REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO 63 of 2010

Lesiit, J.

REPUBLIC ……..……...….PROSECUTOR

VERSUS

COSMAS MULWA KITULYA…….ACCUSED

JUDGEMENT

1. The accused person **COSMAS MULWA KITULYA** is charged with two counts of **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of each offence are as follows:

COUNT 1

> **"That on the 1st day of August, 2010, at Borma Villa Bar in Syokimau Estate within Nairobi Area, he murdered Charles Ngugi Njane."**
>
> **COUNT 2:**
>
> **"That on the 1st day of August,2010 at Borma Villar Bar in Syokimau Estate within Nairobi Area, he murdered Samuel Kipkoech Maiyo."**

2. The prosecution called a total of 10 witnesses. Mwilu J as she then was, heard a total of eight (8) witnesses, before Muchemi J. took over the matter under **section 201(1)** and**200** of the **Criminal Procedure Code** and heard two (2) other witnesses, PW9 and 10. I took over the matter under **section 201(1)** and**200** of the **Criminal Procedure Code** and heard two (2) witnesses, PW1 and 10, who were re-called by the prosecution. I thereafter heard the defence and submissions. After the close of the case I invoked **section 150** of the **Criminal Procedure Code** and re-called some witnesses for purposes of clarifying issues touching on some exhibits as the record will clearly show.

3. The prosecution case is that the accused was at Borma Villa Bar in the company of PW9, PW3 and the1st deceased, hereinafter referred to as Charles. The prosecution case is that the accused turned violent and had to be ejected from the bar. That it is then that he shot the 2nd deceased, hereinafter referred to as Maiyo. He then walked back into the bar and shot Charles four times with his official gun and then went into hiding. The accused surrendered later to his seniors upon which he was arrested and charged with the

two offences.

4. In his defence the accused denied the offence and stated that he was a victim of pick pocketing outside the bar where the offence is said to have taken place. He stated that following the theft he suffered an asthmatic attack and lost consciousness. He said when he eventually healed he went to his seniors and reported the matter only to be arrested for murder.

5. Mr. Konga Learned Prosecution Counsel made submissions. He urged that 10 witnesses testified for the prosecution and that the prosecution had proved that it was the accused that shot Charles, and that the motive for the attack was the fact that Charles was getting too close to PW9 who was accused girlfriend and lover.

6. Secondly, Mr. Konga urged that the accused shot Maiyo because he was trying to restrain him from gaining access to the bar.Mr. Konga submitted that although there was no eye witness of the shooting there was sufficient circumstantial evidence to link the accused to both deaths. Learned Prosecution Counsel relied on the case of **Musili Tullo Vs REP (2004) eKLR** for the proposition that the three tests laid in the cited case to determine whether circumstantial evidence adduced by the prosecution was sufficient to sustain a conviction had been met.

7. . Mr. Konga submitted further that the State had proved the fact that the accused person was armed with a firearm on the material day. He urged that the accused had not denied having a relationship with PW9.Counselurged the court to construe the accused conduct of running away after committing the offence as conduct of a man with a guilty mind.

8. Mr. Konga submitted that the statement recorded by PW10 from Maiyo indicated that Maiyo was shot by a man who was causing fracas at the bar. Learned Counsel urged that it was only the accused who had causeda fracas at the bar on the material evening, and that he was the only person who had been at the bar armed with a firearm. He urged that the prosecution evidence linked the accused to the shooting. Mr. Konga urged that the prosecution had proved that the accused had been issued with a Taurus firearm and that the accused himself admitted that he had the gun while at Borma Villar bar on the night in question.

9. Mr. Mbindyo, Counsel for the accused relied on all his written submissions. In his highlight of the filed submissions, Mr. Mbindyo urged that the prosecution had failed to prove that the accused had committed the murders. Counsel urged that the prosecution had failed to prove how the offences were committed. Counsel urged that there was no evidence linking the accused to the offences and further that no evidence was adduced to prove motive.

10. Mr. Mbindyo urged that what ought to be determined by the court is whether the firearmP. MFI 9was used to commit the offence the accused person was facing, and secondly, whether the murder weapon was recovered. Counsel urged that the firearm TK 70350 said to have been issued to the accused wasnot produced as an exhibit; that there was no evidence to link the bullet heads recovered from the bodies of the two deceased persons with the firearm said to have been issued to the accused person. Counsel urged that there was no link between the cartridges and the firearm issued to the accused person; that there was no explanation given to the honourable Court as to the source of the bullet head marked “A” in the Exhibit Memo dated 11th May, 2011 and produced in court as P. Exhibit 13 since the post-mortem report on Charles bore no record of any bullet heads having been recovered from the deceased body.

11. Mr. Mbindyo raised issue with the fact there was no eye witness to the alleged shooting. Mr. Mbindyo raised issue with the evidence of PW10 that Maiyo could not talk when he visited him in hospital and therefore the statement purportedly given to him by Maiyo could not be considered as a dying declaration. Mr. Mbindyo urged that even in the event Maiyo’s statement was considered a dying declaration, Maiyoneither mentioned nor described who shot him whether at the scene of attack or at the hospital. Counsel submitted that this statement ought to have been corroborated by some other independent evidence in order to be relied upon by the court.

12. I have carefully considered the evidence adduced by the prosecution and the defence together with the

written submissions of the learned counsels for the State and the defence. I have also considered the authorities relied upon.

13. The accused is facing two counts of murder contrary to **section 203** as read together with **section 204** of the **Penal Code (PC)**. **Section 203** of the **PC**defines murder as follows:

> **203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

14. Malice aforethought is an essential ingredient for the offence of murder. The circumstances that constitute malice aforethought are set out under **section 206** of the **PC**as follows:

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**
>
> **(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
>
> **(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
>
> **(c) An intent to commit a felony; and;**
>
> **(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

15. The burden of proof lies upon the prosecution to prove the charges as against the accused beyond any reasonable doubt. The prosecution has the onus of proving that the accused caused the death of the deceased persons by an unlawful act, that of shooting at the deceased persons and causing each of them serious injuries from which they succumbed and died. The prosecution has to prove that the accused had formed the necessary malice aforethought at the time he shot and caused fatal injuries to the deceased in this case.

16. After considering the evidence adduced by both sides and the submissions made by both sides, I find that the following are the issues for determination:

> **a. Whether the prosecution has proved that the accused shot the deceased persons.**
>
> **b. Whether the prosecution has proved which firearm was used to shoot the deceased persons, and whether that firearm was recovered and whether it was before the court.**
>
> **c. Whether the prosecution has proved any link between the firearm which was issued to the accused and the deceased death.**
>
> **d. Whether the prosecution had established that at time the accused caused the fatal injuries on the deceased persons he had formed malice aforethought to commit the offences.**
>
> **e. Whether the prosecution proved motive for the offence and if not whether it is fatal to the prosecution case.**
>
> **f. Whether the prosecution has established that any statement was made by Maiyo to PW10 and CW3 and recorded by PW10 and if so, whether the statement qualifies as dying declaration.**

g. Whether the prosecution has adduced evidence to establish that bullet head(s) were recovered from the body of the deceased Charles and further whether any evidence was adduced to establishwhere the bullet head marked "A" came from.

h. Whether the accused defence is plausible, reasonable and logical.

17. I will start by stating that certain facts in this case are not in dispute. There is no dispute that the accused and PW9 had a love affair for a period of time. It is not in dispute that the accused had a wife and that it was not PW9. There is no dispute that the accused and PW0 had spent the night preceding this incident in accused house. There is no dispute that the accused and PW9 left the accused house at 3pm in order to meet the deceased Charles for the purpose of being taken to see a plot PW9 intended to buy. There is no dispute that PW9 and the accused went together to Borma Villa Bar, belonging to PW3 to have a drink.

18. There is no dispute that the accused, PW9 and Charles sat together at one table and had alcoholic drinks. It is not in dispute PW3 joined them briefly at their table and shared a drink with them. There is no dispute that the three, accused, PW9 and Charles rose from their table and walked out of the bar together at about 7 pm just before a turn of events took place.

19. **As to whether the prosecution has proved that the accused shot the deceased persons**. It was the submission of Mr. Mbindyo, learned defence counsel that the prosecution did not adduce any evidence to establish that it was the accused who committed the two murders which are the subject of this case. Mr. Konga, learned Prosecution Counsel urged that the prosecution had proved its case to the required standard.

20. There was no eye witness to this offence. The persons who were within close proximity to the scene of the attack were PW3 and 9. The other two are the deceased in this case. The evidence of PW9 was that she was the girl friend and lover to the accused. PW9 stated that on 1st August, 2010, they were together with the accused having spent the night before together. She called Charles on phone and they arranged to meet at Borma Villa Bar in Syokimau. PW9, the accused and Charles met as agreed at Borma Villa Bar. PW9 stated that they sat together at one table inside the Bar. They were joined by PW3, the bar owner and another Old man. They all ordered for beer apart from the accused person who ordered first for soda but later for alcohol. PW3 later left the group for a meeting within the bar area.

21. PW9 stated that at around 7.00 pm, Charles expressed his desire to leave and head to Donholm where he lived. PW9 testified that she too announced that she would go home and so would accompany Charles in his car because they both resided along Jogoo Road. They all decided to leave and as she was walking ahead of Charles and the accused, she heard accused shouting saying ***"huyu ni Malaya yangu, bibi yangu ako nyumbani"***, which in English means **"this is my prostitute, my wife is at home."**

22. PW9 testified that having had alcohol with the accused on several occasions before that day she knew him to turn violent after consuming alcohol. With that knowledge PW9 stated that on hearing the accused shouting, she decided to run away. As she ran, the accused followed her, caught up with her and started kicking her and finally knocked her down. PW9 testified that it was Charles that lifted her up and walked her back to the bar.

23. PW9 went ahead to state that the accused followed them into the bar and she heard him shout ***"wapi hiyo taka taka?"*** meaning ***"where is that rubbish".*** PW9 stated that on hearing the accused say that she ran into a container used as the counter area of the bar where she locked herself and hid. She said that while hiding there, she heard a loud blasting sound followed by three more blasts. After a few minutes she peeped from the counter and saw Charles lying on the ground in the middle of the bar.

24. Much later after the police came is when she came out of hiding. She was arrested for interrogations. She denied having any love affair with Charles and stated that she had only dealt with him over land issues for a period of three weeks prior to his death. PW9 said that she did not witness the shooting of both deceased persons. However, PW9 testified that she was however aware that the accused was armed

with a gun on the material day.

25. The other evidence was that of the bar owner PW3. He testified that while at his bar on 1st August, 2010, he met Charles, PW9and the accused. PW3 had earlier been introduced to the accused by PW9 as her husband.

26. On 1st August, 2010 PW3 said that he saw Charles,PW9 and accused all seated at one table having alcoholic drinks and he decided to join them. He later left to attend to a meeting at a different sitting area inside the bar. At around 7.00pm his employee known as Agnes informed him of some commotion outside. On his way towards the scene of alleged commotion, he met Charles and PW9 rushing, headed back to the Bar. He saw them proceedto sit at a table. Upon inquiring from Charles and PW9 what had transpired, they told him that the accusedwas beating up PW9.

27. While still inquiring from Charles and PW9 about the commotion, PW3 saw the accused return back into the bar. PW3 saw the accused start to beatup PW9. Together with Charles, PW3 tried to restrain the accused but were unable and that is when PW3 decided to seek help from the watchman, Maiyo. PW3 testified that the accused was taken outside by him and Charles assisted by the watchman. After duration of about 10 minutes, PW3 heard a loud bang outside. On rushing out to check what had happened, he found Maiyo lying down seriously injured and bleeding, and uttering the words **"Ameniua! Ameniua!"**interpreted to mean **"He has killed me! He has killed me!"** PW3 testified that the deceased did not state the name of the person he meant had killed him.

28. As he assisted Maiyo take off his jacket, PW3 heard 3 gunshots inside the bar. He saw people running and heard customers saying **"Amemuua! Amemuua!"** meaning, **"He has killed him! He has killed him!"**PW3 asked a friend to call the police.The police came much later, interrogatedthe people present and took photographs. They arrested PW9 and went away with her.

29. The evidence of both PW3 and 9 is supportive. It places the accused at the scene of the incident. From the evidence of PW9 it is clear that the accused and PW9 had an amicable afternoon until she announced that she wanted to hike a lift from Charles. They even walked out of the bar together but before they could go far, the accused changed. He started shouting calling PW9 his prostitute. He then set upon her with kicks and even knocked her down.

30. PW3 was not present at that time. However he saw Charles and PW9 running back into the hotel in a frightened manner. PW9 told him that the accused had assaulted her. Indeed before long the accused appeared again and set upon PW9 to assault her more. It took three men, PW3, and both deceased to forcefully eject the accused out of the bar. He was then left with the deceased Maiyo with instructions to Maiyo to ensure that the accused does not enter the bar again that evening.

31. I find that the evidence adduced by the prosecution clearly placed the accused at the scene. In addition the evidence adduced shows a person who was agitated and aggressive. He was also rowdy, shouting obscenities or at least derogatory remarks directed against PW9. The accused assaulted PW9 twice and it took the intervention of three men to contain him, at least for a while.

32. Regarding the firing it is the evidence of PW9 that the moment the accused was ejected from the bar, it did not take long before he started shouting from outside the bar, asking for **"Wapi huyo taka taka"** "**where is that rubbish"**. PW9 testified that she knew he was referring to her so she did not wait for him to show up. She ran into a lockable space where she hid. She heard the loud blasting sounds,first one then three more. In her testimony she said that she peeped from her hiding place and saw Charles lying on the floor of the bar.

33. PW9 did not see the accused at that point. However she said that she was aware that the accused carried a gun, and that on the material day he had it in his possession.

34. PW3 was outside trying to help Maiyo who by then had been shot once. PW3 had heard the shot which hit Maiyo and went towards where he was. It was while there that he heard four other blasts which

turned out to be gunshots.

35. In the case of **VENANZIO NZIVO –V- REP. CA NO. 81 OF 2003,** the test for circumstantial evidence was set out in the following manner:

> ***"The correct test for such evidence was whether it led to only one conclusion and was not explainable on any other reasonable hypothesis. He went through the evidence of each of the 10 prosecution witnesses and pointed out that there was singular omission by the learned Judge to consider and eliminate the issue of sickness or accidental injury to the deceased prior to the date of death. There was also no consideration of the conduct of the appellant betraying his culpability as a murderer either prior to or after the incident.***

36. I have taken the liberty to quote from the same case, **VENANZIO NZIVO, supra,** a test laid by the court. TUNOI, O'KUBASU and WAKI JJA set out the correct test for circumstantial evidence as follows:

> ***"For our part, we think the appellant is on firmer ground here. As the entire case is dependent on circumstantial evidence the tests laid by this Court on many occasions readily come to mind:***
>
> ***"In a case depended on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (****Sarkar on Evidence – 10th Edition P.31****). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference*** *– Teper v. The Queen [1952] AC 480, at page 489."* ***– See*** *James Mwangi v. R [1983] KLR 327* ***at pg.331."***

37. I have carefully considered the evidence adduced by PW3 and 9. I have no doubt that the accused was at the scene of the shooting at the time the shooting took place. The evidence of PW3 and 9 creates a clear pattern that the accused started by assaulting PW9. From PW9's evidence there is a clear connection between the expression by PW9 that she wanted to go to her house in the company of Charles and the accused sudden change of conduct to an abusive, derogatory and aggressive behavior. That change of accused behavior is attributable to PW9's intention to leave him and to give someone else her company. That would explain the accused words to the effect PW9 was his prostitute. The accused was clearly being possessive. That was not strange since PW9 was his lover and PW9 was not hiding that fact having even introduced the accused to PW3 as her husband. The other fact is that the accused refused to go away even when PW3 made it clear that he was no longer wanted there.

38. There was further link between the accused and the shooting. When PW10 and CW3 went to where the deceased Maiyo was admitted with a gunshot wound, and asked him who shot him, the deceased Maiyo made a statement P. Exhibit 6 in which he was a watchman at the bar. That a client caused trouble and that he attempted to remove him, the client removed a gun and shot him.

39. There was also other evidence by a brother of the deceased Maiyo who visited him in hospital after the incident. That was PW2 who was the older brother to the deceased Maiyo. While at the hospital, Maiyo told him that he had been shot by a customer who had disagreed with his wife. PW2 later identified the body of his deceased brother Maiyo to the doctor who performed the postmortem on the deceased.

40. The statement of the deceased Maiyo to PW10, CW3 and PW2 is in tandem with the evidence of PW3 and 9. For PW9 she said the accused beat her outside the bar which is where Maiyo was stationed on the night in question. Maiyo therefore saw the accused beating the PW9 and soon thereafter his help was sought to eject him for being violent against PW9. It is clear that Maiyo was referring to the incident he had just witnessed between PW9 and the accused.

41. PW3 on his part said that when the accused caused trouble, he called Maiyo to help him and Charles to eject the accused from the bar which they succeeded in doing. From the evidence of PW3 and 9 it is

clear that the only person who caused trouble at the bar that day, and who was ejected forcefully from the bar was the accused. It is clear that there was no other incident of aggressive and rowdy character on that evening except the accused. There is no doubt in my mind that when Maiyo said he was shot by a man who had quarreled with his wife, he meant the accused.

42. There was evidence of two other officers in regard to the gun. PW5, Sgt. Ibrahim Malava (also re-called as CW1 under **section 150** of the **CPC**) was attached tothe Armory Departmentat Uhuru Administration Police Camp along Mbagathi Road. His duty was to issue guns to officers going out on duty and receiving the same back when the officers returned them. At both instances, PW5 required the officers receiving or returning the firearms to sign for them in the Firearms Movement Register.

43. PW5 testified that on the 22nd June, 2010, he issued a revolver, make Taurus Serial No. TK 70350 to Personnel No.25136 Corporal Cosmus Mulwa, the accused in this case.PW5 stated that the accused availed to him a copy of the Letter of Authorization to be issued with the firearm, as was the requirement, and also signed in the Firearm Movement Register, as required. PW5 asserted that the accused never returned the firearm and that he never went back to explain why he had not done so. PW5 produced a photocopy of the register, P.Exhibit 2. He identified P. MFI 9 as the gun he issued to the accused and which he did not see again until it was shown to him in court.

44. The other evidence was of the lead Investigating Officer, PW10. He testified that on 2nd August 2010, the DCIO Mr. Musyoki instructed him together with Sgt. Munyasia, CW3 to investigate the case of a fatal shooting incident which had taken place on 1st August, 2010 at Borma Villa Bar in Syokimau area. They proceeded to the scene in the company of PW9 who was in Police custody at EmbakasiPolice Station. They interviewed the owner of the bar, PW3 and three other attendants. They were informed of the shooting of two people at the bar, one Charles Ngugi deceased in count 1 and one, KipkoechMaiyo the deceased in count 2.

45. PW10 stated that the accused was an Administration Police Officer and that he was based at Uhuru Administration Police Camp along Mbagathi Way. In the course of investigations, on the 5th August, 2010, together with CW3, they proceeded to Uhuru Camp where the accused was based.

46. The officer on duty informed them that the accused was attached to guard Government Offices at KICC. The officer-in-charge of the Armoryat the camp, PW5 informed them that the accused had been issued with a Taurus revolver loaded with 5 rounds of 0.38mm ammunition. They were informed that the gun had not been returned to the camp as at 6th August, 2010. They obtained the copy of the Arms Movement Register P.Exhibit2.

47. I find that the prosecution has placed the accused at the scene of incident and has established that the accused had a gun on the material evening. It was an official revolver issued to him for use to guard government premises. The prosecution has proved that the accused had the weapon and the opportunity to use it on that day.

48. Even though neither PW3 nor 9 saw him shooting at the deceased persons, PW9 heard him shouting. First he chased and assaulted her and continued seeking to continue the assault on her, PW9 then heard him shouting aggressively twice. The first time she heard him saying ***"huyu ni Malaya yangu, bibi yangu ako nyumbani"***, which in English means **"this is my prostitute, my wife is at home."**The second time he said **"wapihiyo taka taka**" which means **"where is that rubbish."**

49. Regarding voice identification such evidence should be received with caution within certain perimeters. These were discussed in the case of **Choge –vs- Republic [1985] KLR 1**wherethe Court of Appeal held in part that:

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that**

the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."

50. I am satisfied that PW9 was very familiar with the voice of the accused having had intimate relationship with him. The words spoken were lengthy and were made in close proximity to PW9. They were uttered soon after the accused had assaulted PW9, an act connected to PW9's expression of a desire to get a lift from Charles, a matter the accused violently opposed. I am satisfied that the circumstances under which the words were spoken, the number of times the accused spoke and the proximity of accused to PW9 at the time all considered together remove any possibility of mistake or error in identifying accused voice.

51. I am satisfied the circumstances obtaining at the scene at the time enabled a correct identification of accused voice by PW9. The voices were heard just before the shooting. That proves that at the time the accused turned aggressive and was shouting derogatory words against PW9 was just before the shooting. I find a connection between accused aggressive behavior and the shooting of the two deceased in this case.

52. **As to whether the prosecution has proved which firearm was used to shoot the deceased persons, and whether that firearm was recovered and whether it was before the court. I will consider that issue with the next one which is whether the prosecution has proved any link between the firearm which was issued to the accused and the deceased death.**

53. Mr. Mbindyo for the defence urged that it was an issue whether the murder weapon was recovered and whether it was before the court; and that the prosecution had not established a link between the firearm issued to the accused and the deceased death. Mr. Konga urged that the prosecution had proved the connection between the accused and the deceased deaths.

54. I will begin with the evidence of PW5 cum CW1. After submissions by both parties and before judgement was rendered, the court invoked **section 150 of the Criminal Procedure Code** and issued Witness Summons for 5 witnesses to clarify certain issues and produce the exhibits they had handled. The first witness to be called was CW1 Sergeant Ibrahim Malava. CW1, who had apparently testified as PW5 (herein after PW5), stated that on 22nd June, 2010 he issued a pistol TK70350 , PMFI 9 to one personnel No. 99025136 Corporal Cosmas Mulwa, the accused in this case. The information was entered in the Arms Movement Register which he produced as P.Exhibit9A. PW5 in cross-examination stated that the accused never returned the assigned pistol and that he was seeing the same pistol for the first time in court since the day he issued the same to the accused. The evidence of this witness shows that the accused was issued with an official firearm which he was still holding at the time of this incident.

55. CW4 P.C Geofrey Mwiti stated that on 11th August, 2012, the DCIO Embakasi, one Peter Kimulwa instructed him to proceed to Kayole Police Station to collect exhibits. He proceeded there and was given a revolver Taurus serial No.TK 70350, P. MFI 9. CW4 testified that the revolver was loaded with 3 live ammunitions which he marked B1 to B3, and 2 spent cartridges which he marked C1 and C2, identified as P. MFI 14, 15 (a) & (b) and 17 (a) & (b) respectively. CW4 stated that he had no idea how and where the revolver and the live ammo and spent cartridges were recovered from. His evidence confirms that the firearm was recovered after the accused was arraigned in court.

56. It is precisely because of the failure to call the person who recovered the firearm marked P. MFI 9 in the case and the 3 live ammunitions which CW4 marked B1 to B3 and 2 spent cartridges which he marked C1 and C2, identified as P. MFI 14, 15 (a) & (b) and 17 (a) & (b) respectively that these exhibits were not admitted in evidence. The ammunition had no connection with this case as they were not found at the scene of this incident neither were they shown to have anything to do with this case, even remotely.

57. For purposes of completion I will include the Ballistic Examiners report on these items. PW1, Chief Inspector Alex Chirchir, a Ballistic Expert based at the C.I.D headquarters,stated that on 23rd August, 2012, he received some exhibits from P.C Mwiti CW4. These were a Taurus revolver serial No. TK70350

P. MFI. 9 and three rounds of live ammunition which he marked B1, B2 and B3 P.MFI 14, 15(a) and (b) respectively two fired cartridges which he marked as C1 and C2, which are P. MFI 17 (a) and (b) respectively. He was required to examine the exhibits as directed in the Exhibit Memo Form, P. Exh. 11 which he did. His finding as per his Report, P. Exhibit 7 and his evidence in court was that the three fired cartridges were fired from the revolver P. MFI 9.

58. PW1 stated that on 11thMay, 2011 he received from Sgt. Munyasia, CW3, three bullet heads, marked as A, B and C which he identified as P. Exhibit 10(a), 10(b) and P. Exhibit 12 respectively.

59. Upon examining the exhibits, he noted that P. Exhibit 10(a) bore five land engraved areas with a slight hand twist, while P. Exhibit 10(b) bore a land engraved area out of possible 5 land engraved areas. He said that from his examination of the two bullet heads he found that they had been fired from the same gun.

60. PW1 was recalled by the court under **section 150** of the **Criminal Procedure Code (CPC)** and he produced by consent of all parties P. Exhibit11, the Exhibit Memo that requested him to carry out examination which resulted to his report P. Exhibit 7 dated 27th February, 2013. Also by the consent of the parties he produced the Exhibit Memo P. Exhibit 13 which requested examination that resulted to the report dated 11th May, 2011 produced as P. Exhibit13.

61. PW1 testified that when the firearm P. MFI 9 was recovered and submitted for examination, he compared P. Exhibit 10 (a) and (b) and P. Exhibit 12. He stated that the first two, as he had earlier found had insufficient striation markings to enable any conclusive findings. P. Exhibit 12 he found was extensively damaged and was not suitable for microscopic examination.

62. PW1 explained that several factors could cause marking to be insufficient. He said that it included wear and tear; the material of the bullet; contact with harder material if the bullet was made of lead would affect the bullet as lead is malleable. PW1 testified that the bullet heads in this case were made of lead and that the markings would therefore not be clear. PW1 testified that human flesh or human bone could also affect the bullets in question but said he could not explain why P. Exhibit 12 was extensively damaged as opposed to P. Exhibit 10 (a) and (b).

63. The implication of the findings of PW1 on the examination of P. Exhibits 10 (a) and (b) and 12 is that the Ballistic expert could not make any conclusions in regard to which firearm was used to fire them due to the damage on the bullet heads.

64. **As to whether the prosecution has proved which firearm was used to shoot the deceased persons, and whether that firearm was recovered and whether it was before the court.** The answer is that since the bullet heads recovered from the bodies of the two P. Exhibits 10(a) & (b) and 12 were damaged no conclusive findings could be made by the Ballistic Expert. In terms of the bullet heads and the firearm P. MFI9 no material nexus has been established by the Ballistic Expert.

65. It is true that the revolver issued to the accused by PW5 was not an exhibit in court and the reason for this as this judgment will show is because the police officer who recovered the same and other exhibits were not called as witnesses. In fact none of the witnesses referred to them in the case.

66. **The issue is whether failure to produce murder weapons is fatal to the prosecution case**. In ***EKAI V. REPUBLIC (1981) KLR 569*** it was held:

> "**failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon**."

67. *Likewise in the case of* ***KARANI V. REPUBLIC (2010) 1 KLR 73*** the Court delivered itself as follows:

"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."

68. The Court took a similar approach in ***RAMADHAN KOMBE V REPUBLIC Mombasa CR.A NO. 168 OF 2002*** where it stated:

"In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission."

69. I find that the cause of the death of the two deceased persons in this case was patently obvious. It was a firearm which was used. Bullet heads were recovered from both their bodies at post mortem. I find that failure to produce the murder weapon did not prejudice the accused defence nor affect the prosecution case.

70. **As to whether the prosecution had established that at time the accused caused the fatal injuries on the deceased persons he had formed malice aforethought to commit the offences.** In **Nzuki v Republic [1993] KLR 171,** the Court of Appeal stated that **malice aforethought** can be inferred from the acts of an accused person. The Court held as follows:

"Malice aforethought" is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670.

An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237."

71. Further, the Court of Appeal has held that in arriving at a conclusion as to whether **malice aforethought** has been established, the court must consider several factors. In **R vs. Tubere s/o Ochen (1945) EACA 63** had this to say regarding weapon used, the manner in which it is used and the part of the body injured:

"With regard to the use of a stick I cases of homicide, this Court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it was used, and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the use, say, of a spear or knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has, of course, to be judged on its own facts"

72. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the

deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."

73. The accused herein was armed with a gun which is a lethal weapon. From the facts adduced in this case, it is evident the accused was the only person who was armed with such a lethal weapon at the scene at the time, a matter PW9, his girlfriend testified to. The deceased were shot, one of them four times and the other once. The deceased in this case met their deaths by succumbing to gunshots.

74. The deceased Charles was shot 4 times as was evident from the post-mortem produced as P. Exhibit 4. Charles was shot on the head, chest and abdomen. The deceased Maiyo was shot once in the abdomen and succumbed to that single gunshot two weeks later while undergoing treatment at Kenyatta National Hospital.

75. The deceased Charles having had 4 gunshots fired at him could not have survived especially considering the areas he was shot included the head and the chest. He in fact died at the scene. The deceased Maiyo was shot in the abdominal area and was also left for dead by the assailant. He died later in hospital in severe pain.

76. Being a police officer, the accused person had the knowledge that his act of cocking his gun, aiming at, and shooting the deceased persons the number of times he did, and the areas of the body he shot at, would lead to either the deceased suffering grievous bodily harm or dying.

77. Having considered the weapon used by the accused in this case, the manner in which he used it, and the parts of the body he shot and injured both deceased in this case, I have arrived at the conclusion that the prosecution has established that the accused had formed the necessary malice aforethought to cause death to the deceased persons.

78. **Whether the prosecution proved motive for the offence and if not whether it is fatal to the prosecution case.** It was their submission that the accused person had motive to kill the 1st deceased because he was getting too close to his girlfriend and was to be accompanied by the same girlfriend on his way home. As for the Maiyo, the prosecution stated that the accused killed the 2nd deceased because he was restricting him from getting into the bar where the wife had gone to hide. Under **section 9(3)** of the **Penal Code**, the prosecution is not required to prove motive unless the provision creating the offences so states.

79. **Regarding motive in the case of Libambula Vs. Republic [2003] KLR 683, the court defined motive in the following terms:**

> **"Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."** (Emphasis added)

80. I would say that the motive of this attack was not the subject of any discussion by the prosecution witnesses. However, considering that the accused had just had an altercation and fight with PW9 who he regarded as his wife, after she declared she wanted to leave in Charles' car, the motive for the attack can be inferred from the facts. Charles does not seem to have expressed any desire to go with PW9. However he intervened to prevent the accused from further beating PW9. The deceased Maiyo on the other hand prevented the accused from entering the bar to prevent him further attacking PW9. I find that the attack

on Charles and Maiyo was transferred malice. The obscenities directed towards PW9, and the derogatory treatment she endured under the hands of the accused, and the violence she got through the beatings she suffered are proof of that. Transferred malice is still malice aforethought as envisaged under **section 206(a)** of the **Penal Code** which provides as follows:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***
>
> ***(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not,"***

81. I find that even though motive is not a must that it be proved, the same could be inferred from the facts of the case. The accused was annoyed that PW9 was not going with him that evening and he could not take it that attempts were made to keep him away from her. The wrath fell on Maiyo who put tried to force him to keep away from where PW9 was; and Charles the preferred person to him.

82. **As to whether the prosecution has established that any statement was made by Maiyo to PW10 and CW3 and recorded by PW10 and if so, whether the statement qualifies as dying declaration.** Mr. Mbindyo for the accused urged that Maiyo neither mentioned nor described who shot him whether at the scene of attack or at the hospital. Counsel submitted that this statement ought to have been corroborated by some other independent evidence in order to be relied upon by the court.

83. PW10 and CW3 testified that they proceeded to Kenyatta National Hospital and found Maiyo admitted there. PW10 recorded a brief statement from Maiyo but he did not manage to sign the said statement as he was in great pain. The statement was admitted into evidence by the trial court and was produced as P. Exhibit 6. In the statement Maiyo stated that he was on duty on the 1st day of August, 2010 when a customer he had seen drinking at the bar disagreed with his wife and started causing trouble inside the bar. On attempting to eject the client outside the bar, the same customer flashed out a gun and shot him. Maiyo stated that he could identify the customer who shot him.

84. More importantly however is that the statement by the deceased Maiyo was admitted in evidence under section 33 of the Evidence Act which provides as follows:

> **"Statement by deceased person, etc., when**
>
> **Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—**
>
> **(a) relating to cause of death**
>
> **when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"**

85. I find that the statement by the deceased was admitted in evidence under section 33 of the Evidence Act, and that it was relevant inn the question of how he met his death. The statement is in tandem with the rest of the evidence by the prosecution as to the cause of the deceased Maiyo's death. It is also in tandem with the evidence of the prosecution regarding the circumstances prevailing just before he was shot. It is clear that the accused was violent for being prevented from reaching PW9 who he was in the process of disciplining. The deceased Maiyo's statement shows the circumstances under which he was shot and from

those facts it is clear it was the accused who shot him.

86. **Whether the prosecution has adduced evidence to establish that bullet head(s) were recovered from the body of the deceased Charles and further whether any evidence was adduced to establish where the bullet head marked "A" came from.**

87. PW7 was a pathologist attached at Kenyatta National Hospital. On 10th August, 2010, he examined the body of Charles that was identified to him by the relatives of the deceased and which was escorted by P.C. Mwanzia, CW2. He found the body clothed in a blood stained blue T-shirt. Externally the body had abrasive injuries on the right medial elbow and left lateral chest. PW7 stated that the body had multiple gunshot wounds. He testified that he saw four entry gunshot wounds on the left paraumbilical, on the left chest below the ribs, and on the left hypochondrium; and two exit wounds, one on the right maxilla and one on the left posterior lateral lumbar region.

88. PW7 noted that internally, there was blood in the chest cavity where he also recovered a bullet in the posterior wall. PW7 testified that there were fractures on the head and on bone lining the eye with brain damage. The doctor testified that he recovered a second bullet in the head. He said that the two bullets which were not recovered from the body of the deceased had exited the body and the exit wounds were seen as he stated in his evidence. PW7 testified that he handed over the two recovered bullets to P.C Mwanzia.

89. PW4 was the sister to Charles. She stated that on 10th August, 2010, she went to City Mortuary and identified the body of the Charles to the doctor for post mortem. PW4 testified that she noticed that the body had been shot three times, one shot was near the nose, another on the chest and the other in the abdomen. She saw the doctor retrieve bullets from the body of Charles.

90. CW2 P.C. Musyimi Mwanzia witnessed the postmortem being performed on the body of Charles at City Mortuary on 10th August, 2010. The post mortem was performed by the Government Pathologist Dr. Mungai, PW7. He stated that two bullet heads were recovered from the body of Charles and were handed over to him by the doctor.CW2 stated that he later handed the two bullet heads over to PW10 and CW3, the investigating officers. CW2 identified the bullets with the numbers he had marked and had allocated to them, i.e. Exhibit C and B. These two bullet heads were produced by PW10 as P.Exhibit10 (a) and 10(b). PW10 confirmed the evidence of CW2 that indeed he and CW3 received P. Exhibit 10 (a) & (b) from him.

91. Regarding Exhibit A, the prosecution proved that it was the exhibit later produced as P. Exhibit 12. PW10 testified that in the course of his investigations, he caused a post-mortem to be performed on the body of one Maiyo on 18th October, 2010 at Kenyatta National Hospital by Doctor John Ndungu. Dr, Ndungu was not called as a witness. In fact PW10 produced the post mortem report on the deceased Maiyo by consent of all parties as P.Exhibit 8.

92. PW10 testified that he also received one bullet head from P.C. Mwiza, which had been removed from the body of the Maiyo. He produced the bullet head marked Exhibit A as P. Exhibit 12. P.C. Mwiza was not called as a witness. PW10 produced an Exhibit Memo Form prepared by CW3 for the analysis of the bullet heads as P.Exhibit13.

93. The evidence of PW10 about the receipt of the bullet heads was confirmed by CW3 who was the co-investigating officer with PW10. CW3 testified that on 19th August, 2010, he, together with PW10 received one bullet head in a plastic container and 2 bullet heads wrapped in a paper from P.C. Mwanzia, CW2. CW3 identified P. Exhibit 12 as the bullet head retrieved from the body of Maiyo, while he identified P. Exhibit10 (a) and 10(b) as the bullet heads recovered from the body of Charles.

94. While PW10 stated that P. Exhibit 12 was handed over to them by PC Mwiza and P. Exhibit 10 (a) & (b) were handed over to them by CW2; CW3 said that it was CW2 who gave the three bullet heads to him and PW10. CW2 said that the only bullet heads he handed over to PW10 and CW3 were the two

recovered from the deceased Charles.

95. CW3 gave inconsistent evidence from that of PW10 regarding the bullet heads. On whether the evidence of CW3 affects the prosecution case I am guided by the persuasive authority in **Dickson Elia Nsamba Shapwata and Another Vs The Republic *C.A. No.92 OF 2007*,** where the Court of Appeal of Tanzania stated:

> **"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter"**

96. I find PW10 was clear about who brought these exhibits to him. I find that the evidence of CW2 vindicated him. CW3 therefore made a mistake when he said all bullet heads were brought by CW2. However I find the inconsistency in the evidence on this point minor and therefore immaterial. I find that it does not go to the substance of the case and was inconsequential to the final determination of this case.

97. I am satisfied beyond any reasonable doubt, from the evidence adduced that P, Exhibit 10 (a) & (b) were recovered from the body of Charles. I find that the prosecution adduced overwhelming evidence to prove that point.

98. Regarding Exhibit A, P. Exhibit 12, I am satisfied beyond any reasonable doubt that the same was recovered from the body of the deceased Maiyo.

99. **As to whether the accused defence is plausible, reasonable and logical.** The accused was placed on his defence and he opted to give an unsworn statement. He denied committing the offence. He stated that on the material day, 1st August, 2010, he was robbed off his Taurus revolver serial no. 70350 that had been issued to him on 22nd June, 2010. He did not dispute having been with PW9, PW3 and Charles at Borma Villa Bar within Syokimau. He stated that they had several drinks before they decided to leave together after Charles expressed his desire to go home.

100. While they were out of the gate, the accused stated that PW9 excused herself to go for a call of nature. Accused said that he then heard someone shout "***muna fanya nini na bibi yangu***", meaning ***"what are you doing with my wife"***and that all of a sudden a gang of several men emerged.

101. The accused stated that PW9 and Charles, on sensing danger ran away leaving him behind. He said that the gang blocked him and they started beating him, causing him the injuries that were referred to in the P3 form filled in his regard. He said that as he was fleeing from the gangsters,he heard gunshots behind him and instantly noticed that his gun was missing. He collapsed after suffering an asthmatic attack and only found himself on the ground on the morning, on 2nd August 2010. He said that he went home to nurse his asthmatic attack and on 11th August, 2010 he reported the loss of his gun and was apprehended.

102. I have considered the accused defence and analyzed the same against the rest of the evidence. PW6 was the doctor who assessed the accused age, physical body injuries and mental status on 20th August, 2010. He assessed the accused age as 33 years and his mental status as fit to stand trial. On the aspect of physical body injuries, PW6 stated that the accused had scars on proximal parts of the 2nd and 3rd left hand. He also found healed tissue on the upper joint of the left fifth finger. He assessed the injuries as harm. His report was P. Exhibit 3.

103. The doctor confirmed that the accused had some scars on two fingers and healed tissue on the joint of one finger. The injuries found on the accused do not support his defence that he had been beaten by a gang to the extent of losing consciousness. The injuries noted by the doctor really superficial or at most minor.

104. The accused said that a gang emerged as he, PW9 and Charles left the bar. He stated that PW9 and Charles ran away on seeing the gang and sensing danger. PW9 did not talk of seeing any gang involved in the matter. More significantly however is the fact that during cross examination of PW9 it was never suggested to her that a gang came to the scene and caused havoc.

105. Likewise when PW3 went out to investigate the very first gunshot, he did not see any gang. I also noted that in cross examination no question was put to him either to suggest a gang involvement. He said that soon after the first gunshot, four other gunshots were fired inside the bar as he attended to Maiyo. Surely if there was a gang, PW3 could not have failed to see it. Especially noting his evidence that he remained outside the bar until police came to the scene.

106. PW10 when he interviewed people at the scene one day after the incident, he was informed of a lone gunman. It was not suggested to him or even to CW3 when he finally came to testify that a gang and not a lone gunman was involved in this case. I find the issue of a gang was an afterthought.

107. The accused said that the gang which came to the scene just before the attack started by saying "***muna fanya nini na bibi yangu***". He said that both Charles and PW9 were present. During cross examination of PW9 no suggestion was put to her that the words spoken at the scene were not "**Huyu ni Malaya yangu, bibi yangu ako nyumbani**" and "**Wapi hiyo taka taka**"; but "***muna fanya nini na bibi yangu***"

108. In fact no attempt was made to challenge PW9 concerning the words she said she heard at the scene just before the gunshots were heard. The words PW9 said she heard at the scene were not challenged at the time. I find the accused defence that someone else and not him was the one who spoke at the scene was not just a lie but an afterthought.

109. The accused in his defence said that he suffered an asthmatic attack and lost consciousness until the next day when he woke up in the bush. He said that he then went home until the day he went to report the loss of the gun and was arrested.

110. PW10 stated that he and CW3 looked for the accused on several occasions both at his place of work and his residence but to no avail. In fact it was the evidence of PW10 that on 2nd August, one day after the incident, PW9 took him to the accused home but that they did not find him. Surely if the accused was sick and recuperating at home as he said in his defence, he could not have been missed. PW10 testified that it was only on the 11th of August, 2010 that the accused surrendered to his seniors at Uhuru A. P. Camp, and was handed over to him and his team.

111. I am aware that the accused need not prove his defence, or indeed even his innocence. That said, under **sections 111(1)** and **119** of the **Evidence Act**, he is expected to explain matters which are within his knowledge and which would be in his interest to explain. **Section 111(1)** and **119** of the **Evidence Act provides thus:**

> **"'111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
>
> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**
>
> **Provided further that the person accused shall be entitled to be acquitted of the offence with which he s charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.'**

'The court may presume the existence of any factwhich it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

112. In this case the rebuttable presumption is that since the accused had been given a revolver for his official use, and since he admits carrying it on the day in question, he should explain what happened to it. Further he should explain why he disappeared for 10 days after the incident. Accused defence is that the gun was stolen from him. He also stated that he fell sick and so was at home recuperating. Is that defence plausible and reasonable?

That question of plausible and reasonable has to be answered given *stare decisis*. In the Court of Appeal case of **ERNEST ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR),** the Court of Appeal observed:

"In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, **the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that**:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect."

113. I have analyzed the evidence adduced before this court and find the accused defence and the statements he has given by way of explanation incredible, unreasonable and false to the extent I have shown in this judgment. The evidence is clear that the accused shot the two deceased then ran away from the scene and hid for ten days. During the time of hiding, he had the sole opportunity to dispose of the revolver he had been issued. His defence that he lost it unawares at the scene is not true and I reject that explanation was incredible.

114. I find that the accused person left the scene soon after the incident and was conduct of a person with a guilty mind. Accused was apprehended ten (10) days after the incident when he surrendered to his bosses at Uhuru Camp. This act of running away is consistent with a guilty mind. His explanation that he was ill and recovering at home from an asthmatic attack was proved to be a lie by PW10 and CW3 who went to his house one day after the incident and several times afterwards and failed to find him. I do not believe that the accused was recuperating at all after the incident.

115. I have cautioned myself further for the reason the evidence against the accused is largely circumstantial and also voice recognition by a single witness. I have guided myself with the case of **KIMEU –VS- REPUBLIC (2002) 1KLR 756**, where the Court of Appeal held as follows:

"The court can only act on circumstantial evidence to support the conviction of an accused person if the evidence points irresistibly at the accused's guilt to the exclusion of everybody else.

Before drawing the inference of accused's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused."

116. I find that the prosecution has proved their case against the accused, beyond all reasonable doubt. I find that the accused shot at the two deceased in this case, and that at the time he shot at them he had formed malice aforethought to cause their death.

117. Before I end this judgement I must mention a final important matter. The court invoked **section 150** of the **Criminal Procedure Code** and called certain witnesses. I will include in this judgement part of the ruling I delivered on an application by the defence seeking to review. I have included part of the ruling in

order to explain what advised the decision to invoke the said powers.

"I now come to the facts before me. In this case, I ordered that the following witnesses be summoned: No. 231710 CIP Alex Chirchir; No. 232119 CIP Paul Songok; No. 68020 Sgt. Justus Munyasia; No. 95047770 Sgt. Ibrahim Malava and No. 69091 PC Mwanzia. Of these witnesses, No. 231710 CIP Alex Chirchir, No. 95047770 Sgt. Ibrahim Malava and No. 232119 CIP Paul Songok had already testified as PW1, PW5 and PW10 respectively. The witnesses sought to be called anew, who had not testified are Sgt. Justus Munyasia and No. 69091 PC Mwanzia.

PW1, No. 231710 CIP Alex Chirchir was a Ballistics Examiner who testified that he had examined some exhibits A, B and C presented to him by No. 68929 Sgt. Munyasia who was not called to testify. The report was produced in respect of the exhibits. PW1 was later recalled to testify further in respect of some more exhibits he received later and which he examined and presented a report (P. Exh. 7). These latter exhibits had been presented to him by P.C. Mwiti. None of these exhibits were marked as exhibits. There was also evidence regarding bullets recovered from the body of one of the deceased by Dr. Mungai (PW…) which were handed over to P.C. Mwanzia, who was not called to testify. I must add that the failure to have the exhibits marked was not the fault of the prosecution but that of the court.

Therefore, in summoning these witnesses, this court is not stepping into the arena of dispute, rather, this court wishes to have the witnesses identify the exhibits they handled. Not to mention that the exhibits themselves are already before the court. I must hasten to add that this case was heard by two previous judges. I came into the case towards the tail end of the proceedings. The mistakes or omissions I have highlighted were not committed by myself but my predecessors. I must also add that error is to human.

A distinction must be made between reopening of a case after the defence has closed its case under section 212 of Criminal Procedure Code and the court's exercise of powers under section 150. Section 212 of the CPC places limitations within which the prosecution may reopen its case. That section is invoked by the prosecution and the court has the power to allow or decline the application. Section 150 is a power available to the court, not to the benefit of any party, but, to help the court arrive at a just determination of the case. As it was well-set out by the court in the case of *Rajendra Prasad v. Narcotic Cell through its Officer-in-Charge,* Delhi, AIR 1999 SC 2292 as follows:

"Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

As further stated by this court in its order, while taking note of the court's decision in the case of *Mwangi vs. Republic* (supra), the issue in the instant case was not whether witness(es) should be called to testify for the prosecution or whether failure to call them was motivated by some oblique motive. Rather, it was about whether crucial witnesses with material evidence to the case were left out.

The matter before me was heard by different judges over a period of time. While the court ordinarily is seized of the issues throughout the hearing, wherein such issues as these, might have been raised, this court was seized of this case at the defence stage. I find, it would go against the interests of justice for the court to fail to take a step to direct the proceedings to a

just conclusion.

Before I end, I wish to state here that as a court of law I had two options in this case: to recall/call the witnesses I have mentioned herein above and then write the judgment. Alternatively I had the option to declare the case a mistrial and order a retrial of the case."

118. Having carefully considered the entire evidence adduced in this case by both side I have come to the conclusion that the prosecution has proved its case against the accused beyond any reasonable doubt, that the accused caused the deceased deaths with malice. I therefore reject the accused defence, find him guilty of the offence of murder contrary to section 203 as read with section 204 as charged and convict him accordingly.

DATED AT NAIROBI THIS 6TH OCTOBER, 2016.

LESIIT, J.

JUDGE