute Criminal Law (Amendment) Act (No. 5 of 2003) thereby changing the whole criminal law to the effect that the doctrines of English Law as at the time of enacting the Penal Code and all the precedents of Kenya Courts ceased to apply.

Counsel noted, that despite the repeal of section 3 of the Penal Code, certain sections of the Code,

specifically Section 17 still makes reference to the application of English Common Law thereby posing a challenge on the interpretation of the law.

Mr. Bowry advanced the view that application of Article 2(5) of the Constitution of Kenya 2010 which provides that **"The general rules of international law shall form part of the laws of Kenya"** should be considered together with the Section 3(1) of the Judicature Act. He submitted that failure to synchronize the repeal of Section 3 of the Penal Code with other provisions of the Penal Code created confusion in terms of what law is applicable when the court has to deal with the offence of murder and manslaughter in light of the facts of the case and when applying the law to the defences of accident, self-defence and other defences and matters of interpreting malice aforethought, *mens rea* and *actus reus*. He submitted that given the changes in the applicable law, the only issue in the instant case would be proving the unlawfulness of the act or omission and not malice aforethought as defined under Section 206 of the Penal Code.

Counsel further submitted that there is no direct evidence from the prosecution on what transpired during the incident when the 1st accused and the deceased were left alone at the rooftop. Counsel submitted that there is however circumstantial evidence, investigators evidence and medical evidence all establishing the fact of the death of the deceased from one gun-shot wound from very close quarters and nothing else; that all other evidence from both the prosecution and the defence exonerates the 1st accused from any unlawful act or omission devoid of malice aforethought as defined in Section 206 of the Penal Code.

Counsel relied on High Court Criminal Case of **Mohamed and 3 others v. Republic [2005] 1KLR** and Court of Appeal Case of **Mwangi & Another v. Republic [2004] 2 KLR** and submitted that the evidence adduced by the prosecution eliminates all reasonable hypothesis that the 1st accused is guilty of the charge and that the prosecution has not presented to this court any hypothesis of what actions and/or omissions by the 1st accused led to the death of the deceased.

Counsel submitted that the 1st accused did not kill the deceased, had no motive to kill him and had no ill-will against him; that the 1st accused did not fire the shot, the cocked gun was discharged in circumstances of a violent embrace when the 1st accused was protecting himself and trying to take control of the gun which belonged to him; that the 1st accused's defence is contained in his honest and precise sworn evidence corroborated by his statement under inquiry and it establishes the defence of justifiable homicide or complete exculpation of any criminal liability or culpability and that the interpretation of Section 8 and 9 of the Penal Code without reference to English authorities establishes the defence of justifiable homicide and/or accident. Counsel submitted that in Kenyan jurisprudence, defences of complete exculpation, accident and justifiable homicide have not received judicial relevance.

Further submission by Counsel is that the case was poorly investigated as shown by the failure of the investigating officer to draw a proper sketch plan; failure to dust the firearm for fingerprints; failure to preserve all the photographs taken at the scene leading to the omission to produce one photograph; failure to make reference or explain how the glass pieces were gathered from the scene and produced or to show their significance and failure to call Wafula who is mentioned in the fight with the deceased as well as failure to call Jimmy and Ngahu who are mentioned as friends of the deceased who were with him at the Club. He also submitted that the investigating officer failed to call as witnesses the two people who followed and assaulted the deceased before they were escorted downstairs. Further, it was submitted that Dr. Dorothy Njeru (PW4) did not measure the height of the deceased to enable the determination of the trajectory of the bullet; failure to take blood samples from the body of the deceased to determine intoxication level and generalization of head injuries.

Finally, it was submitted that there is no evidence to support murder charges or to reduce the offence to a lesser charge of manslaughter because the split second when the firearm was discharged during the scuffle in which the 1st accused was attempting to restrain the deceased should be taken as an act of self-defence. Counsel urged the court to acquit the 1st accused for the offence of murder.

On the other hand, Ms Catherine Mwaniki, Prosecution Counsel, submitted that the prosecution case

remains unchallenged; that the prosecution case has been supported by the evidence of the accused that he (the accused) was at the scene; that the deceased died of gun-shot wound to the head and the fatal bullet was fired from the Ceska pistol number A785987 belonging to the 1st accused. Prosecution counsel submitted that the 1st accused's act of leading the deceased to the rooftop, walking around a busy club with a cocked pistol and shooting the deceased clearly establishes that he had malice aforethought as defined under Section 206 of the Penal Code. Prosecution counsel submitted that the prosecution has proved the case against the 1st accused person beyond reasonable doubt and urged this court to find him guilty of murder and convict him.

Issues for determination

The law is clear that in a criminal trial, the burden of proving the case lies with the prosecution and does not shift. The standard of proof is "beyond reasonable doubt." It is settled that to secure a conviction on a charge of murder, the prosecution must prove:

i. That the deceased had died,

ii. That the death of the deceased was due to an unlawful act or omission by the accused being tried,

iii. That the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm would result.

Generally, the above three ingredients form the two main ingredients of murder alluded to by Counsel for the accused in his submissions: *mens rea* and *actus reus* or simply the *guilty act* and the *guilty mind*. In addition to the ingredients of murder, the other issues for determination by this court are:

iv. The applicable law in light of the repeal of Section 3 of the Penal Code.

v. Whether the defences of accident and self-defence available to the accused.

Analysis and determination

Before determining the issues identified above, I wish to briefly give reasons why the 2nd accused was acquitted at the no-case-to-answer stage and was not put to his defence. I have read all the evidence including the two statements under inquiry, the handwritten and typed statements by the 1st accused (Ex. 22 (a) and (b)) and the handwritten and typed statements by the 2nd accused (Ex. 22 (c) and (d)). I have also read the sworn defence of the 1st accused. It clear from these statements now corroborated by the sworn defence of the 1st accused that the 2nd accused was not involved with the shooting incident. He had left the scene of the shooting and did not know what had happened after he left. I have considered that the intention of taking the deceased to the fourth floor was not ill intentioned and was meant to rescue him from attack. It is clear from this evidence that the 2nd accused person was innocent. It would have not served any purpose to place him on his defence hence the ruling of the court at the time.

Turning to the evidence in respect to the 1st accused, I find there is uncontroverted evidence showing that the 1st accused was a licenced firearm holder. He held firearm certificate number 7086 (Ex. 4(a)) for a Ceska pistol Serial Number A785987 (Ex. 1). He was one of the directors of Click Club. On the night of 7th and 8th May 2012 he was on duty supervising the operations of Click Club. On that night there were very many customers, the number estimated by different witnesses to be from 200 to 450. The deceased was one of the customers at the Club that night. An incident involving the deceased and another customer(s) occurred after allegations were made that the deceased had stolen a cell phone. The deceased was removed from the Club by the 1st accused and 2nd accused and taken to the fourth floor which houses the Club's kitchen. They were followed to the fourth floor by two people. The 1st accused asked the 2nd accused to escort the two people from the fourth floor. He was left alone with the deceased. It is also not disputed that the deceased died as a result of a gun-shot wound to the head.

However, there is dispute to the issues I have identified above, among other facts. I have opted to resolve the issue of the applicable law first. When operational, the repealed Section 3 of the Penal Code read as follows:

> "***This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."***

I agree with defence counsel in stating that Section 17 of the Penal Code still retains doctrines of English Law. English Law is judge-made law and is not codified. It is made by judges applying statute and legal precedents from previous decided cases. It is also known as Common Law. According to **the Black's Law Dictionary, 10th Ed**., Common Law is *"the body of law derived from judicial decisions, rather than from statutes or constitutions.*"

I do not think that courts in Kenya are facing difficulties in interpreting the law in regard to the offence of murder. This is because the provisions of the Penal Code creating the offence of murder and its ingredients are expressly clear. Section of the Penal Code creates the offence of murder and Section 204 creates the penalty for murder. These sections are clear and unambiguous. Section 206 of the Penal Code expressly sets out circumstances to be considered to establish the existence of malice aforethought. These sections are substantive provisions which have not been repealed. In my view Section 206 of the Penal Code clearly provides the meaning to be attached in determining the existence or otherwise of malice aforethought. There is no need therefore to take recourse to the English principles.

Further to the above, even when Section 3 of the Penal Code was operational, references were made to the English principles in interpreting the Code and the expressions used in the Code were given the meaning attached in English criminal law in instances where *(a)* the application of the said English principles was consistent with the local context and *(b)* where there was no express provision on the meaning. As I have stated above Section 206 of the Penal Code provides the meaning to be attached in determining the existence or otherwise of malice aforethought, thus there is no need to take recourse to English principles.

Secondly, the sources of Kenya law as defined by the Judicature Act (Cap. 8) recognizes under Section 3, among others, the doctrines of common law and equity as some of the sources of the law where written laws do not suffice. Section 3 (1) of the Judicature Act provides that:

> ***'The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with-***
>
> *a.* ***The constitution***
>
> *b.* ***subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;***
>
> *c.* ***subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;***
>
> ***but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.***

To my understanding common law is still relevant in Kenya given the provisions of Article 2(5) of the Constitution and Section 3 (1) of the Judicature and that all laws are subject to the Constitution of Kenya. All that the repeal of Section 3 of the Penal Code did was to do away with the need to take recourse to

English principles and laws with respect to interpreting the Penal Code. In my view therefore the offence of murder ought to be determined with reference to the express provisions of the Penal Code (ss. 203, 204 and 206) and any other relevant law be it common law or other.

Now turning to the ingredients of murder, it is my finding, after analyzing all the evidence, that death of the deceased has been proved beyond reasonable doubt. Dr. Dorothy Njeru (PW4) examined his body. She medically confirmed the death of the deceased due to a gun-shot wound to the head with extensive haematoma and multiple fracture lines on the frontal parietal, temporal and occipital region. The doctor testified that the entry point was at the left frontal temporal region and exit was at the occipital region. She testified that her examination showered features of close range gun shot.

The bullet that killed the deceased was discharged from Exhibit 1, Ceska pistol belonging to the 1st accused. The circumstances leading to the discharge of the bullet are described by the defence as accidental or as a result of a struggle in self-defence. The prosecution terms that incident as a deliberate action on the part of the 1st accused to cause the death or, at the very least, to do grievous harm to the deceased.

I will now turn to the remaining issues whether the shooting of the deceased by the 1st accused was unlawful or by accident and if unlawful, whether the 1st accused possessed malice aforethought. Hand in hand with the two issues I will also be determining whether the defence of accident or self-defence is available to the 1st accused. I want to reiterate that there is no dispute that the 1st accused was armed with a Ceska Serial Number A785987 (Ex. 1) and that it was loaded with ammunition. Given that CPL Kamau recovered the pistol and 13 rounds of ammunition (Ex. 3) and that one expended cartridge (Ex. 5) was recovered at the scene of shooting, I am not wrong in stating that the pistol had been loaded with 14 rounds of ammunition. It is by 1st accused's admission that the pistol had been cocked all the time he was on duty at the Club before the shooting. This evidence that the bullet that hit and fatally wounded the deceased was discharged from Ex. 1 was confirmed by the evidence of CIP Hassan Maningo (PW9) who stated that the expended cartridge (Ex. 5) was fired from the Ceska pistol (Ex. 1).

The prosecution did not tender evidence of what happened at the scene. The available evidence on that incident is gathered from circumstantial evidence and the 1st accused's report to CPL Kamau (PW1), his own statement under enquiry and his sworn defence in court. Evidence on the report made to CPL Kamau is contained in the evidence of CPL Kamau in court and his statement which was produced in evidence (Ex. 6). CPL Kamau testified that the 1st accused, in company of the 2nd accused, were referred to him by report office personnel and that the 1st accused ***"reported that he had shot dead a customer at Click Club."*** CPL Kamau further testified on that issue as follows:

> ***"1st accused came to report the matter with Mr. Kirero who is the 2nd accused in the dock. I did not ask for information from Kirero. The 1st accused is the only one who gave me the information."***

On cross-examination CPL Kamau told the court as follows:

> ***"1st accused explained to me what happened on fourth floor. He said the deceased was rowdy and became very violent and deceased tried to grab the 1st accused and found a gun. He did not tell me the deceased tried to snatch the gun from him. He did not tell me that the gun fired accidentally."***

In his statement dated 8th May 2011 (the date must be erroneous since the incident occurred in 2012) CPL Kamau states on the relevant part as follows:

> ***"…… He then rescued him and he, and the Club Security guard by the name of Joseph Kirero, took him from the third floor where members of the public were taking beer to the fourth floor area. The scuffle between Jackson Maina and the deceased continued and he shot him on the***

head." (sic).

The 1st accused reported to CPL Kamau on 8th May 2012 at 3.00am. On the same day at 10.00am, CPL Kamau recorded his statement. On the same date at 4.00pm the 1st accused recorded his statement under inquiry. He told CIP Eustace Ndubia as follows in respect to the shooting:

> ***"After realizing that the bouncer had left, the deceased attacked me by holding my shirt lapels and started pushing me and as I was pushing him back, we got to a point where he grabbed me by the waist and he said 'Nimesikia uko na bunduki. Hiyo ndiyo nitakuuwa nayo.' He tried to get the gun from my holster by pulling my shirt. I got hold of the gun and he grabbed my right hand with his both hands using a lot of force trying to grab the gun. I am a licenced firearm holder and I always walk with my gun cocked. While struggling to get my hands off his hands, the gun discharged one round of live ammunition. The deceased staggered and fell back about three metres from where we were struggling. I went to where he had fallen down and saw him bleeding from the head. I immediately went downstairs to the Club and called the bouncer Joseph Kirero Sepi who was near the entrance and we both went to Industrial Area Police Station where we reported the incident."***

In his sworn defence, the 1st accused testified on the incident of the shooting as follows:

> ***"Deceased was behind me and he jumped on me and held my shirt. I tried to push him away. He grabbed me by the waist and felt my gun. He then uttered 'Nasikia una bunduki, ndiyo nitakuua nayo.' I held my gun and he grabbed my hand with two hands. In that struggle within a split second the gun fired. It was so fast. I could not have a chance to wrestle him or take gun to a safe distance. Deceased was a bigger man than me. He was stronger than me. The deceased staggered and I noticed he had been hit by a bullet. After the gun fired I could not tell who had been hit until I saw him stagger. I did not remove the gun from the holster and aim at him. I had no motive or any reason to shoot him at all."***

In his evidence in chief the 1st accused told the court that he kept his gun cocked and ready for firing at all times as a matter of habit. He also said that ***"When the gun discharged I was bending and pulling due to the struggle."*** He also said that ***"I did not remove the gun from the holster. I did not aim gun at him or shoot him."***

The evidence is clear that the report of the 1st accused to CPL Kamau did not contain the detailed information expressed in his statement under inquiry or his sworn defence in court. When the report was made, the events of that evening were very fresh and clear in the mind of the 1st accused. Evidence shows that immediately the shooting took place the 1st accused went downstairs to look for the 2nd accused to accompany him to Industrial Area Police Station to make a report. The Station was about one kilometre or so from the scene. He did not tell CPL Kamau that the gun discharged accidentally as they struggled over it.

A close scrutiny of his evidence shows some contradictions. In his statement under inquiry, it is clear that the deceased did not manage to get hold of the gun from the 1st accused. It is also clear that the 1st accused is the one who removed his gun. I revisit part of this statement ***"…….he tried to get the gun from the holster by pulling my shirt".*** According to this statement, the deceased did not manage to get to the gun. He felt the gun on the accused's waist and uttered ***"Nimesikia uko na bunduki……"*** 1st accused's statement continues: ***"I got hold of the gun and he grabbed my right hand with both his hands."*** It is the 1st accused who removed the gun from its holster.

In his sworn defence the 1st accused said that "…….***I held my gun and he grabbed my hand with two hands. In that struggle within a split second the gun fired…"*** Again there is nowhere where it is shown that the deceased got hold of the gun or removed it from the holster.

I am not able to reconcile the statements by the 1st accused that ***"I got hold of the gun and he grabbed my right hand with both his hands"*** and "***I held my gun and he grabbed my hand with two hands. In that struggle, within a split second the gun fired…,"*** with the statement ***"I did not remove the gun from the holster.*** All these statements were made by the 1st accused both in his statement under inquiry and his sworn defence in court. If he did not remove the gun from its holster, it can only mean that the deceased removed the gun from the holster or that the gun discharged while still holstered. It is not possible from the evidence that the deceased removed the gun from its holster because in 1st accused's evidence both in the statement under inquiry and his sworn defence, there is none indicating that the deceased ever accessed the gun. On the contrary, evidence shows that it is the 1st accused who removed the gun. If the gun discharged bullets while still in its holster, it would have meant that at the very least there were gun-shot holes in the 1st accused's clothes. There is no such evidence. The 1st accused told the court that the gun was tucked between his body and his trouser. It was not placed "nakedly" between the body and the trouser. It was in a holster. It would have meant that the deceased overpowered the 1st accused to be able to access the gun from its holster and from where it was tucked between the trouser and the 1st accused's body which is not stated in evidence.

I agree with defence counsel in his submissions that there is no direct evidence from the prosecution on what transpired during this incident. This court will therefore rely on circumstantial evidence as well as the defence of the 1st accused contained in his statement under inquiry and in his sworn defence. In the case **Mohamed & 3 Others case** (supra) cited by the defence, the court stated that:

> ***"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."***

Further, in the Court of Appeal case, **Mwangi & another v. Republic** (supra) also cited by the defence, the Court stated, *inter alia*, that:

> ***"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as prove is incapable of explanation on any other reasonable hypotheses except the hypothesis that the accused is guilty of the charge."***

Evidence shows that after the shooting incident, the 1st accused left the deceased bleeding and went to report the matter to the police. It would have been expected that the 1st accused, after the shooting whether accidental or not, would have rushed to call the 2nd accused, any other bouncer or any person for help to take the deceased to hospital to try to save his life. He did not do so. The 1st accused was cross-examined on the incident and this is what he stated:

> ***"By the time I went to Police Station I did not notice deceased was dead. I did not call an ambulance. I did not look for the ambulance telephone number. Mater Hospital was the nearest to Click Club. It would have taken me 10 minutes to get there. I did not go there. I went to report the incident."***

The 1st accused's conduct in carrying a cocked gun around, especially in a crowded Club which was selling alcoholic drinks, and so late at night portrays a very careless and reckless person. His conduct of walking away after the shooting and the realization that the deceased had been hit by a bullet and fallen down portrays a person who did not care for the life of the deceased.

Do the 1st accused's actions during the moments before the shooting and immediately after the shooting qualify to be those done in exercise of an honest claim or right and without the intention to cause grievous harm? Are those acts such as to completely exculpate the 1st accused in law under Section 9 of the Penal Code? I do not think so. I have examined the evidence carefully and I am satisfied that the 1st accused in

carrying a cocked gun in a crowded Club which was filled to capacity with patrons who were drinking past midnight was a recipe for disaster. It was reckless of him to do so. This was exacerbated by his removing the gun from its holster in the alleged struggle with the deceased. There were other options open for the 1st accused to ensure the deceased was not shot. If indeed the deceased was stronger and bigger than the 1st accused, he would have managed to wrestle the gun from the 1st accused. This court was told that the deceased had been drinking and obviously by 2.30am he could not have been sober. The 1st accused was sober as stated in his evidence. In my view he could have done anything else to stop the deceased if indeed the deceased attacked him including not removing the gun from its holster in circumstances that confronted him going by his defence.

I do not believe the defence of the 1st accused. I have given my explanation why I arrive at this conclusion. I reject the same and find that he acted in an unlawful manner by removing his gun and shooting the deceased.

In regard to malice aforethought as expressly defined under Section 206 of the Penal Code, I doubt that the 1st accused intended to kill the deceased. I am of the view that he shot him to stop him from confronting him but this turned fatal. His conduct after the shooting shows someone who did not care in the least about what he had done.

I have considered the submissions by Mr. Bowry that the Investigating Officer failed in not drawing a proper sketch plan; in failing to dust the pistol for fingerprints and failing to call Wafula, Jimmy, Ngahu and the two people who followed to the fourth flow. In my view these failures on the part of the Investigating Officer are not fatal to the prosecution case given that most of what happened that night, except the circumstances surrounding the shooting, is not in dispute.

In conclusion therefore it is my considered finding that the prosecution has failed to prove malice aforethought or *men rea.* Consequently, the offence of murder has not been proved beyond reasonable doubt. Section 179 (2) of the Criminal Procedure Code provides that:

> ***"When a person is charge with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

It is my view therefore, after taking into account all the circumstances of this case, that the facts disclose an offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. Consequently, I do hereby acquit the 1st accused of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and instead convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. Orders shall issue accordingly.

I wish to thank both Ms Catherine Mwaniki the Prosecution Counsel, Mr. Bowry for the 1st accused and Mr. Naeku for the 2nd accused person for working diligently in facilitating this court to efficiently determine this case. The respective roles they played in the prosecution of this case and the defending of the accused persons is appreciated.

Dated, signed and delivered this 14th day of March 2017.

S. N. Mutuku

Judge