



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL CASE NO.57 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

JAMES OMONDI *alias* CASTRO.....1ST ACCUSED

WYCLIFFE WALIMBWA SIMIYU *alias* ZIMBO.....2ND ACCUSED

PAUL OTHIENO *alias* BABA.....3RD ACCUSED

MARY MUTHONI.....4TH ACCUSED

JUDGMENT

The deceased, Mellitus Mugabe Were (the deceased) was elected as the Member of Parliament of the then Embakasi Constituency in the Orange Democratic Movement Party (ODM) ticket. The deceased's election as the Member of Parliament of the constituency was unexpected in that it was assumed that the candidate being offered by the then Party of National Unity (PNU) would triumph. This "**unexpected**" election of the deceased resulted in two (2) Election Petitions being lodged. The deceased had indicated to some of his supporters, including PW10 Difrose Matengo, that his life was in danger. The deceased informed PW10 that he had requested Parliament to provide him with a bodyguard. However, due to the fact that the deceased had not yet been sworn in as the Member of Parliament of the constituency, he had not been provided with one. At the material time, there was still tension in the country due to post-election violence. The political settlement brokered by the African Union (AU) led by Kofi Annan had yet to reach fruition. It was in this background that the deceased met his death on 29th January, 2008.

Subsequently thereafter, after the police had concluded its investigation, the Accused, James Omondi Odera *alias* Castro, Wycliffe Walimbwa Simiyu *alias* Zimbo, Paul Othieno Omondi *alias* Baba and Mary Muthoni Wamaitha were charged with **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 29th January, 2008 at Woodley Estate in Nairobi, the Accused, jointly with others not before court murdered Mellitus Mugabe Were. When the accused were arraigned before this court, they pleaded not guilty to the charge. The hearing of the case commenced before O. Mutungi J (as he then was). He heard three (3) witnesses before he ceased having jurisdiction. The Accused exercised their right as provided under the law to have the case start *de novo* when the matter was placed for hearing before N. Ombija J. He heard two (2) witnesses before he disqualified himself from hearing the case. The case then was placed before Lady Justice P. Mwilu (as she then was). Again, the Accused persons exercised their right to have the case start *de novo*. The Learned Judge heard one (1) witness before she was transferred to another Division of the High Court. This court was seized with jurisdiction to hear this case on 25th January 2012.

The reason why the court has given this background is to dispel notion that the hearing and finalization of this case has been unnecessarily delayed. Part of the reason for the delay is attributed to the Accused persons exercising their constitutional right to have the case start afresh whenever a new Judge took over the hearing of the case. This court has heard and concluded this case despite the fact that in the intervening period the Judge was transferred out of Nairobi and was also appointed as one of the courts that was assigned to hear Election Petitions arising out of the March 2013 National Elections.

What was the case that was brought by the prosecution against the Accused persons?

PW1 Agnes Wairimu is the widow of the deceased. She lived with the deceased at the material time at their residential house at Woodley Estate in Nairobi. PW1 was at the material time nursing a young baby, a daughter by the name T who was eleven (11) months old. She lived with Irene Kagai, her househelp and PW2 Joseph Ojoro Omedi, then employed by the deceased as a security guard. The deceased also lived with Ian Kuria, PW1's son who was a young adult at the time. PW2 testified that he lived in the servants' quarters of the main house that the deceased lived with his family. The house had its own compound. According to the testimony of PW1 and PW2, the distance between the main house and the gate was about 50 – 60 metres. PW1 recalled that on the morning of 28th January 2008, the deceased left their residential home to go to Parliament. The deceased told PW1 that he would be meeting with several people on the day. The people he met on the day were his constituents and his political associates. The deceased was at the time driving a motor vehicle registration No.KAS 073W, Mercedes Benz. The motor vehicle did not belong to the deceased. It was owned by his uncle, one Mark Okingo. He had allowed the deceased to use the motor vehicle prior to the deceased purchasing his own motor vehicle upon taking his seat in Parliament.

According to PW10, Difrose Matengo, the deceased met her with two (2) other political allies namely, a Mr. Kavembe and a Mr. Lovela at Parliament buildings at 11.00 a.m. They stayed in Parliament until 1.00 p.m. Thereafter, PW10 left with the deceased to go to a briefing organized for New ODM members of parliament at Orange House. After the meeting at Orange House, PW10 went with the deceased to Ciders Restaurant along Lenana Road. The deceased had made an appointment to meet with PW11 Christopher Essendi Asava, a motor vehicle dealer, at the restaurant. PW11 testified that prior to meeting with the deceased on the material night, he had entered into negotiations with the deceased for the purchase of a motor vehicle. The deceased had agreed to purchase a Range Rover Vogue from PW11. The deceased had paid a deposit of Kshs.100,000/-. In the intervening period between the time the deposit was paid and the meeting that was scheduled for 28th January 2008, it became apparent to PW11 that the deceased was having second thoughts in purchasing the motor vehicle. The meeting at Ciders Restaurant had been scheduled to sort out the issue. According to PW11, when he arrived at Ciders Restaurant at about 10.00 p.m., he met the deceased with PW10. He took a drink as he discussed the issue of the purchase of the motor vehicle with the deceased. Nothing was settled. However, the deceased agreed that he would consult further with his friends before making the decision whether or not to purchase the motor vehicle. PW11 left the deceased with PW10 at the said Ciders Restaurant at about 10.30 p.m.

PW10 testified that after PW11 had left, the deceased drove her to her home. PW10 then used to reside at Imara Daima Estate along Mombasa Road. PW10 recalled that the deceased dropped her at her residence between 11.30 p.m. and midnight. She sat in the car chatting with the deceased for about 15 minutes before the deceased drove off. That the deceased dropped PW10 at her residence at Imara Daima Estate was confirmed by PW6 Richard Mutie Kivuva, who was employed at the time as a night watchman. PW6 recalled that the deceased drove into the estate sometime before midnight. He was with PW10. PW6 knew the deceased and PW10 by name. In fact, he testified that he had voted for the deceased in the just concluded elections. He testified that the deceased did not stay for long before he left. The deceased left the estate alone in motor vehicle registration No.KAS 073W, Mercedes Benz.

Meanwhile, PW1 Agnes Wairimu recalled that after watching the 11.00 p.m. news, she fell asleep. She was woken up by hooting and two gunshots. At the same time, PW2 Joseph Ojoro Omedi was at the servants' quarters relaxing as he waited for the deceased to arrive home so that he could open the gate for him. He recalled that he heard a car hoot. He then walked towards the gate which was approximately 60-70 metres to the gate. Before he reached the gate, he heard three (3) gunshots. He started screaming while

running towards the gate. PW2 peeped through the opening at the gate. He saw the deceased lying outside the Mercedes Benz motor vehicle registration No.KAS 073W. He also saw two (2) men next to the motor vehicle. His screams scared away the two men who ran away from the scene. At that moment, PW1 and Ian Kuria also arrived at the gate. Their attempt to open the gate was frustrated by the fact that the motor vehicle had hit the gate causing it to jam. PW1 instructed PW2 to jump over the gate. PW2 jumped over the gate and succeeded in opening it from the outside. PW2 rushed to where the deceased was lying on the ground. He saw that the deceased was bleeding from an injury on his left eye. Although the deceased was breathing, he was not talking. PW1 instructed PW2 and Ian Kuria to put the deceased in the motor vehicle that the deceased had driven. She drove the motor vehicle to Nairobi Hospital where the deceased was attended to at the Emergency and Casualty Unit. The doctor who attended the deceased pronounced the deceased dead on arrival. He informed PW1. The police based at Kilimani Police Station were duly informed. They arrived at the scene and impounded the motor vehicle. They escorted PW1 to Kilimani Police Station where she recorded a statement before she was driven to her house at Woodley.

Meanwhile, while at Nairobi Hospital, the police commenced investigations. They were able to establish that the deceased was with PW10 and PW11 the material night of the shooting. PW10 and PW11 were requested to go to Nairobi Hospital. On their arrival, they were arrested by the police and detained at Kilimani Police Station. PW2 was also arrested. The three (3) witnesses were detained for a period of fourteen (14) days before they were released. While in police custody, they recorded their respective statements.

PW4 CIP Timothy Chepngabit a Scenes of Crime officer then based at Nairobi Area, CID Headquarters was instructed at 2.30 a.m. on 29th January 2008 to visit the scene of crime at Woodley Estate. He went to the scene but did not find the motor vehicle. Neither did he find the body of the deceased. He was informed that the deceased had been taken to Nairobi Hospital for emergency treatment. He went to Nairobi Hospital. He found the motor vehicle registration No.KAS 073W having been detained at the hospital. He dusted the motor vehicle for finger prints. He took photographs of the motor vehicle both inside and outside. He also took the photographs of the body of the deceased before and after the conduct of post mortem. He told the court that, in total, he lifted seven (7) finger prints from the motor vehicle. The said finger prints were lifted from the following areas of the motor vehicle: on the driver's door in the area marked 1, there was another print in the area marked 2 on the same door surface. A third finger print was found between the door and the bonnet. A fourth finger print was found adjacent to the position that the third finger print was found. Other finger prints were found on the rear red light indicators and another found on the front bonnet. After lifting the finger prints, PW4 reproduced the finger prints in photographic form and forwarded it to the CID's Criminal Record Section. The photographed finger prints were produced into evidence as *Exhibits No.13(a), (b), (c), (d), (e), (f) and (g)*. PW4 prepared the requisite forms and sent them to CID Headquarters. When the 1st, 2nd and 3rd Accused persons were arrested, their finger prints were taken on 23rd February 2008. The finger prints were recorded in Form C46 which was also sent to the CID Headquarters. The finger prints were taken by CPL. Sayange then based at the CID Office, Kilimani Police Station. PW4 reiterated that of the finger prints that he lifted from the motor vehicle registration No.KAS 073W, only one set of finger prints were excluded which were confirmed to belong to PW1, the wife of the deceased. She had legitimate access to the motor vehicle. He confirmed that he could not obtain good finger prints inside the motor vehicle because of the rough surface inside. He testified that he did not observe any bullet marks in the motor vehicle.

When the Accused persons were arrested, their finger prints were taken. PW3 Evans Mangaa, a Finger Print Expert based at the Registration of Persons Headquarter was requested to confirm the particulars of the Accused persons in regard to their finger prints impressions recorded in Form P24. This request was made by the Director of CID. He confirmed the three (3) sets of finger prints in the name of James Odera Castro having been registered to Jim Castro Adera Identity Card No.14497929 and the one in the name of Wycliffe Walimbwa Simiyu was registered in the name of John Wycliffe Muse Simiyu Identity Card No.7955528. As regard Paul Otieno Olema, PW3 did not find any matching details in the records. In his opinion, Paul Otieno Olema had not obtained an identity card and therefore his records were not kept by Registrar of Persons. SSP Patrick Ndunda, the Principal Criminal Registrar based at CID Headquarters was on 29th February 2008 requested to analyze the finger prints impressions that had been lifted from motor vehicle registration No. KAS 073W by PW4 and compare it with the finger prints impressions that

had been obtained from the 1st, 2nd and 3rd Accused persons. On analysis, PW5 confirmed that the finger print which was lifted as No.4 from the motor vehicle was the finger print impression of Wycliffe Walimbwa, the 2nd Accused. The finger print lifted as No.2 matched that of Jim Castro Odera, the 1st Accused. While the finger print lifted as No.6 matched the details of the left palm impression of the 3rd Accused Paul Otieno. PW5 produced his analysis and comparison charts as *Prosecution Exhibit No.16* and 17.

After post mortem examination was performed on the deceased's body, the clothes that the deceased wore when he was shot were retained by the police for further investigations. On 26th February 2008, PW7 John Kimani Mungai, a Government Analyst based at the Government Chemist was given the clothes of the deceased to examine and determine if there was any DNA material matching that of the suspects. The clothes of the deceased which PW7 examined were marked and produced into evidence. Upon his arrest, the clothes of the 1st Accused were also taken to PW7 for DNA analysis. PW7 also examined the blood samples of the deceased and the 1st Accused. According to the police, the 1st Accused, upon his arrest, voluntarily gave his blood samples for DNA analysis. Among the pieces of clothing that the 1st Accused surrendered for DNA analysis was a black long sleeved shirt. It had blood stains. The conclusion of PW7 is contained in the report marked as *Prosecution's Exhibit No.19* and it states as follows:

“The DNA profile generated from the blood stains from the shirt (EX-N1), the underpant (EX-N2), the leather jacket (EX-N3), the pair of long trousers (EX-N4) all marked deceased, the black shirt EX-M2) and the grey jacket (EX-M5) both marked suspect matched the one generated from the blood sample in the bottle labelled “Hon Melitus Mugabe Were, deceased. The probability that this stains originated from someone else apart from Hon. Melitus Mugabe Were is 1.0754×10^{-20} .”

The 1st Accused, in cross-examination, made the suggestion that the clothes of the 1st Accused could have been contaminated with the clothes of the deceased. This was the suggested explanation why the clothes of the 1st Accused contained bloodstains which contained the DNA of the deceased.

Acting on information, the police arrested the 1st Accused at Eldoret on 20th February 2008. According to the investigating officer, PW13 CIP Joseph Nzioka, the interrogation of the 1st Accused led to the subsequent arrest of the 2nd and 3rd Accused on 21st February 2008. In the afternoon of the same day, the 3rd Accused led the police to his house in Waithaka area where two (2) pistols were recovered in a cupboard in a house where the 3rd Accused lived with the 4th Accused, Mary Muthoni his girlfriend. The two (2) pistols were respectively, a Browning and a Tokarev. The Browning pistol had Serial No.T152902KG while the Tokarev pistol had Serial No.ND56953. The Browning pistol was recovered with eight (8) rounds of ammunition. The two pistols were produced in evidence as exhibits. The two pistols were examined by a Ballistic Expert, Lindsay Kipkemboi who left the police service in 2009. The ballistic report that he prepared was produced on his behalf by CIP Emmanuel Lagat, a Ballistic Expert attached to Ballistic Section at CID Headquarters. According to PW12, Lindsay Kipkemboi was on 22nd February 2008 requested by the investigating officer (PW13) to examine the following items:

- I. One Browning Pistol Serial No.T152902KG
- II. One Tokarev Pistol Serial No.ND56953
- III. Two magazines marked H1 and H2
- IV. Eight round of ammunition marked I1 to I8
- V. One Ceska Pistol Serial No.F5978

Upon examining and test-firing the two pistols, *i.e.* the Browning and Tokarev pistols, Lindsay Kipkemboi formed the opinion that the two pistols were in good working condition and were capable of being fired. He compared the cartridge which was recovered from the scene of crime at the house of the deceased with the cartridges from the ammunition that he had test-fired. He formed the opinion that the Browning pistol was used to fire the cartridges that were recovered from outside the gate of the house of the deceased. The officer also examined the fired bullet that was recovered from the body of the deceased.

He formed the opinion that the said bullet was fired from the Browning pistol. The Browning pistol had also been used in three other robbery incidences that had been reported to the police. In one incident in 2007, two (2) victims of the robbery were shot dead. Lindsay Kipkemboi took the photomicrographs of the cartridges and the bullet and the comparisons that he made led him to the conclusion that indeed the bullet that fatally injured the deceased had been fired from the Browning pistol. The photomicrographs were produced into evidence as *Prosecutions Exhibit No.33* and *34*. PW12 testified that he would have reached the same conclusion that was reached by Lindsay Kipkemboi based on the evidence that has been supplied to the court.

PW8 Senior SGT Nicholas Sore testified that on 21st February 2008, he accompanied several police officers including Inspector Maina and Inspector Muriuki to Waithaka area. The 3rd Accused Paul Otieno had volunteered to escort them to his house. Upon reaching Waithaka area they were informed that the wife of the 3rd Accused had moved houses. They were informed by the neighbours that the 3rd Accused's wife by the name Mary Muthoni (4th Accused) had relocated to Dar es Salaam Village within Waithaka area. This was about 2-3 kilometres from Dagoretti. The police located the house and found the 4th Accused. A search was conducted in the house in the presence of the Landlady by the name Lucy Wahu. By the time the case was heard, Lucy Wahu was deceased. However, her statement was produced into evidence under **Section 33** of the **Evidence Act** as *Prosecutions Exhibit No.48*.

According to PW8, upon the search of the house he found the two (2) pistols *i.e.* the Tokarev and the Browning pistols hidden in a paper bag inside a cupboard. He also recovered a magazine with eight (8) rounds of ammunition. Also recovered was a 21 inch Samsung Television set which was later identified as having been robbed from another victim of robbery. PW8 prepared an inventory which was signed by witnesses who were at the scene. The Browning pistol was produced as *Prosecutions Exhibits No.22*, the magazine was produced as *Prosecutions Exhibit No.23* and the Tokarev pistol was produced as *Prosecutions Exhibit No.24*. The inventory of the items recovered from the 3rd Accused's house was produced as *Prosecutions Exhibit No.21*. According to PW8, it was the information that they obtained from the 3rd Accused that led to the recovery of the two pistols. It was after the recovery of the pistols that the 4th Accused was arrested.

Post mortem was performed on the body of the deceased by Dr. Wasike. The post mortem report was produced on his behalf by PW9 Dr. Daniel Makau Mbithi. Dr. Mbithi testified that Dr. Wasike was not within the jurisdiction of the court hence the necessity of his testimony on his behalf. He told the court that he had worked with Dr. Wasike at the National Public Health Laboratories – Medical Legal Services and was familiar with the handwriting and signature of Dr. Wasike. He testified that post mortem was conducted on 6th February 2008. On external observation, Dr. Wasike noted the following gunshot wounds:

“I Entry wound right supra orbital region 7cm from midline 1 cm from below measuring 0.5 cm dm, with darkened edges.

II. Penetrating right medial eye, with laceration 3 x 1 cm

III. Laceration of left alae of nose 1.0 cm.

IV. Entry left upper arm, medial aspect, mid arm, abraided margins (skin stretched) measuring 3 x 3 cm.

V. Left lateral chest 16 cm inferior to apex of mid axilla circular, abraided margins.

VI. Entry left anterior superior iliac crest region, 8 cm from midline, measuring 2 x 2 cm, circular margins.

VII. Entry left arm posterior lateral, 10 cm inferior to apex, 0.5 cm.

VIII. Exit wound, right back, 20 cm inferior to tip of scapula 8 cm from midline measuring 2 cm dm, 2 lead tattoos sup to wound.

Fracture left humerus.”

On internal examination, Dr. Wasike noted that the deceased had sustained a fracture of the left 8th rib,

laceration to the left lower lobe lung, laceration to the diaphragm. There was blood which had accumulated in the chest cavity. There was laceration in the right iliac vessels, laceration of the spleen and jejunum. There was fracture of the spinal cord (T11 L15). There was fracture of the pelvic bone. The bullet head had lodged in the subcutaneous tissue right of the luteal region (buttock). In the opinion of Dr. Wasike, the cause of death of the deceased was massive haemorrhage (hemothorax and Hemoperitoneum) following gunshot injuries to the chest. The bullet head was removed and handed over to the investigating officer for ballistic examination. Blood was extracted from the body of the deceased and handed over to the investigators. The clothes of the deceased were also handed to the investigators. The post mortem was produced as *Prosecutions Exhibit No.27*.

When the Accused persons were put to their defence, they opted to exercise their constitutional right and said nothing. This court heard the closing oral submission made by Mr. Weda for the Accused and by Ms. Oundo for the State. This court has carefully considered the said submission. This being a criminal case, it is the duty of the prosecution to establish the charge brought against the Accused persons to the required standard of proof beyond any reasonable doubt. The burden of establishing the guilt of the Accused persons is on the prosecution. It does not at any time shift to the Accused persons. In essence, it is not the duty of the Accused persons to establish their innocence rather the duty is upon the prosecution to establish the guilt of the Accused persons on the charge brought against them.

Upon evaluating the facts of this case, the issues for determination are as follows:

- I. Whether the prosecution adduced sufficient evidence which connected the Accused persons to the death of the deceased.
- II. Whether the prosecution adduced evidence which established a nexus between the shooting of the deceased and the Accused persons.
- III. Whether the prosecution established every element of the charge of murder to the required standard of proof beyond any reasonable doubt.

As regard the first issue, the prosecution relied solely on forensic evidence in its quest to establish the guilt of the Accused persons. The deceased was shot on the night of 29th January 2008. From the testimony of PW1 and PW2, it was clear that the deceased sustained fatal injuries at the scene of crime i.e. the gate of his house at Woodley Estate, Nairobi. According to PW1 and PW2, they heard a car hoot after which several gunshots were fired. PW1 heard two gunshots while PW2 heard three (3) gunshots. PW2 was at the material time employed as a security guard by the deceased. On hearing the gunshots, he rushed to the gate. He saw two men standing next to the motor vehicle. He raised alarm. PW1 also rushed to the scene. It was the screams of PW2 and the househelp that scared away the two men. They ran from the scene of crime. PW2 did not identify them. He could not even give the description how the two men looked like. PW1 and PW2 rushed the deceased to Nairobi Hospital. He was pronounced dead on arrival at the hospital. The police were informed.

The police arrived at the hospital about 30 minutes after the report was made. They secured the motor vehicle Registration No. KAS 073W Mercedes Benz that the deceased drove in the night he was shot. PW4 CIP Timothy Chepngabit, a Scenes of Crime officer then based at Nairobi area CID office, undertook forensic examination of the motor vehicle. He took photographs of the motor vehicle and the body of the deceased at the hospital. He also thoroughly scrutinized the motor vehicle with a view to ascertaining whether there were finger prints on the same. PW4 was able to lift seven (7) finger prints from the motor vehicle. After eliminating the finger prints of PW1, PW4 sent the recovered finger prints to CID Headquarters for further action. Upon the arrest of the Accused persons, their finger prints were obtained. PW5 SSP Patrick Ndunda, the Principal Criminal Registrar based at CID Headquarters did a comparison of the finger prints recovered from the motor vehicle with the finger prints impressions obtained from the 1st, 2nd and 3rd Accused persons. He formed the opinion that three (3) of the finger prints matched those of the 1st, 2nd and 3rd Accused persons. From the evidence of the two (2) witnesses (i.e. PW4 and PW5), it was clear to the court that the three (3) Accused persons were in close proximity with motor vehicle registration No. KAS 073W Mercedes Benz.

According to PW4, finger prints can be recovered for upto fourteen (14) days provided that the surface

where the finger prints are is well preserved. In the present case, the only reasonable explanation as to why the finger prints of the 1st, 2nd and 3rd Accused persons were found in the motor vehicle then driven by the deceased is that it was 1st, 2nd and 3rd Accused persons who shot the deceased. From the evidence adduced by the prosecution witnesses, particularly PW13, the investigating officer, it was clear that the motive of the assault of the deceased was robbery. The 1st, 2nd and 3rd Accused persons were thwarted in their bid to rob the deceased when the PW1 and PW2 raised alarm. This court formed the firm view that the prosecution established, to the required standard of proof beyond any reasonable doubt that it was indeed the 1st, 2nd and 3rd Accused persons who shot the deceased on the material night by virtue of the fact that their finger prints were found outside the motor vehicle that the deceased drove on the material night.

Another piece of forensic evidence that the prosecution relied on in its bid to establish its case against the 1st Accused is DNA. The police retained the bloodstained clothes of the deceased after the conclusion of post mortem. They also took blood samples from the deceased. On his arrest, the 1st Accused was requested to surrender his clothes for DNA analysis. He also gave a sample of his blood for the same analysis. PW7 John Kimani Mungai, a Government Analyst was tasked to examine the said evidence with a view to ascertaining if the deceased's DNA was found in the clothes worn by the 1st Accused. PW7 established that the shirt and Jacket worn by the 1st Accused had blood stains, which upon DNA analysis, was established to be that of the deceased. This evidence established that, upon being shot, the bloodstains of the deceased came into contact with the shirt and Jacket that the 1st Accused wore at the time. There is no reasonable explanation as to how the bloodstains of the deceased came into contact with a shirt and jacket worn by the 1st Accused other than the fact that the bloodstains splattered on the shirt and jacket of the 1st Accused during the attempted robbery that resulted in the deceased being shot and fatally injured.

The suggestion made by the 1st Accused in cross-examination to the effect that his clothes may have been contaminated with that of the deceased is not supported by evidence. PW7 testified that the bloodstained clothes of the deceased were sent to him separately from those of the 1st Accused. In fact, the clothes of the deceased were delivered to him prior to him receiving the clothes of the 1st Accused. If there was contamination as claimed by the 1st Accused, how come that his other items of clothing were not similarly contaminated with the DNA of the deceased? The theory advanced by the 1st Accused in raising the spectre of contamination, in this court's assessment, is just but a red herring to explain away the fact that the biological samples, namely the bloodstains of the deceased, were found in his shirt and jacket. In this court's assessment, the prosecution proved, to the required standard of proof beyond any reasonable doubt that indeed the 1st Accused was in close proximity with the deceased when the deceased's blood from the injuries he sustained from the gunshot wounds splattered on the 1st Accused. This evidence connects the 1st Accused with the fatal shooting of the deceased on the material night.

The third piece of forensic evidence that the prosecution relied on to support the charge of murder brought against the Accused persons is that of the recovery of the two (2) pistols, particularly the Browning pistol in possession of the 3rd Accused. PW8 Senior SGT Nicholas Sore testified that on 21st February 2008, after the arrest of the 1st, 2nd and 3rd Accused persons, upon interrogating the 3rd Accused, he volunteered to escort them to his house in Waithaka area. PW8 was accompanied by several police officers. They found the 4th Accused in the 3rd Accused's house at Dar es Salaam Village in Waithaka area. The 4th Accused has been described either as the wife or girlfriend of the 3rd Accused. Whatever the description, it was clear that, at the material time, the 3rd Accused lived with the 4th Accused. Lucy Wahu, the Landlady confirmed in her statement which was admitted into evidence under **Section 33** of the **Evidence Act**, that indeed the house had been leased to the 3rd and 4th Accused persons. Upon conducting a search in the house, two pistols were recovered in a cupboard within the house. An inventory was prepared in the presence of the 3rd and 4th Accused persons and in the presence of the Landlady. The two pistols were respectively a Browning and a Tokarev pistols. A magazine with eight rounds of ammunition was also recovered.

The two pistols were sent to CID Headquarters for ballistic examination. The pistols were examined by Lindsay Kipkemboi who then worked as a ballistics expert in the Ballistic Section at CID Headquarters. The reports that he prepared were produced on his behalf by PW12 CIP Emmanuel Lagat. According to the ballistic report, the cartridge recovered outside the gate of the deceased's house was upon examination, established to have been fired from the Browning pistol. The bullet recovered from the body of the deceased was also established to have been fired from the Browning pistol. The ballistic report and the photomicrographs were produced into evidence as exhibits by the prosecution. In this court's evaluation, the prosecution established a nexus between the Browning pistol that fired the fatal bullet with the 3rd Accused. The Browning pistol was recovered in his possession. It was recovered in his house about three (3) weeks after the deceased was fatally with the pistol.

The 3rd Accused suggested that the two pistols were planted in his house by the police. This claim was however disproved by the evidence adduced by PW8 which established that it was indeed the 3rd Accused who escorted the police to his house where the two pistols were recovered. An inventory was prepared. It was witnessed by the 3rd and 4th Accused persons and the Landlady. There were other persons who were within the same compound when the police conducted the search. After investigations, they were eliminated as persons of concern in the death of the deceased. It is this court's finding therefore that the prosecution, established to the required standard of proof beyond any reasonable doubt that the Browning pistol which was recovered from the house of the 3rd Accused was the one that was used to fatally shoot the deceased.

Applying the doctrine of recent possession, the said Browning pistol having been found by the police in the 3rd Accused's house, raised a rebuttable presumption that he was found in possession of the same. The 3rd Accused had the right to rebut this presumption by giving an explanation to disprove this rebuttable presumption. In this court's view, the 3rd Accused failed in this regard. The court holds that he was in possession of the Browning pistol that was used to fatally shoot the deceased. The 3rd Accused did not have a firearm license to possess the Browning pistol. He was therefore in illegal possession of the same. The 3rd Accused, in company of the 1st and 2nd Accused persons, used the said Browning pistol in the attempted robbery of the deceased that resulted in his fatal shooting.

Taking into consideration the totality of forensic evidence adduced by the prosecution, it was clear to this court, in answer to the second issue for determination, that the prosecution established to the required standard of proof beyond any reasonable doubt that it was the 1st, 2nd and 3rd Accused persons who in concert attempted to rob the deceased as he was returning home on the night of 29th January 2008, and in the course of the attempted robbery fatally shot the deceased. The finger print evidence connected the 1st, 2nd and 3rd Accused to the scene of crime. Their finger prints were found in motor vehicle Registration No.KAS 073W Mercedes Benz that was being driven by the deceased on the material night. The DNA of the deceased was found in the 1st Accused's shirt and jacket. The shirt and jacket contained bloodstains of the deceased. The Browning pistol that was used to fatally shoot the deceased was found in the 3rd Accused's house. Ballistic examination established that it was this Browning pistol that was used to fatally shoot the deceased. The prosecution therefore established a nexus between the fatal shooting of the deceased and the 1st, 2nd and 3rd Accused persons. The prosecution proved to the required standard of proof beyond any reasonable doubt that it was the 1st, 2nd and 3rd Accused persons who jointly participated in the fatal shooting of the deceased. The three (3) Accused persons did make a choice not to adduce any evidence in their defence. That is their constitutional right. No evidence was however adduced by the prosecution to establish the guilt of the 4th Accused. Other than her association with the 3rd Accused, no evidence was adduced that established that the 4th Accused participated in the fatal shooting of the deceased. In the premises therefore, the 4th Accused is acquitted. She is ordered set at liberty forthwith unless otherwise lawfully held.

The issue that remains for determination by this court is whether the prosecution established malice aforethought. Malice aforethought is defined under **Section 206** of the **Penal Code** thus:

“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 or a 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;***
- 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.”***

In the present case, the prosecution established to the required standard of proof that the 1st, 2nd and 3rd Accused persons with the intent to commit a felony, namely robbery with violence, accosted the deceased outside the gate of his house, and in the process fatally shot him. The prosecution therefore established malice aforethought as a result of which this court holds that the prosecution established to the required standard of proof the charge of **Murder** contrary to **Section 203** of the **Penal Code**. The 1st, 2nd and 3rd Accused, with malice aforethought, caused the death of the deceased.

This court will not conclude this judgment without appreciating the diligence in which the police investigated this case. More often than not courts have made pronouncements decrying the shoddy manner in which criminal cases are investigated. In the present case, the police acted with utmost professionalism in first securing the motor vehicle which the deceased drove on the night he was fatally shot. It is the securing of this motor vehicle that yielded the finger prints that led to the arrest of the Accused persons. The police also used DNA as a forensic tool in establishing the persons who committed the crime. The ballistic expert produced evidence which established the connection between the pistol that was used in the fatal shooting of the deceased and the bullet that was recovered from the body of the deceased. The case was investigated by senior and experienced investigators. The combination of this effort is evident in the quality of evidence that was produced before this court. It is the hope of this court that the investigations conducted in this case should serve a template on how investigations should be conducted with a view to resolving cases involving serious crimes. Maybe the high profile of the victim of this crime may have prompted the police to marshal their best resources in resolving the case. That should not be the case. Each serious crime should be accorded the professionalism that was shown in this case.

In the premises therefore, the 1st, 2nd and 3rd Accused persons are accordingly convicted of the charge of **Murder**.

DATED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2015

L. KIMARU

JUDGE