



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 55 of 2006**

**REPUBLIC.....APPLICANT**

**-VS-**

**THOMAS GILBERT CHOLMONDELEY....RESPONDENT**

**JUDGMENT**

The accused has been charged for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are as follows:

**“On the 10<sup>th</sup> of May, 2006, at Soysambu Farm, on the Delamare Estate within Nakuru District, the Rift Valley Province murdered ROBERT NJOYA MBUGUA.”**

In her evidence Sarah Waithera Njoya introduced herself as a widow to the deceased and that their marriage had been blessed with four children. She also stated that she stays at Kiunguria village. She recalled that on 10<sup>th</sup> of May 2006, she wake up as normal and went to cultivate her shamba. At around 2pm she went back to her house to prepare lunch before she eat. Thereafter she went back to the farm while her husband went to see his friends at around 3pm and later came back after 20 minutes. At around 4 pm the husband went out while PW1 was in the farm. PW1 went back to her house at around 6pm and started prepared supper. However, at around 7pm 3 friends of his husband went to see her. These were Peter Gichuhi, Joseph Kamau and Ndegwa. The three inquired whether her husband had arrived home and she replied in the negative. When they looked behind they saw the dog of the deceased and asked what time it had come back. PW1 explained her husband had a big and a small dog. It was the big dog that had come back. The friends of the deceased told her that they had gone to the Delamare Farm where they heard gun shots and they escaped. They promised to go and wait for him at the fence to see whether the husband had come back. However, those friends never went back. Though PW1 waited for her husband for the whole night, he never went back. Seeing the above, PW1 went to Elmentaita Police Station, and on arrival found two police officers and enquired whether they had a suspect in custody by the name of Robert Njoya. After getting the full details of the deceased, the police officers informed PW1 that her husband had been shot in the Delamare Farm and had died on the way to the hospital. In addition to the above, they also told her that the body was lying at Nakuru Municipal Mortuary. Subsequently PW1 went to inform her brother –in-law called James Kiarie who later accompanied her to the mortuary. While there PW1 identified the body of her husband and from there she went back home. PW1 recalled that her husband had been wearing a black trouser, black T-shirt with a brown colour and a jacket. PW1 was able to identify the T-shirt exhibit 1 and Jacket exhibit 2. She was able to identify the panga exhibit 3 that her husband was carrying on the material day. According to PW1 that was not the first time her husband had gone to Delamare Farm. Previously her late husband used to clear cactus from the said farm on payment of Kshs.700/- for a full lorry. He used to go there in pursuance of an agreement exhibit no. 4. In his evidence Philip Gatu Mbugua introduced himself as an elder brother to the

deceased. He recalled that on 13<sup>th</sup> of May 2006 while he was in his place of work, PW1 went there and informed him of what had happened. Subsequently PW2 went to Nakuru Municipal Mortuary where he identified the body of his brother before the postmortem was carried out. On the other hand, PW3 James Kiarie Warie recalled that on 13<sup>th</sup> of May 2006 he went to the butchery where he operates his business. Consequently, he also went to the mortuary where he identified the body of the deceased before the postmortem was carried out. Thereafter, he was shown the fragments of the bullet. In his evidence PW4 Peter Gichuhi Njuguna testified that he has known Robert Njoya Mbugua since childhood since they had been neighbours. He also explained that he knows Joseph Kamau Muthoni who is also his neighbour. He recalled that on 10<sup>th</sup> of May 2006 he met Robert Njoya and Joseph Kamau at around 4 pm near their farm. Earlier, he had met Robert Njoya at around 10 am and they had agreed how they will go and hunt for some meat in the bush. Specifically they had agreed to go and hunt at the Delamare Farm. At around 4 pm PW4 met Robert Njoya and they were later joined by Joseph Kamau. From there, they went to the Delamare Farm which is about 100m away. By then PW4 was carrying a panga and a rungu while Kamau also had a panga and a rungu. On the other hand Robert Njoya had a panga and a small iron bar. Subsequently they proceeded to the Delamare Farm while accompanied by six dogs. Out of those dogs, three belonged to PW4. On the other hand, Kamau had a black dog with white spots while Njoya had two dogs. The big dog was brown while the small dog was white in colour. On entering the farm, they took about 20 – 30 minutes before reaching where they wanted to go. They were able to enter the farm through a fence which had gaps. On entering they, tried to chase the gazelles and other animals towards the traps that they set about two days earlier. By a stroke of luck they got somebody else's snare that had caught a gazelle which was about 10m from theirs. PW4 was able to identify the snares which were produced in court as exhibit 9. The gazelle they found was already dead and hence they removed the intestines and cut off the head. The above was done by Robert Njoya who used his panga. They later gave the intestines and the head to the dogs. Subsequently, Robert Njoya started carrying the carcass and while they were approaching a nearby tree PW4 heard somebody firing a gun shot and hence he started running away. Thereafter PW4 heard three gun shots from the same directions. Each of his friends ran in different directions. Earlier when Robert Njoya heard the sound of the gun shot, he dropped the carcass while Kamau dropped the "matumbo". After running for a distance, PW4 and Kamau started asking each other what they had heard. Kamau confirmed that he heard sounds of gun shots. They later agreed to leave the forest for fear of what would happen. That incident took place at around 6 pm and though they waited for Robert Njoya outside the Farm, the same was in vain. Kamau later suggested that they should go to his home since he had lost his shoes so that he could pick another pair of shoes. After Kamau collected another pair of shoes, they went to the late Njoya's house where they found the widow who said that she had found one of their dogs at home. They later explained to her what had transpired and they also advised her to find out whether her husband had been arrested. On the following day, PW4 was informed that Robert Njoya had been shot dead. PW4 also explained that after the incident, he went back to the scene while accompanied by police officers. On arrival he explained to the officers how they went into the farm. During the second visit, PW4 repeated his story while somebody was using a video camera to record what he was saying. He also explained to the police officers where they had set the snares up to where he heard gun shots. While concluding his evidence, PW4 admitted that he never saw the person who fired the gun shots. He also admitted that he did not know how many people fired the gun shots. On the other hand, PW5 Carl Jeampiere Tundo introduced himself as the General Manager of Lesiolo Grain Handlers Ltd. Apart from the above, he also informed the court that he stays in Soysambu Estate in Nakuru. Apart from the above, he also explained that his mother is Lynn Tundo while his father is Frank Tundo. In addition, he also stated that he has known the accused as Thomas Cholmondeley for **the last 5 – 6 years**. Recently, PW5 became a tenant to the accused person and in April 2006, he became aware that the latter wanted to create new ventures in his farm. By then, PW5 and his partner called Stephen Scott were looking for land to do various projects like bio-diesel, agro-forestry and land to build a residential house. Thereafter, the accused approached PW5 and agreed to give the two partners a long term lease on part of his land. The two partners agreed that they will give him 25% of the profit on the 15 years lease in relation to the bio-diesel project. As far as the agro-forestry was concerned, the two partners agreed that the Delamare Farm would receive 50% of the profit while 10% will go to the local community. They agreed to meet on 9<sup>th</sup> of May 2006, so that the accused would show PW5 where he could put up a residential house. Unfortunately the accused was delayed in Nairobi and rang to postpone the meeting to 10<sup>th</sup> of May 2006. At about 4.30 pm, on 10<sup>th</sup> of May 2006 PW5 went to pick Scott and found that he was busy and from there he went to see the accused at around 4.50 pm but never found him. However, after 5

minutes the accused arrived at his house, and on coming out they decided to use a Rav4 which belongs to PW5. On seeing that the accused had a weapon, PW5 asked him the reason for carrying the same. In response the accused said that they would have to walk around and that there were buffaloes in that area. PW5 described the weapon as the Winchester rifle serial number 117808. From there, they drove to Milia Hills which is about 5km from the house of the accused. On reaching there, they got out of the car and the accused loaded his rifle before they walked around. After viewing the site, PW5 liked the same but thought that it would be expensive to get water, electricity and materials up to the site. He explained his sentiments to the accused person who suggested that they should go to the bio-diesel project where the land was lower and water was more accessible. From there they drove for about a kilometre and parked the car. They then started walking downward along the bushes after the accused had loaded his gun. After walking for about 500m, the accused showed him another site which had a small ridge. Though PW5 liked the area, he observed that the bush was thick and that there was no good view. He was of the opinion that the area needed a lot of investment to build a house. Thereafter the accused suggested another site where PW5 would get a better view. While walking to the suggested site, PW5 stopped to urinate and on finishing he realized that the accused had gone ahead and hence he could not see him. Then PW5 moved to where he could see the accused who was 15 – 20m away. He observed that the accused was on one knee while holding the rifle. Then PW5 heard loud noise as the accused was aiming at something. Apart from the above, PW5 heard voices of human beings talking. PW5 thought that he had seen some wild animals whom he later learnt were dogs. According to PW5, the incident took about 3 – 5 seconds and by that time, the accused was about 15 – 20m away from him. PW5 also estimated that the animals were about 15 – 20m away. When PW5 heard the accused firing, he realized that he should get away and hence he turned back and ran towards the car. According to PW5, he could not remember the exact number of shots but thought that they were three or four in quick succession. He reckons that he ran for about 100m and heard Tom shouting while calling him. According to PW5 the accused told him to get the car since he had hit somebody by mistake. Subsequently, PW5 went to the car and weaved through the bush to the scene and drove where the accused was. He found the accused tying a handkerchief on the leg of Njoya who was bleeding from the back. By then the accused was telling Njoya that everything would be okay. Since the Kencell mobile phone of the accused was not working, PW5 gave him his mobile Safaricom line to enable him call Jeff Mito. PW5 heard the accused telling Jeff to bring the police to the scene since he had shot somebody by mistake. Thereafter the accused told PW5 that they had to take the man to the hospital and he picked him up. PW5 later went to the car and opened the rear door before reclining the seat. Consequently, the accused put Njoya into the car and shut the rear door. As PW5 got into the driver's seat, the accused ran and picked the carcasses of two dogs, an impala, panga and rifle. He observed the accused put all the above in the car all at once. Earlier, PW5 observed that the carcasses which were close to each other were about 5 – 10m from Njoya's body. Specifically PW5 saw an impala and two dogs as shown in photograph exhibit 10. Eventually the accused jumped onto the car and drove to the main gate while the victim was in a lot of agony. PW5 recalled that the whole incident took about 10 – 15 minutes at around 6pm. Eventually they met Jeff Mito who also had a car. It was at that stage that the accused suggested that they take Njoya and put him in that car since it was bigger. When they met Mito he was driving a Peugeot van and he was accompanied by a police officer and two other people. PW5 observed that the accused quickly transferred Njoya from his car to that of Mito. The accused later directed them to take Njoya to hospital. Immediately Koigi and somebody else drove up to where they were. In response, the accused stated that he would go with Koigi who was the manager of the farm. After entering that car while carrying a panga and a rifle, the accused stated that he was going back to the scene. From there, PW5 decided to drive back to his parents' house where he found his mother and explained what had happened. In turn the mother called the father and PW5 explained what had transpired. Consequently the father drove PW5 back to the scene while using his vehicle. On arrival at the scene at 7 pm, they found many KWS officers and other people. Though he also saw the accused there, PW5 could not remember seeing Koigi. He also observed that the accused had been explaining exactly what had transpired at the scene. According to PW5 he remained at the scene up to 11pm and by then the accused was not carrying any weapon. While leaving the scene, PW5 was directed by police officers to go to Nakuru police station to record a statement. His father drove PW5, the accused and two police officers to the said police station. However on arrival, they were told that it was too late to take statements and hence PW5 and the accused were directed to spend the night in the police station. On the following day, PW5 and accused were taken back to the scene where they went to the spot where their car had been parked and where the incident took place. While the accused led the

police officers to the scene, PW5 explained what happened. The accused also explained what had happened and where he shot from. Thereafter, police officers looked around for the empty cartridges but instead found a hat exhibit 6. The visit to the scene took the whole afternoon. From the scene, PW5 and the accused were taken to Gilgil Police Station where they remained in the car for about 15 minutes. From there they were taken to Central Police Station, Nakuru. Where they were held since it was said that it was too late to make any statement. That meant that they spent the night of 12<sup>th</sup> May 2006 at the police station. After being interrogated by CID officers, PW5 was released on the following Sunday. On her part, PW6 Lynn Tundo introduced herself as the mother to PW5. She recalled that on 10<sup>th</sup> of May 2006, at around 5.45 pm while at home cooking and watching TV, her son Carl went to her while very agitated and told her that the accused had accidentally shot somebody. In addition to the above Carl Tundo explained that they had moved the victim from the scene to the hospital. Thereafter, her husband Frank Tundo and her son called the accused who asked them to join him. From there, the two went back to the scene of the incident while using their husband's car namely Nissan Pick-up. PW6 conceded that her son was driving a Rav4 on the material day. She also observed that on arrival to her house, Carl Tundo went to the toilet and came out and washed his hands. Eventually at around 3 am, her husband came up alone since their son had been locked up in Nakuru. Ultimately, PW6 was informed that the man who had been shot had died. On the other hand, PW7 Frank Anthony Tundo explained that Carl Tundo was one of his sons. Apart from the above, he recalled that on 10<sup>th</sup> of May 2006 at around 5.30 to 6pm his wife rang him with some urgency. After about 45 minutes, he reached home where he found his wife and son Carl Tundo who told him that Tom Cholmondeley had shot somebody. In response, he rang Cholmondeley while using his mobile phone. According to PW7, the accused told him that he was at the scene and he responded by telling him that he was going down there. On arrival, PW7 and his son found the accused, a woman from KWS and two police officers from Elmentaita. That apart, PW7 showed them two dogs and the carcass of an impala. PW7 explained that they just sat at the scene while the police did their work. He also observed that many police officers had come to the scene. Besides the above, at around midnight, the OCS Gilgil Police Station asked them for a lift to the central police station since he wanted his son and the accused to record statements. However, on arrival the two were placed in custody and he was told to go home and come back on the following morning. According to PW7, his son Carl Tundo had earlier explained to him that while they were walking together, the accused shot something like a buffalo. Since his son thought it was a buffalo he ran away. In his evidence PW8 Stephen Koigi Kahuria introduced himself as the estate manager in Soysambu Estate which is located in Gilgil Elmentaita location. In addition to the above, he explained that Soysambu Estate comprises of 56,000 acres which had been divided into different sections. Besides the above, he also revealed that they also keep 5,000 beef cattle and wild animals that include buffaloes, zebras, elands, impalas and many other small animals. He also informed the court that Kenya Wildlife Service regularly carry out census of the animals every four months. In addition to the above, he also testified that the KWS regularly monitors the various animals in the farm. In addition to the above, he also testified that Soysambu farm which is on private land is owned by the Delamare family. PW8 also admitted that he has known Tom Cholmondeley for over 30 years and he described him as the strategic manager since he controls the finances. PW8 also explained that he normally meets villagers who throng their two clinics since they are allowed to go for medication there. He also explained that they have two primary schools and one secondary school where the children of the villagers are allowed to go to. Apart from the above, he also explained that there are two water points where they provide water to the villagers. All the above facilities are provided by the farm on condition that the villagers seek permission from the management to use the same. However, he was also aware of the number of people who enter the estate without permission to poach animals or to steal galvanized pipes. He was also aware of theft of fencing wires, illegal charcoal making and illegal grazing of animals. PW8 also explained that whenever they see poachers, they normally call Kenya Wildlife officers. However, when they observed any theft and illegal grazing, they normally call the police to enable them charge the offenders. PW8 was aware that on several cases, offenders have been arrested on the farm and eventually charged. He recalled that on 10<sup>th</sup> of May 2006 at around 6 pm, while he was driving home from Soysambu Farm he met Jeff Mito who informed him that he had received a call from the accused that he had shot a man and that he was calling police officers to the scene. From there, PW8 decided to go back to the ranch while driving the Patna vehicle. PW8 also explained how he drove up to where he met Jeff Mito who in turn had met with Carl Tundo and Tom Cholmondeley. PW8 also found they had already transferred Robert Njoya to Tom's vehicle. However, he admitted he had never seen Robert Njoya. Thereafter, the accused went to his vehicle while carrying a rifle and being accompanied

by police officers. PW8 admitted that he was aware of the agreement exhibit 4 which had allowed Njoya to clear cactus by the roadside in Soysambu Farm. While inside the car of PW8, the accused directed him to drive back to the scene of the incident where he saw two dead dogs, an impala and a panga that had been modified to be a special knife. PW8 confirmed that the scene was at Milia Hills. From there, the accused directed that he be driven to Lanet junction so that he could wait for KWS officers. On arrival, he met KWS officers who included Nyongesa and they later drove back to the scene. After a few minutes, the accused told him to go back to Lanet house since he had left his rifle and a packet of ammunitions in his car when they met for the first time. PW8 was able to identify the exhibit 6 which the accused left in his car. Consequently, PW8 went back to Lanet house to await the OCS Gilgil Police Station. On arrival he found two watchmen before the OCS came followed by Jeff Mito. Since his car had mechanical problems, PW8 decided to leave it behind after telling the watchman to guard the same. Eventually, PW8 handed over the rifle and packet of ammunitions at Lanet house and from there he went back to his house. On the other hand, PW9 Joseph Kamau Muthoni explained that he knows both Peter Gachuhi Maina and the late Robert Njoya since they were staying in the same village. According to PW9 he also testified that he knows Delamare Estate which is about 100m away from their village. Besides the above he also testified that on 10<sup>th</sup> May 2006, Robert Njoya went to visit him at his home at around 4pm while accompanied by two dogs. He later requested PW9 to accompany him to check the traps which they had set in the Delamare Estate. Thereafter, they met next to Gichuhi's dam while PW9 was carrying a panga, a rungu and was also accompanied by a black male dog. He also found Gichuhi who was carrying a piece of metal while accompanied by a black dog and two brownish dogs. By then Robert Njoya was carrying a panga and was accompanied by two white dogs. From there all the three proceeded to Delamare Farm where they found that their traps did not have any animals. However, they found another trap with a dead gazelle which Njoya later cut the head and removed the intestines while being helped by Gichuhi. They carried the intestines and gave the "mara" to the dogs. Subsequently Robert Njoya decided that they should take the dead gazelle from the thicket to another tree which was about a kilometre away. At that stage they followed the footpath while Gichuhi was ahead with the iron bar and was followed by Njoya who was carrying a gazelle and panga. PW9 himself was carrying a panga, a rungu and "matumbo". According to PW9, as they were walking they heard gun shots. Immediately Robert Njoya dropped the gazelle and PW9 dropped the "matumbo" before he escaped on his left. Similarly, Gichuhi also escaped on his left. However, Robert Njoya ran straight on. Subsequently PW9 met Gichuhi and asked him whether he had seen Robert Njoya. In response Gichuhi stated that he saw Robert Njoya escaping right ahead. **PW9** recalled that while they were running away, *he heard five gun shots*. Eventually PW9 and Gichuhi escaped towards their home at around 5pm. After standing next to Delamare fence for ten minutes, PW9 told Gichuhi he wanted to go and wear another pair of shoes and go and look out for Robert Njoya. From there they went to Robert Njoya's home where they met the widow who told them her husband had not gone back home. While they were leaving, PW9 saw Njoya's big dog. PW9 further stated that they explained to Njoya's widow that they had been chased from Delamare's Farm. From there they went up to the gate of Gichuhi where they went for Robert Njoya in vain. At around 7.30pm the two parted and on the following day PW9 went back to Robert Njoya's home but never found him. Eventually, PW9 was informed by a young man that somebody had been killed in the Delamare Farm. On going to his home, PW9 confirmed the information that Robert Njoya had been killed. In response PW9 escaped to Ngarusha Menengai which is about 100km away. PW9 explained that he escaped to that place because he was worried of the reaction of the local people. Consequently, the mother to PW9 accompanied with Gichuhi, Njoya's brother and advocate Kiruba Ken went and assured and advised him to go back and record a statement. Eventually PW9 recorded a statement at CID headquarters, Nakuru and on the following Monday police officers took him to the scene. While at the scene, PW9 showed the police officers where the traps were and the place where they had slaughtered the gazelle. In his evidence PW9 PC Joseph Obao introduced himself as an officer attached to Elementaita police post which is under Gilgil Police Station. He recalled that on 10<sup>th</sup> of May 2006 at around 6.30 pm, he was with Senior Sgt. Mukolwe, PW Oduor and Jeff Mito discussing security matters relating to poaching, several attacks on the farm and cutting down of indigenous trees. While they there in the meeting, Jeff Mito's mobile phone ran and he excused himself to attend to the same. However, on coming back he requested that the meeting be stopped since there was a shooting incident at Delamare Farm. Further to the above, he explained that it was the accused who had rang him and hence he wanted to go to the farm to see what had happened. PW10 accompanied Jeff Mito in his vehicle together with Sgt. Mukolwe. According to PW10, on reaching the farm's main office, they met Tom Cholmondeley

and Carl Tundo who were using a brown Rav4. Thereafter Tom Cholmondeley brought the injured man into Jeff Mito's car which was a white Peugeot Patna. Though PW10 was seated behind Sgt. Mukolwe nobody talked to him. Consequently, Tom Cholmondeley informed Jeff to rush the injured man to Pine Breeze Hospital, Nakuru. From there PW10, Tom Cholmondeley and Koigi proceeded to the scene. PW10 observed that Carl Tundo left for his home but joined them later on at the scene. On arrival at the scene which was deep in the forest, Tom Cholmondeley explained what had happened at the scene. While there, PW10 saw two dogs and an impala whose head and intestines had been removed. At the scene PW10 also saw a slim panga. PW10 later recalled that Tom Cholmondeley explained that he had gone to the forest with his friend Carl Tundo to find a place for him to build a residential house. The accused also explained that he saw six people carrying an impala and then there occurred a confrontation since the same people were rude to him. That apart, the accused also explained that the said people directed some weapons and dogs at him. Further to the above, the accused explained that he decided to shoot the dogs one by one. During the endeavour to shoot another dog, the accused shot the injured man. PW10 stated that that was the explanation given by the accused person. After the accused had been picked by the OCPD Naivasha, PW10 and other police officers picked the gun exhibit 12A and the sheath exhibit 12B. Thereafter, PW10 was instructed to collect the dogs. While they were still at the scene with the accused and Koigi, Senior Sgt. Mukolwe and Jeff Mito came from the Pine Breeze Hospital around 8.30 pm and informed them that the injured man had passed away. Subsequently, Jeff Mito and Sgt. Mukolwe decided to conduct the search and PW10 remained at the scene. After about 20 minutes PW10 saw Sgt. Mukolwe holding a bow exhibit 17 and arrows exhibit 18 (a), (b), (c) and (d). They were later joined by Chief Inspector Riungu from Gilgil Police Station and Senior Supt. Kiragu from Naivasha police station. At around 1 am, the Provincial Police Officer Rift Valley went to the scene and collected Tom Cholmondeley and Carl Tundo so that they could give more information at Nakuru police station. On his part Senior Sgt. Patrick Khamati Mukolwe introduced himself as the police officer in-charge of Elmentaita Police Post which falls under Gilgil Police Station. He testified that on 10<sup>th</sup> of May 2006, at around 6pm while he was at the police post with Jeff Mito discussing about thefts of pipes at Delamare Farm the phone of the latter rang and he attended to it. On coming back, Jeff Mito told them that Tom Cholmondeley and Carl Tundo were patrolling the farm and encountered some poaches who were carrying meat and that somebody had been shot. Subsequently, PW11, PC Obaa were rushed towards the scene while being led by Jeff Mito. On the way they met Carl Tundo and Tom Cholmondeley who were carrying a passenger who was bleeding profusely. Apart from the above, the passenger was also screaming in pain and they transferred him to their vehicle. Thereafter, Tom Cholmondeley gave him a medical card to take the injured person to the hospital. On the way to the hospital, the injured person introduced himself as Robert Njoya. On arrival at the hospital, a clinical officer took the patient into one of the rooms with the assistance of some nurses. However, after a few minutes the clinical officer called Kuria admitted that he could not control the bleeding and shortly later on pronounced the patient dead. After confirming that information, they transferred the body to the vehicle and took the same to the Municipal Mortuary, Nakuru. From there, PW11 went back to the scene and found PC Obaa, Carl Tundo and Tom Cholmondeley at around 8pm. While searching the lower part of the scene, PW11 found a bow exhibit 17 and four arrows exhibit 18 (a), (b), (c) and (d), two dogs an animal without a head and a panga exhibit 3. From there PW11 was instructed to go back to the mortuary to lift the fingerprints of the deceased. Unfortunately on arrival PW11 never found the mortuary attendant. On 24<sup>th</sup> of May 2006, PW11 went back to the scene while accompanied by Inspector Mwangi and Dept. Commissioner of Police Gideon Mutua. While there, PW11 managed to recover one cartridge exhibit 19 and one live bullet exhibit 20. Further to the above, PW11 also testified that he observed that the clothes of the accused and Carl Tundo were blood stained. PW11 Further explained that on the material night, he safeguarded the scene till the OCS came and he handed the same to him. However, he later remained at the scene up to 2.30 am when he left using a vehicle Registration No. KAR 307H belonging to the Delamare Farm. In his evidence, PW12 Francis Thuku Kuria introduced himself as a clinical officer attached to Nakuru General Hospital. However, on 10<sup>th</sup> of May 2006, at around 10 pm while he was doing part time job at the Pine Breeze Hospital, he was approached by two men who told him that they had a very sick patient in the vehicle that was outside. On going outside he found a Peugeot Patna that was carrying a patient who was lying and gasping for air. PW12 observed the injury of the pelvis and that the patient had only an underpant and a piece of cloth that had been tied on the upper part of the thigh. By then the patient was wearing a dark jacket and was bleeding. With the assistance of the nurses, PW12 placed the patient on a stretcher and took him in a room where he tried to resuscitate him by cardiac

message. When PW12 realized that the patient was not bleeding he stopped the resuscitation and concluded that the patient had already died. Eventually he informed the two police officers who had accompanied the body. Ultimately the two police officers left with the body of the deceased whom PW12 identified through the photographs exhibit 2, 3, 10, and 13. In his evidence Joseph Martin Nyongesa introduced himself and an assistant warden with KWS at Nakuru National Park. He recalled that on 10<sup>th</sup> of May 2006 at around 6.30 pm while on his way home, he received a call from Tom Cholmondeley who told him that he had met some poachers and that "...nimechapa mmoja matako...". Apart from the above, Tom Cholmondeley wanted him to go and help him since the person he had shot was bleeding and also wanted him to identify the animal that those people were carrying. In response, PW13 went to the scene while accompanied by Cpl. Daniel Nyange and Cpl. Momanyi who was their driver. On meeting Tom Cholmondeley at the junction of Lanet House, the latter explained to him what had transpired. **According to the accused, he had shot two dogs and unfortunately another bullet got to the deceased.** On arrival at the scene, PW13 observed two dogs and a male impala without intestines and a head. He also found PC Obao and Carl Tundo and his father. While there, the accused informed him that the victim had passed away. When the scene of crime personnel from Nakuru went to the scene, PW13 left the scene. On the other hand, PW14 Jeffrey Mito introduced himself as the Security Manager of Soysambu Farm from March 2006. He recalled that on 10<sup>th</sup> of May 2006 he received a call from Tom Cholmondeley who told him that he had a problem and he needed his assistance to rush somebody to **hospital since he had shot him by mistake.** After informing the other police officers, PW14 left with Senior Sgt. Mukolwe and PC Obao in his vehicle. On the way they met Tom Cholmondeley who was wearing a black stained trouser exhibit 13. Tom Cholmondeley opened the rear door of the car before they took the victim to the hospital. On arrival at the hospital the nurses and the doctor rushed the victim to an emergency room but after about 15 – 20 minutes they were informed that the victim had passed away. From there they took the body of the deceased to Nakuru Municipal Mortuary and while there PW14 rang the accused and informed him what had happened. From there PW14 and Sgt. Mukolwe returned to the scene where they met Tom Cholmondeley, Carl Tundo, PC Obao and KWS officers at around 8.30pm. At the scene PW14 saw two dogs and an impala. After about 10 minutes Sgt. Mukolwe informed them that they had recovered the bow and arrows. On his part, PW15 PC Jackson Ouma recalled that on 10<sup>th</sup> of May 2006 at around 9.30 am while accompanied by other police officers they went to Soysambu Farm using a police Landover. On arrival at the scene, Mr. Mutua Deputy Commissioner of Police instructed them to look for cartridges. At around 11.30 am PW15 managed to get the first cartridge while at 11.40 am Sgt. Mukolwe got the second cartridge which was about three metres away from the first one. Subsequently at 12.10 pm Sgt. Mukolwe got a live bullet while at 12.45 pm Inspector Wachira got the last cartridge. Eventually the scene of crime personnel took charge of the scene. In his evidence, PW16 Chief Inspector Lawrence Riungu introduced himself as the OCS Gilgil Police Station. He testified that on 10<sup>th</sup> of May 2006 while he was at the police station at around 7.20 am he received a phone call from the accused. The accused explained to him that when he was with his friend Carl Tundo on his farm, he met a group of five poachers who were carrying an impala. The said poachers were accompanied by some bows and when he challenged them to stop they released the dogs to bite him and hence he responded by firing them. **The accused further explained that after the shooting he realized that he had also hit a human being.** When PW16 asked the accused about the state of the victim, the accused replied that he had not died. In turn, PW16 advised the accused to take the victim to hospital and that he was on the way to the scene. Consequently, while accompanied by two police officers, PC Watasumu and PC Irimu, PW16 proceeded to Soysambu Farm where they reached after an hour. On arrival at the scene, they met two police officers from Elmentaita police force, the accused, Carl Tundo, his father and Jeff Mito. While there, the accused explained that he had given the victim to Jeff Mito and Sgt. Mukolwe to take to the hospital. **After observing two carcasses of dogs and an impala, the accused told him that his aim was not to kill that person.** Subsequently PC Obao gave PW16 the gun which had two rounds of ammunitions. On the way to Nakuru police station, PW16 was given eleven rounds of ammunition exhibit 16. On arrival at Nakuru Police Station, PW16 booked Tom Cholmondeley and Carl Tundo for the offence of murder. In his evidence, PW17 Chief Inspector Kiberenge Soronei introduced himself as the DCIO Naivasha Police Station. He recalled that on 10<sup>th</sup> of May 2006 at 9.15pm he received a call from Simon Kiragu who was then the OCPD Naivasha. The latter directed that he accompany him to Soysambu Farm since Tom Cholmondeley had shot somebody in the farm. On arrival at the scene at around 10.30pm, PW17 found Chief Inspector Riungu, other police officers, Carl Tundo and some workers. The OCS who had already taken over the scene showed them

two carcass and impala which had been heaped together after being shot. By then the deceased had been rushed to the hospital though he later died. While there, the PCIO Morris Amata and PPO Mr. Wasike arrived at the scene. Subsequently the OCS was instructed by the OCPD to take the accused, Carl Tundo and the carcasses to Nakuru Police Station. In his evidence PW18 PC Elnathan Watachum testified that on 11<sup>th</sup> of May 2006 at around 2.30 pm while he was at Gilgil Police Station, he was called by the Chief Inspector Riungu who directed him to handover the exhibits that he brought from Soysambu Farm. These are the rifle exhibit 12(a), the cover exhibit 12(b), a panga exhibit 3, a bow exhibit 14 and four arrows exhibit 18. He also explained that he was given 11 rounds of ammunitions in a box exhibit 16. Later PW18 booked the exhibit in the OB as No. 40 of 11<sup>th</sup> of May 2006. On the other hand, PW19 Simon Mureithi Kiragu introduced himself as the then OCPD Naivasha. He recalled that on 10<sup>th</sup> of May 2006 at around 9pm while he was in his residence, the OCS Gilgil Police Station called and told him that he was in Soysambu Farm where Tom Cholmondeley had shot one of the poachers. In addition to the above, he also informed him that the deceased had died on his way to the hospital. Further to the above, he also told him that while at the scene he had also found two dogs and an impala. That apart, he also explained that they had recovered four arrows at the scene. On receiving the information, PW19 summoned the DCIO Chief Inspector Soroine proceeded and to Soysambu Farm while using an official car. On reaching the scene, they found the OCS together with Tom Cholmondeley and Carl Tundo. That apart, PW19 confirmed the presence of the carcasses which were heaped together. Consequently, Pw19 decided that Tom Cholmondeley and Carl Tundo had to be held in custody and Nakuru Police Station. Eventually, PW19 the DCIO and PC Obao remained at the scene. On his part, PW20 Cpl. Kennedy Mwangi recalled at on 11<sup>th</sup> of May 2006 at 8 am, he was instructed by Chief Inspector Riungu to escort two carcasses of dogs and one deer which were in a police Landover that was carrying the OCS. While escorting the said animals, he observed that the abdomen of the impala was open and the head was missing. Apart from the above, he also observed that the first dog had a wound that entered the left side of the dog, and he got the impression that the dog had been shot. Similarly he saw the second dog had a wound on the rear and thought the same had been shot. Eventually, PW20 was given two reports exhibit 24 (a) and (b) which he took to Chief Inspector Riungu. In his evidence PW21 Inspector Godfrey Wachira recalled that when he was the Deputy OCPD Gilgil Police Station on 24<sup>th</sup> of May 2006, he went to Soysambu Farm to search for empty cartridges while accompanied by eight police officers. On arrival at the scene they were shown two carcasses and the place where the body of Robert Njoya was found. Further to the above, they found that the scene had already been marked and thereafter they started looking for empty cartridges. He confirmed that the first cartridge was found by PC Ouma and the second cartridge was found by PC Mukolwe. He also testified that at around 12.10 pm Sgt. Mukolwe recovered a live round of ammunition and later recovered an empty cartridge. On the other hand, PW22 testified that on 10<sup>th</sup> of May 2006 at about 6.30 pm his boss called Nyongesa rang and directed him to go on duty at the Delamare Farm. While on the way Mr. Nyongesa told him that a poacher had been shot dead. On arrival at the farm they found a police officer and a farm worker. Later Tom Cholmondeley escorted them to the scene while PW22 showed them two dogs and one impala. He observed that the head and intestines of the impala had been removed. Subsequently the accused told Mr. Nyongesa that the victim had died and thus they decided to go back to the scene. On his part, PW22 SSP Benjamin Mwaliko testified that on 17<sup>th</sup> May 2006 he was asked to proceed to Rift Valley Province to record a statement from Tom Cholmondeley. On receipt of the said instructions, PW23 proceeded to Soysambu Ranch while accompany by Inspector Riungu and Cpl. Asiyo. He observed that the accused was accompanied **by his lawyer called John Kagucia**. Eventually PW23 recorded a narration of events by Tom Cholmondeley. After preparing the transcription of the narration, PW23 returned the same to the investigating officer. PW23 informed the court that the recording took 45 minutes and that he prepared the transcription on 27<sup>th</sup> of May 2006. Further to the above PW23 explained that the original tape was returned to him for safe custody. Eventually, he produced the video tape as exhibit 25 and the transcript exhibit 26. In his evidence, PW24 Gideon Muoki Mutua introduced himself as a retired Deputy Commissioner of Police. He testified that on 23<sup>rd</sup> of May 2006 he was instructed by the Director of CID to proceed to the PCIO Headquarters Nakuru and assist the investigating officers in a case involving a shooting in the Soyambu Farm. After consulting the PPO, the PCIO and the Chief Investigator, they went through the investigation file and he pointed out areas that need further investigations. At around 5.30 pm, PW24 proceeded to the scene while accompanied by SSP Mwangi and Inspector Sambu and he was shown where the deceased fell down after the shot. He was also shown where the gunman knelt while shooting. On 24<sup>th</sup> of May 2006,

PW24 returned to the scene while accompanied by 8 police officers and he gave them specific instructions on how the search for the cartridges was to be carried out. After about 20 minutes, Sgt. Mukolwe lifted his hands after seeing the first cartridge. Then after about 10 minutes, PW Ouma found another cartridge. Later Sgt. Mukolwe recovered one live bullet which was about one metre from the shrub. In addition to the above, Inspector Wachira recovered an empty cartridge two metres away. On his part, PW25 Morris Amwata introduced himself as the Snr. Asst. Commissioner of Police in-charge of Investigations at the CID Headquarters. He recalled that on 10<sup>th</sup> of May 2006 at around 10 pm while he was in his house he was phoned by Mr. Wasike who informed him about an incident which had occurred at the Soysambu Farm. On going to the scene, PW25 met the OCPD Naivasha Mr. Kiragu, the DCIO Chief Inspector Soronei, then OCS Gilgil Chief Inspector Riungu and Snr. Sgt. Mukolwe. While there, they found that the scene had already been sealed by Inspector Sambu. Thereafter, PW25 and his team were shown the carcass of an antelope, carcasses of two dogs, a bow, four arrows and a panga. Subsequently, PW25 gave instructions to Chief Inspector Riungu to take charge of all the three carcasses before taking them to the veterinary doctor for postmortem. On the following day, PW25 went back to the scene and instructed Mr. Mwangi to take over the case and continue with the investigation. In his evidence, PW27 Inspector Francis Irungu recalled that on 11<sup>th</sup> of May 2006, he was instructed by the PCIO Mr. Amwata to team up with Mr. Mwangi to investigate a shooting that had occurred at the Delemare Farm. On arrival at the scene, they found that Inspector Sambu had already cordoned the scene using a tape and briefed them that he had taken photographs on the previous night. They later drew the scene together and prepared a sketch plan. Though they tried to search for spent cartridges the same was in vain. From there, they went back to Nakuru police station to take the two suspects so that they could show them the scene. On going back to the scene, the two suspects showed them where they had previously walked. While there, the accused explained where he was shooting from and eventually PW27 drew a sketch plan using an acacia tree as his fixed point. On 12<sup>th</sup> of May 2006, PW27 went to the village of the deceased while accompanied by the PPO and other police officers. On arrival, the widow of the deceased explained to them that her late husband was accompanied by Peter Gichohi and Kamau wa Muthoni to the Soysambu Farm. On visiting the homes of the two, the police were unable to trace them and hence they left a word that they should report to the nearby police station. On 14<sup>th</sup> of May 2006, PW27 went back to the homes of the friends of the deceased but he never found them. In addition to the above, PW27 was also able to identify the bullet fragments exhibit 30 which were removed from the body of the deceased. Later that evening, PW27 recorded the statement of Peter Gichohi and later organized for the accused to be examined by a psychiatrist. On 15<sup>th</sup> of May 2006, PW27 visited the scene where Peter Gichohi and Kamau showed him and other police officers where they got the impala and the 9 snares exhibit 9. On 19<sup>th</sup> of May 2006, PW27 organized for the blood of the accused to be taken for analysis. Subsequently on 17<sup>th</sup> of May 2006, they prepared the exhibit memo form and re-visited the scene with SSP Mwaliko who video taped the scene. On 25<sup>th</sup> of May 2006, PW27 went back to the scene where he drew the sketch plan exhibit 31 (a), fair sketch plan exhibit 31 (b) and a legend exhibit 31 (c). Later he merged the sketch plans to form exhibit 32. On his part, PW28 Chief Inspector Fanuel Musonge introduced himself as the licensing officer at the Firearms' Bureau. He explained that they had been maintaining the records of the accused and that by 10<sup>th</sup> of May 2006 he had ten licensed firearms. Besides the above, they had also maintained a master card for the licensee which shows the following firearms:

1. Winchester – Rifle (type) – Calibre 2006 – S/No. 117808
2. Pruno – Rifle (type) Calibre 375 – S/No. 00399
3. Pruno – Rifle (type) Calibre 2.22 – S/No. 14209
4. Rifle – Calibre 308 S/No. 976567
5. Shot Gun – Calibre 12 BORE S/No. 960289
6. Humane Killer – Calibre .22 S/No. K53490

7. B.S.A Shot Gun – Calibre 12 BORE S/No. 6376
8. Barretta – Shot Gun Calibre 12 BORE S/No. 68797B
9. Benelli – Shot Gun Calibre 12 BORE S/No. M 470078
10. RUGER – Revolver – Calibre 357 – S/No. 174 – 62798

As far as the Winchester Rifle is concerned, the Firearm Bureau had renewed the licence on 26<sup>th</sup> of April 2006 and the same was to expire on 26<sup>th</sup> of July 2006. Though the Bureau had issued several temporary permits to various workers from Soysambu Farm, the owner of all the firearms was the accused. Because it was the accused who had applied for temporary permits for other users. Apart from the above, PW28 produced a certified copy of the master card as exhibit 34 and form 16 exhibit 35. According to PW28, on 26<sup>th</sup> of May 2006, his boss called Peter Achuka Egolla proceeded to the residence of the accused and recorded the firearms that he found in the safe and also tabulated the serial numbers for items no. 6 and 7 as shown above. Those two items were found in a safe that could not open. During the trial, the court was informed that items no. 8 and 9 are being held by the CID Naivasha and that the first five firearms are being retained at the Firearms Bureau Nairobi. From the Master Card the Winchester Rifle appears as item no. 7 serial No. 117808 which is an exhibit in this court. On the other hand, PW29 Inspector Sambu Wafula introduced himself as the officer-in-charge of Scene of Crime Nakuru. He testified that on 10<sup>th</sup> of May 2006 at around 7.30 – 8pm he received a call from the OCS Gilgil Chief Inspector Riungu who informed him to proceed to Soysambu Farm since there was a shoot out. On arrival at the scene, he found Chief Inspector Riungu, the accused person, KWS officers and members of the public. After being shown the dead animals, the accused explained to him the original place where they were and subsequently the two dogs, an impala and the panga were photographed. PW29 described the scene as dark, grassy with small trees. After requesting for the scene to be preserved, PW29 performed his work for three hours before leaving. From there, PW29 went to Nakuru Municipal Mortuary where Sgt. Mukolwe identified the body of the deceased. PW29 observed that the deceased **had bled a lot and had a sharp fresh wound and that he was partially dressed in a jacket** exhibit 2 and a t-shirt exhibit 1. Consequently, PW29 pulled the underpant of the deceased to take more photographs. Consequently, PW29 personally delivered the samples that he had collected to the government analyst before they were analysed. On 21<sup>st</sup> of July 2006, PW29 received a report which was duly signed and produced as exhibit 44. After receiving the Winchester Rifle, the case and thirteen rounds of ammunitions, PW29 made arrangements for the ballistic expert to examine the above. Eventually, the said rounds of ammunitions were confirmed as being of calibre .30-06. Further to the above, on 11<sup>th</sup> of May 2006 PW29 did a swab on the rifles barrel and submitted the same to the government analyst by a memo dated 18<sup>th</sup> of May 2006. He later identified the analysts' report as exhibit 49. Besides the above, PW29 also explained to the court that he also submitted the bullet fragments to the government analyst together with the Winchester Rifle S/No. 117808. He was able to identify the said fragments as exhibit 13. Earlier PW29 requested the government analyst to find out whether TC. 11 which were the bullet fragments were fired from TC 17. After examining the above items, the ballistic expert prepared his report exhibit 45 (a) which was signed and dated 19<sup>th</sup> of May 2006. Though PW29 made two visits to the scene while accompanied by other police officers, they were unable to make any recoveries at the scene. However, on 24<sup>th</sup> of May 2006, PW29 was joined at the scene by the Deputy Commissioner of Police and they recovered three empty cartridges and one round of live ammunitions. The above recoveries were made by police officers who were part of the search team. Following those recoveries, PW29 stuck labels on each of the exhibits. Eventually, PW29 photographed the recovered items before they were packed separately in different envelopes. Ultimately, PW29 marked the envelopes before he prepared the memo forms in his office. During the trial, PW29 was able to identify the items and the envelopes that he had marked. He emphasized that he was present when all the items were recovered. Subsequently, PW29 received a report exhibit 51 dated 29<sup>th</sup> of May 2006 which was signed by Mr. Mwongela. According to PW29, Mr. Mwongela was of the considered opinion that the three cartridges were fired from the Winchester Rifle S/No. 117808. That apart, PW29 informed the court that the expert concluded that the rifle was in good mechanical condition and was capable of being fired and that the same is a firearm as defined by the Firearm Act. In addition, the rounds of ammunitions were found to be ammunitions under

the Firearm Act. While concluding his evidence in-chief, PW29 stated that he is a gazetted Scene of Crime officer and that he took all the photographs, processed and printed them under his supervision. He also assured the court that the negatives had never been interfered with and that they had been under his custody. In his medical evidence, PW30 Dr. Joseph Waigi Njau introduced himself as a psychiatrist based at the Provincial and General Hospital Nakuru. He testified that on 15<sup>th</sup> of May 2006 he examined Tom Cholmondeley and found him to be mentally sound and that he did not have any history of psychiatry illness. In addition to the above, he found that his memory, judgment, abstract thinking, concentration and attention were normal. Ultimately, he formed the opinion that the accused was fit to plead to the present charges before the court. PW30 was able to identify the accused as the person that he had examined and eventually he produced his report exhibit 44. On the other hand, PW31 Dr. Mbai Enkoroi introduced himself as the Snr. Veterinary Officer Nakuru. He recalls that on 11<sup>th</sup> of May 2006, while he was on duty, police officers from Gilgil Police Station took to him three carcasses of a deer and two dogs. Further to the above, he explained that he had performed a postmortem on the above animals jointly with Dr. Githui Kaba and consequently wrote a joint report. During the examination, they took x-rays as exhibit 55 (a) and (b) and observed some particles. He later identified the veterinary report as exhibit 24 (a) and (b). According to PW31, the first dog died due to shock from multiple organ failure. He admitted that he did not know what punctured the first dog but he observed an exit wound on the left side. PW31 described the first dog as brown in colour and the cause of death was acute shock from multiple organ failure. He also explained that the entry of the bullet was caudal while the exit was cranial. In his opinion, the two dogs were in a standing position. Apart from the above PW31 stated that the wound on the first dog was roundish on the entry point and hence he was of the opinion that the said wound must be inflicted from the back. On being shown exhibit 10, PW31 was able to identify photograph no. 6 which showed three carcasses. Besides the above, PW31 also explained that he took his own photographs which he later produced as exhibit 56. Apart from the above, PW31 also performed a postmortem on the deer which was given reference no. G16 and categorised as Capeline species. He described the deer as in good body condition with an intact skin that was white in colour. The carcass had been beheaded and the abdomen opened through a clean looking cut right from the xyphoid cartilage. He also testified that the abdominal organs were missing save for the liver and kidneys. No pathological lesions were detected. He formed the opinion that the cause of death was beheading with severance of the brain. Secondly, the abdominal organs were missing. According to him, the deer must have undergone shock due to loss of the head. Subsequently, the deer carcass was disposed in their pit and the dog carcasses were kept in the deep freezer for about two weeks. He also explained that an impala and an antelope are all deers. He later produced a report exhibit 4 (a) for dogs and exhibit 4 (b) for the deer. In his medical evidence, PW32 Dr. Albert Gachau introduced himself as a pathologist attached to the Provincial General Hospital Nakuru. He also explained that he holds a Master's Degree in Human Pathology. Apart from the above, he also testified that on 13<sup>th</sup> of May 2006 at around 13.50 hours while he was at the Nakuru Municipal Mortuary he was requested to conduct a postmortem on the body of the late Robert Njoya after he was identified by his brothers. According to PW32, he carried out the autopsy with the assistance of Dr. Andrew Gachie and a mortician called Titus Kuthia. Specifically Dr. Gachie was representing the interest of Tom Cholmondeley. During the autopsy, PW32 found the body of the deceased dressed in a black faded jacket which had an inner brown lining, a black golf t-shirt with a white upper part in front. The clothings were blood stained predominately on the lower left side. After undressing the deceased, they handed over the clothes to the investigating officers. PW32 described the deceased as well nourished and that he was about 37 years old, 100cm in height, lean built without any deformities. He observed that the mucous membranes were **markedly pale** and that there were no features to prove any preexisting diseases. That apart, he observed that there was rigor mortis but the body had been refrigerated and was well preserved. He admitted that he never saw any evidence of medical interventions. Apart from the above, he observed healing lacerations of various sizes on the head, and the knee joint had healing ulcer. He observed a healing laceration on the right hand and two healing lacerations on the right shoulders. On the left lower limb, he observed a void which was 2 x 1cm defect situated 94cm vertically above the sole of the foot, 7cm below the iliac crest and 9cm from the midline. However on the rest of the body there were no remarkable marks. Besides the above, there was free blood within the pelvic cavity estimated at 300ml and there was a fracture of the pelvis girdle. In addition, there was also a fracture of the sacrum close to the sacrum iliac joint. The fragments caved in the cavity of the pelvis. There was also fracture of the right ilium. According to PW32, the two pathologists were able to form the opinion that the resultant injuries were caused by a single bullet that

penetrated into the pelvic. They were also able to find an entrance wound though they never found any exit wound. Specifically, the entry was through the back of the left foot and the same traveled to the right through the sacrum and ilium to lodge in the muscle of the right hip. Thereafter, they recovered metal fragments from the right hip area which they submitted to the police team for further tests. He identified the metal fragments as exhibit 30. After the autopsy, photographs were taken by Inspector Sambu. PW32 was able to identify the deceased through the photographs which had been taken. Eventually, the two pathologists took hair from the scalp, blood from the pelvic region, urine from the urinary bladder and metallic fragments from the wound track. Ultimately, they handed over the exhibits to the investigators for forensic tests. After the examination, the two pathologists formed the opinion that the **cause of death was due to haemorrhage occasioned by laceration of the left iliac** vessels following a single penetrating gunshot wound into the pelvis. PW32 later incorporated his findings in the usual form provided by the police. Ultimately both pathologists signed and dated the postmortem form on 13<sup>th</sup> of May 2006 in the presence of the investigating officers. PW32 identified the report as exhibit 29 (a) and typewritten form which was handwritten and exhibit 29 (b). In conclusion, he also produced a report exhibit 29 (c) dated 13<sup>th</sup> of May 2006 which was typewritten. On his part PW33 Dr. Julius Ogato introduced himself as a radiologist based at the Provincial General Hospital Nakuru. He further explained that he holds a Master's Degree in Diagnostic Radiology. He recalled that on 20<sup>th</sup> of May 2006, while he was at the hospital, he was requested by a police officer to do x-ray films or a radiograph on two dead dogs. The said dogs were sent to the hospital while in polythene bags. When PW33 saw the dogs they had changed and were blackish and were similar in appearance to the ones in photo no. 6 of exhibit 10. After putting the dogs in the x-ray machines, he did an exposure and subsequently processed the films exhibit 55 (a) and (b). Exhibit 55 (a) shows a fracture of the bones and deformity at the back. According to PW33 he also saw several pieces of metal and that there was gas and air within the soft tissues. He concluded that there was a fracture of the thoracic vertebrae no. 8 with possible compression of the spinal cord that was due to penetrating injury which was likely to have been caused by a gunshot. Eventually, PW33 compiled a report dated 20<sup>th</sup> of February, 2007 which he produced as exhibit 55 (c). He also identified the film of the second dog Exhibit 55 (b) which shows metallic densities and gas within the soft tissue. In conclusion, he stated that the penetrating injury was most probably due to gun shot wound. Ultimately, he complied, signed and dated the report Exhibit 55 (b). On the other hand, PW34 Superintendent Johnstone Musyoki Mwangela introduced himself as the firearms examiner attached to the Firearms Laboratory, CID Headquarter Nairobi. He testified that on 18<sup>th</sup> of May 2006 he received the following exhibits from Inspector Sam Wafula

- a) Winchester Rifle S/No. 117808 – “TC17” (Exhibit 12 (a))
- b) 13 rounds of ammunition marked “TC18” (Exhibit 16)
- c) Fragments of bullets marked “TC11” Exhibit 13

The above exhibits were accompanied by exhibit memo form that requested him to ascertain whether “TC17” was capable of firing and whether “TC11” were fired from “TC17”. He produced the exhibit memo form as Exh. 35 and the report Exh. 35 (a). Besides above he was asked to identify the calibre and manufacturer of “TC17”. PW34 was able to identify the Winchester rifle which bears the laboratory reference number LAB 256/06. He further testified that he used three rounds of ammunitions during his analysis. While in court, he was able to identify the remaining ten rounds of live ammunition bearing their laboratory number – LAM 256/06. He was also able to identify three cartridge cases Exh. 52 (a), (b), (c) and test bullets exhibit 53 (a), (b) and (c). In addition to the above, he also testified that he had examined bullet fragments exhibit 30 which has been labeled LAB 256/06. After examining the above exhibits, he made the following findings:

Exhibit TC17 is a Winchester Bolt Action Rifle Model 70 and is calibre .30 inch 06. The said rifle was adopted in 1906 by the American military. Apart from the above, he also found that the said rifle was manufactured from the United States of America and that the same has a telescopic site for aiming and magnifying. He also observed that the magazine is capable of holding five bullets. That apart, the rifle was in good general mechanical condition and complete in all its components parts. The said rifle was

capable of firing ammunitions and hence he successfully tested the same using 3 rounds of ammunition which he picked at random. Thereafter, he recovered the 3 test cartridges and 3 test bullets. Following the test, PW34 formed the opinion that the TC17 is capable of being fired and is a firearm as defined by the Firearms Act. He also found that exhibit TC18 were thirteen rounds of ammunition in calibre .03-06 in the metric system. The same can be referred to as 7.62 by 66mm. He also concluded that the ammunitions were capable of being used in the firearms TC17. That apart, he formed the opinion that TC17 were live and capable of being fired and they were ammunitions as defined by the Firearms Act Cap. 114 Laws of Kenya. As far as exhibit TC11 were concerned, there were fragments of bullets and the examination revealed that some were copper while others were lead. Unfortunately, he found that the fragments were not suitable for comparative microscopic examination. Following the above, he formed the opinion that TC11 could have been jacketed bullet that disintegrated on impact on a hard surface. After examining the exhibits, PW34 prepared and signed a report on 19<sup>th</sup> of May, 2006 which he produced as exhibit 45 (a) and exhibit memo exhibit 45. Further to the above, PW34 testified that on 26<sup>th</sup> of May, 2006 he received three fired cartridge cases (TB1 to TB3) and one live round of ammunition (TB4) from Inspector Sambu. The above were accompanied by an exhibit memo form asking him to examine and ascertain whether TB1, TB2, TB3 had been fired from TC17. He was also asked to determine whether TB4 was capable of being fired and the calibre and characteristics of the exhibits. After examination, he concluded that TB4 is a round ammunition in calibre .30-06 (7.62 x 63mm). He also found that TBI to TB3 had been fired cartridge that had been released from one gun. He also microscopically examined and compared in conjunction with three test cartridge cases that were fired from the Winchester Rifle. As a result, he found sufficient matching firing pin markings and sufficient matching breech face marking to enable him form the opinion that the three exhibit cartridge cases marked TB1 to TB3 were fired from the exhibit Winchester Rifle S/No. 117808 marked TC17. That apart, he also explained that firing pin markings are normally made by a firearm and that the same are unique to the firing pin in that firearm. He likened them to finger prints and explained that they cannot be transferred to any other firearm. He gave a further explanation that breech face markings are transferred by the breech face to the fired cartridge face and that the markings are also unique to each firearm. Eventually he produced the exhibit memo form exhibit 50 and his report exhibit 51 dated 29<sup>th</sup> of May, 2006. In his evidence PW35 Paul Waweru Kangethe introduced himself as an officer working with the Government Chemist Nairobi. He recalled that on 19<sup>th</sup> of May 2006 he received the following exhibits A1- cotton wool swab indicated as swab from the barrel, A2 – a cotton wool swab (control swab), TC6 – a multi-coloured woolen headcap indicated as from C and TC8 – a black stained green hat indicated as point “8”. After carrying a chemical analysis of the above items, he found out that there was no gun powder detected from the same. However, he detected traces of zink at the end of the sleeves of the shirt of the accused. The same was marked as item No. TC 20. On the swabs of the hole on the jacket of item marked TC14 – exhibit 3 traces of zink and lead were detected on the holes on the t-shirt of the deceased which was marked as item TC13 – exhibit 1. He marked the items as GC – A65/06 PWK. PW35 was also able to identify the woolen hat exhibit 8 and blood stained green hat exhibit 6. White/Black t-shirt exhibit 1 and maroon black jacket exhibit 3. Stained trouser exhibit 13 and long sleeved blazer exhibit 27. Eventually, PW34 compiled a report which he produced as exhibit 49. The exhibits had earlier been accompanied by an exhibit memo form exhibit 39. He also compiled a report on the swab and found that it did not have any gun powder. He later on produced the report exhibit 47. On his part, PW36 Superintendent Julius Kikwai Ole Sunkuli testified that he is attached to the CID Headquarters Nakuru as the officer-in-charge of operations. He recalled that on 10<sup>th</sup> of May 2006, while he was in his house at around 9pm he received a phone call from Chief Insp. Kiberenge Soronei who was by then the DCIO Naivasha. Further to the above, he explained to him that he was proceeding to a scene of shooting that involved the grandson of Lord Delamare. After ringing Mr. Amwata, PW36 was instructed to pass the message to SSP Geoffrey Mwangi. On 14<sup>th</sup> of May 2006, at around 4.20pm while PW36 was in the Provincial Police offices, he **recorded a charge and caution statement from Tom Cholmondeley**. After cautioning him, the accused elected to make a statement although he was told that he was not obliged to say anything. The accused was also informed by PW36 that if he opted to say anything then the same would be reduced in writing and produced in court as evidence. Having understood the charge and caution, Tom Cholmondeley **denied the charge and later signed the statement**. In response, PW36 countersigned and made a certificate stating that the accused had not been forced nor intimidated to make that statement. PW36 eventually produced the statement as exhibit 37. In his forensic evidence, PW37

John Kimani Mungai informed the court that he holds a Masters Degree in Forensic Science from London Southbank, United Kingdom. He also described himself as an analyst based at the government chemist department. He testified that on 19<sup>th</sup> of May 2006, the Government Chemist received the following exhibits: dry red stains in a khaki envelope marked 1, TC 1, red stains in a khaki envelope marked TC2, dry leaves in a khaki envelope, in a polythene paper bag marked .3, TC3, Black woolen hat with red/grey/green/yellow strips – wrapped in a khaki paper marked TC6, a soil sample in a polythene bag marked exhibit TC7.7, a green hat in a khaki paper bag marked TC. 8 – hat picked from point 8, a blood sample from the deceased marked deceased TC. 9, a black/white T-shirt in a khaki envelope marked t-shirt of Robert Njoya Mbugua TC13, a grayish jacket in a polythene bag marked TC 14 deceased, a panga wrapped in a paper bag marked TC 15, a bow and 4 arrows all wrapped in a paper bag marked TC 16, a khaki pair of long trouser in a khaki envelope marked Mr. Thomas Patrick Cholmondeley exhibit TC 19, a long sleeved blue shirt in an envelope marked Thomas Patrick Gilbert Cholmondeley exhibit TC 20, a blood sample in a bottle marked Accused blood – TC 21, a soil sample in Republic of Kenya envelope marked exhibit TC 22 – soil sample from area where the head of the impala was hanged, soil sample in a khaki paper bag marked exhibit TC 23 – slaughtering area of impala and greenish plant material in a khaki paper bag marked exhibit TC24 – intestine waste.

After examining the above items, PW37 came up with the following findings; the dry red stained blood marked exhibit TC1, TC2 and TC3 were found to be blood of human origin, no blood stains were detected from the woolen hat exhibit TC6, the soil sample exhibit TC7, the bow TC 16, soil sample exhibit TC 22, soil sample exhibit Tc 23 and reddish material exhibit TC 24, green hat TC 8, navy blue/white t-shirt – exhibit TC 13, grayish jacket TC 14 and a khaki pair of long trouser TC 19 were all stained with blood of human origin, panga – TC 15, four arrows TC 16 were all slightly stained with blood. He could not establish the origin of the said blood and long sleeved shirt exhibit TC20 was slightly stained with blood of human origin.

The above blood stains and samples were analysed using the DNA system. However, there were no DNA profiles that were generated from the envelopes marked exhibit 1 – TC 1, TC2, TC3 from the hat TC8, from the panga TC 18 from the shirt exhibit TC 13 from the arrows exhibit TC 16. PW37 also informed the court that the DNA profiles generated from the other samples are tabulated and produced at the end of his report. Eventually, PW37 came to the conclusion that the blood of the deceased was found on the clothes of the suspect and that there was very high probability that the blood came from the deceased. Unfortunately, PW37 could not identify the source of blood from the panga and arrows and hence the same could have come from other species. Ultimately he compiled and signed his report, on 21<sup>st</sup> of July, 2006 and he produced the same exhibit 44. He also produced exhibit memo form exhibit 43. On the other hand, PW38 Geoffrey Mwangi introduced himself as the SSP based in Nakuru Provincial CID Headquarters. Apart from the above, he also informed the court that he was the investigating officer in this case. He recalled that on 10<sup>th</sup> of May 2006, while he was resting in his house he received a call from Supr. Julius Sunkuli who informed him that there was a shooting incident at Soysambu Ranch of Delamare Estate at around 6 pm and that the PPO and the PCIO had already gone to the scene. On the following day, PW38 got a briefing from Mr. Amwata who instructed him to take over the case. Besides the above, PW38 learnt that the two suspects had already been placed in custody on suspicion that they were involved in a shoot out. The two suspects were the accused and Carl Tundo. By then PW38 had already established that the victim Robert Njoya had already died. From there, PW38 proceeded to the scene while accompanied by scene of crime personnel. On arrival, he was shown a place which had a pool of animals blood and it was alleged that the two dogs had been shot died. In addition to the above, he was also shown another place where it was alleged that the deceased had fallen. He was also shown a place where the carcasses of two dogs and an impala had been picked. While going around, he saw two caps exhibit 8, 6 and bathing sandals. He also found “matumbo” which belonged to the slaughtered impala. After directing the scene of crime personnel to take photographs, PW38 also directed Insp. Irungu to prepare a sketch plan exhibit 28. Though they tried to search for empty cartridges and bullet heads, the same was in vain. From there, PW38 went back to Nakuru Provincial Offices where he sent for the two suspects. Subsequently, the suspects took him back to the scene where they confirmed where they were and when the shooting took place. Specifically the accused pointed to him where he knelt down while shooting the dogs. The accused also explained to him where Carl Tundo was standing behind him and where the deceased laid. Apart from the above PW38 also explained to the court, where the

accused had heaped the two carcasses and an impala. According to PW38, the accused told him that he was supposed to show Carl Tundo a place to build a residential house and that it was inevitable for him to carry a rifle for self protection and his friends from the buffaloes. However, on their way back they met a group of poachers with one of them carrying an impala while accompanied by eight dogs. When he saw the poachers, the dogs barked at him and the poachers told him the following words “...*huwezi fanya kitu ....*” (*that means there is nothing that you can do to us*). It is at that stage that the accused knelt down and shot two dogs. Thereafter, the accused reloaded his gun and aimed the whitish dog that he wounded but did not die. PW38 further stated that when the accused **approached the victim, he was not sure that he had shot him**. The accused also complained to him that some poachers had aimed arrows at him. He only realized that he had shot somebody when he saw the deceased fall down and started shouting, “.....matakoto .....matakoto” ..... In response the accused rushed to the deceased who was still crying and tied his handkerchief to the wound on the left buttock. Despite the above, the bleeding still continued. It was the evidence of PW38 that it was the **accused who confirmed that he had used four rounds of ammunitions**. Eventually, the accused told him that he had taken the deceased to the car so that he could get him to the hospital. From there, he decided to remove the two carcasses to another point where he hid them. That apart, he also went and took the panga where the deceased had laid down. That means when the police team went to the scene, they found that the scene had already been interfered with. The accused also explained to him how he had handed over the deceased to Jeff Mito and Sgt. Mukolwe to take him to Pine Breeze Hospital Nakuru. Unfortunately the deceased died before he could be treated. After PW38 was through with the accused he directed that the two suspects be returned to custody. From there, PW38 went to Gilgil Police Station and collected the Winchester Rifle, the sheath, 13 rounds of ammunitions, four arrows and bows that were produced in court as exhibit 17 and 18. PW38 was also informed that the carcasses had been taken to Nakuru Veterinary laboratory for postmortem and possible recovery of the bullet. Eventually PW38 recorded a statement from both the accused and Carl Tundo on 12<sup>th</sup> of May 2006. However, the statement of the accused was not produced following objections from the defense counsel. Following further investigations, PW38 visited Kiunguria Village where he was informed that there were only three persons who had gone to the Delamare Estate to hunt. On 14<sup>th</sup> of May 2006, Peter Gichui and Joseph Kamau wa Muthoni went to his office at around 6pm and confirmed that they had earlier accompanied the deceased to the Delamare Farm. On the same day, PW38 caused the statements of suspects to be recorded. On the following day, the two suspects accompanied him to the scene where they showed him how they entered the Delamare Farm and how they had laid down nine snares exhibit 9. Thereafter, the two repeated exactly what they had earlier told this court in relation to the incident. Eventually after recording the statements of the two poachers, PW38 released them and thereafter organized for the postmortem of the deceased to be carried out. In addition to the above, PW38 explained to the court how he visited the scene on several occasions. That apart, he also explained that on 17<sup>th</sup> of May 2006, the accused agreed to go with him to go to the scene for purposes of making a video recording. During the shooting of the video recording, the accused explained in details what had transpired on the material day. After the postmortem was carried out, the bullet fragments were forwarded to PW38. Ultimately, PW38 received various reports from different government agencies which he compiled before the accused was brought to court. Though PW38 was not present when Mr. Mutua and the team of police officers recovered the three spent cartridges and live bullet, the same were later handed over to him. On conclusion of his investigations, PW38 forwarded the file to the Attorney General. That culminated in the accused being arraigned before the court on 24<sup>th</sup> of May 2006. PW38 also pointed out that on 14<sup>th</sup> of May 2006, the accused recorded a charge and cautionary statement before a Molo Magistrate. In that statement, the accused denied the charge before that court.

In his defence, Thomas Patrick Gilbert Cholmondeley (hereinafter referred to as the accused) stated that on 10<sup>th</sup> of May 2006 he was a resident of Soysambu Ranch. On the said date, he had arranged to meet Carl Tundo whom he had known for about thirty years. The accused explained that after he was dropped in his house at around 5.30pm, Carl Tundo went there and they decided to go to Milia Hills to look for a suitable site to build a residential house. Since the accused did not want to risk being attacked by wild animals, he armed himself with a rifle. He explained that during that time, people had been attacked in the farm and specifically buffaloes had killed three people, including Simon Combes. He also recalled that in 1997, he had also been attacked by a buffalo and he showed the court the scar on his leg. Besides

the above, the accused explained that the rifle he was carrying was loaded with two rounds of ammunitions in the magazine. Apart from the above, he also carried a box of ammunitions, though he could not remember the number of rounds of ammunitions. The accused also explained that they used a Toyota Rav4 that belonged to Carl Tundo and drove for about 15 minutes up the hills. On reaching the hill, the accused took the gun from the case and loaded one round of ammunition to enable him fire quickly incase a buffalo surprises them at close quarters. Since Carl Tundo did not like the site, they drove the car to the bottom of the hill and walked into the bush for about 20 minutes. Unfortunately, Carl Tundo did not like the site since the same was too bushy and there wasn't any good view. From there they walked for about 15 minutes and Carl Tundo explained that he wanted to relieve himself and also explained that he would catch up with the accused. However, after about 20 minutes, the accused was surprised by a group of five people and a number of dogs. These were 20m to his right and were talking among themselves. According to the accused, he thought that he heard one of them saying the following words ".....hawezi kufanya kitu ....." . On seeing the dogs ahead of the five men, the accused dropped on one knee and aimed through the telescopic site and hit the red/brown dog. The accused reckoned that he shot one dog and saw it drop instantly. Then he shot the second dog. Further to the above, he also explained that the shots vibrated the hillside and left his ears ringing. Apart from the above, the accused also explained that he loaded the magazine with five rounds of ammunition and then shut the rifle and put the ammunition box in his pocket. While he was doing that, the accused saw a man whom he had seen earlier running on his right disappearing on the left in the bushes. The accused observed that one of the guys was carrying a gazelle on the shoulder but had a black strip on the side. In addition to the above, the accused also saw a white fluffy dog and fired two shots at it. To him it was the only thing in view of the telescope and he thought he had hit it on the front leg. He also explained that he saw it limp off after he shot it. While pursuing it into the bushes, the accused was shocked and surprised to find a man on his left about 20m away. At that stage, Carl Tundo appeared on his left while carrying a pistol on his hand and went about 50m into the bush ahead. According to the accused, Carl Tundo fired the white dog that was on the ground. The dog died and never moved again. Prior to the above, he explained that he did not know that Carl Tundo was carrying a pistol. However, in his statement to the police, the accused never mentioned that Carl Tundo was carrying a pistol. The accused explained that he never did that because when they were arrested Carl Tundo was tearful and upset at the Nakuru Police Station. It was also the evidence of the accused that Carl Tundo had asked him not to mention it for fear of getting into trouble. While they were at the scene, the accused explained that he saw the deceased bleeding and saying the following words "....*matako* .....*matako*....". It was at that stage that the accused shouted to Carl Tundo to bring the car so that they could take the deceased to the hospital. The accused confirmed that he had borrowed a cellphone from Carl Tundo because his was not working. He also admitted that he had rang Jeff Mito so that they could meet on the way to allow the deceased to be taken to the hospital. The accused also explained how he had tied his handkerchief to the leg of the deceased to try and stop the flow of the blood. Apart from the above, he recalled how he had grabbed two reddish brown dogs and an impala into the open place near the car to dissuade poachers or animals. On the way they met Jeff Mito and the policeman in one car. They also met Stephen Koigi and the policeman in another car. They then transferred the man into the car where Jeff Mito and Snr. Sgt. Mukolwe were. After giving them his credit card, the accused directed them to take the deceased to Pine Breeze Hospital, Nakuru. While there, Carl Tundo sped off without saying where he was going. From there, the accused went back to the scene while accompanied by Stephen Koigi and the policeman that he was with. On arrival at the scene, the accused showed the policemen the dogs and the impala. Consequently, KWS officers went to the scene while accompanied by police officers. Eventually, Carl Tundo and his father arrived at the scene while using a pick-up and parked at a distance where the accused had seen a white dog. According to the accused, he was by then shocked and confused and hence could not tell the order in which people arrived at the scene. Eventually, both the accused and Carl Tundo were taken to Nakuru Police Station where they were locked up. The accused reckoned that he could not see how he could have shot that person since he was not in the telescopic view when he shot those dogs. In addition to the above, the accused stated that had he shot the deceased then he would have expected him to be where he had shot the dogs. The accused could not understand why the man would have been 20m to the left if he had shot him. He emphasized that he had shot the white dog twice and he saw Carl Tundo shooting the same white dog. Besides the above, the accused explained how he was taken back to the scene on the following day and interrogated. That apart, he also explained how he found carcasses and the deceased. On the 5<sup>th</sup> day he was taken back to the scene to help the police find the cartridges. He concluded his defence by stating

that when the video was being taken, he had not been told where they were going. As far as the accused was concerned he could not have shot that man.

On the other hand, DW2 Benson Gathirwa Ngugi introduced himself as a worker attached to Delamare Estate Ltd. He also testified that on 10<sup>th</sup> of May 2006 at around 6.30pm he was informed by Stephen Koigi that there was a shooting incident in the Soysambu Farm. On going to the scene of the incident, DW2 saw two carcasses of dogs and one carcass of an impala that was headless and did not have any intestine. The same had all been heaped together. Subsequently the accused introduced the DW2 to Carl Tundo and his father. While the scene of crime personnel were taking photographs DW2 went to relieve himself behind a pick-up and saw a white dog that had three legs. Though he immediately informed Carl Tundo, the latter told him to leave that issue alone. Though the accused and Carl Tundo left the scene earlier, DW2 remained behind until the PPO arrived. Consequently while DW2 was on his way home, Koigi rang and instructed him to go back to the scene to collect the two dogs and an impala since they were required by the police. Specifically, DW2 stated that he never collected the third dog since he had been told to leave it alone by Carl Tundo. Thereafter, they handed over the carcasses to police officers who had their own vehicles. After a couple of days, DW2 was interviewed by a private investigator called Alexander Ndegwa. From there, they went to Carl Tundo house where Jeff Mito asked him about the white dog. In reply, Carl Tundo stated the following "...me and Benson know about the white dog and that I thought it was for Tom's benefit that we hide it". According to DW2, Carl Tundo went to his house on the following day at around 6am and asked him about his views in relation to Tom Cholmondeley case. However, the DW2 feigned ignorance on account that he was just in the shamba. Though Carl Tundo offered to fix grills on windows, DW2 reminded him that the house did not belong to him and that he should seek permission from the estate manager before any work is done. On the other hand, DW3 Chief Inspector Fanuel Musonge conceded that he had already given evidence as PW28. According to DW3 he was keeping in custody a master card for Frank Tundo D exhibit 1. Under the said master card, there are three firearms and these are as follows:

- Techmic – Short gun – 12 bore S/No. 71149
- Boito – Short gun – 12 bore S/No. 29247 – 02
- Beretta – Automatic Pistol – 9mm No. N92196Z.

He also testified that the bureau had issued temporary possession permits for the above firearms. That means that the licence can be extended to another person for three months. Secondly, he also explained that it can be extended to another person for the duration of the main licence. Later he produced a temporary possession permit D exhibit 2. On his part, Stephen Wando Hamisi Kepha introduced himself as the gardener working in the home of accused. He confirmed that on 10<sup>th</sup> of May, 2006 while he was with Benson Ngugi the latter received a phone call directing him to collect two dogs and an impala which they were supposed to take to the vet. On receipt of those instructions, he accompanied Benson Ngugi to collect the carcasses which they later handed over to two police officers who were having a pick-up at the main gate. He also explained how he saw the car belonging to a Mr. Cavenagh carrying two Europeans being driven towards 'Look-out' area. In her evidence, DW5 Jane Wangui Maina explained that she worked for Frank Tundo for three and half years in Soysambu Farm. Besides the above, she testified that on 10<sup>th</sup> of May, 2006, she saw Carl Tundo carrying something that had been wrapped and that he went towards the kitchen and later to the boiler which normally uses firewood. Immediately Carl Tundo called out for his mother and he came out without carrying anything before going to wash his hands. After whispering to his mother the two went to the sitting room for about thirty minutes. Subsequently, the mother directed DW5 to tell the askari to call Maina to wash the car. While going towards the boiler, DW5 saw something burning in the fire and stated that it was what Carl Tundo had carried earlier. Subsequently, Maina told DW5 that there was a lot of blood in the car. At around 7.30pm Frank Tundo went back to the house and joined his wife and son in the sitting room. DW5 further stated that he heard Frank Tundo telling his son the following words "...this is the thing that we should remove first ...." Thereafter, Frank Tundo left the house while accompanied by his son in his pick-up. On the following morning at around 7.30 am DW5 saw Frank Tundo with Cavenagh who used to own a red Mitsubishi. From there, Frank Tundo left with Cavenagh while using the red car. Consequently, Jeff Mito and

Alexander Ndegwa went to that home and interrogated DW5 on how Carl Tundo had gone to that house on the material day. DW5 conceded that she never saw any cartridges in the vehicle that Maina had washed since she had not gone to the same. However, she told them that she had seen two cartridges next to the bed of Frank Tundo on the following day. She further explained that she never saw the two empty cartridges on 10<sup>th</sup> of May, 2006. According to DW5, she later gave the two empty cartridges to Jeff Mito after she had placed them on a toilet paper. She was able to identify the two empty cartridges as D exhibit 3. On the other hand DW6 Douglas Maina Gatia introduced himself as the security officer at Delamare Estate. He testified that on 10<sup>th</sup> of May, 2006 he saw Carl Tundo talking to his mother on a low tone. Immediately Mrs. Tundo directed him to collect soap and water to go and wash the son's car. While he was passing next to the boiler, DW6 saw something like clothe burning inside. While washing the red Rav4 car, the witness found a lot of blood at the back. After about half an hour DW6 saw Carl Tundo leaving with his father while using a white Nissan double cab. On the following day, DW6 washed the Rav4 car again and later washed a Mitsubishi car belonging to Alistair Cavenagh. Later on in the day, DW6 heard that Robert Njoya whom he knew had been killed. The witness concluded his evidence by stating that on 29<sup>th</sup> of September 2006 he left employment after he was told to wash blood and was abused by Frank Tundo. In his medical evidence DW7 Dr. Andrew Kanyi Gachie introduced himself as a consultant pathologist and a practitioner in forensic medicine. Apart from the above, he recalled that on 13<sup>th</sup> of May, 2006 he was involved in the postmortem of Robert Njoya following instructions from the family of the accused. Besides the above, DW7 stated that he agrees with the general comments on page 2 of the postmortem report. Thereafter he also testified that during the postmortem they gave the bullet fragments to the investigating officer. Eventually he prepared his own report which he produced as exhibit 3. It was his evidence, that his findings were in agreement with those ones of Dr. Gachau. Subsequently, DW7 testified that high velocity weapons normally cause devastating wounds and the bullet is likely to exit out of the body. In his opinion, a low or medium velocity weapon was used. He further stated that if a high velocity weapon was used, he would have expected massive bleeding, more damage and that the patient would have been incapacitated.

After the court delivered the summing-up, both assessors returned a verdict of "Not Guilty" against the accused for the offence of murder. Whereas the first assessor never gave any reasons, the second assessor gave lengthy reasons. His reasons were, inter alia, nobody had seen the accused shoot the deceased. Secondly, the second assessor also stated that the accused never planned the shooting and that he had intended to shoot the dogs. Thirdly, he also pointed out that the accused had called Jeff Mitto to take the deceased to the hospital. The final reason is that the accused informed the police about the incident and that the bullet fragments were **not** suitable for comparison. No doubt, the reasons given by the second assessor are detailed to the extent one would be tempted to think that he has undergone some legal training.

During the trial, the prosecution called a total number of thirty-eight witnesses. Among the witnesses who were at the scene was PW4 – Peter Gichuhi Njuguna who admitted that he had accompanied the late Robert Njoya to the Delamare Farm on the material day. As stated earlier, when they entered the farm they found a gazelle that was already dead and they removed the intestines and cut off the head. While they were walking to the nearby tree, PW4 heard a big sound and he realized that somebody had fired a gun shot and hence he started running away. Thereafter, PW4 heard three gun shots from the same direction. When PW4 concluded his evidence, he admitted that he never saw the person who fired the gun shots. The second person who was present at the scene was PW5 Carl Jeampiere Tundo who had gone to look for a suitable parcel of land to build a residential house. Though he had stated that he had known the accused for only five to six years, the latter stated that they had known each other for about 30 yrs. According to PW5, while they were inspecting several sites, he stopped to respond to a call of nature. However, on finishing, he realized that the accused had gone ahead and hence he could **not** see him. After walking for a few metres, he saw the accused who was about 15 to 20 metres away. It was the evidence of PW5 that he saw the accused on one knee while holding his rifle. Then PW5 heard loud noise as the accused was aiming at something. In addition to the above, PW5 heard voices of human beings talking. That apart, PW5 thought that he had seen some wild animals whom he later learnt that they were dogs. According to PW5, the incident took about three to five seconds and that by that time, the accused was about fifteen to twenty metres away from him. Besides the above, PW5 also estimated that the animals were about fifteen to twenty metres away. It was the evidence of PW5 that when he

heard the accused firing, he realized that he should get away and hence he turned back and ran towards the car. He ran for about a hundred metres. PW5 thought that he heard three or four shots in quick succession and after he ran for about a hundred metres, he heard the accused calling him. According to PW5, the accused told him to get the car since he had hit somebody by mistake. Seeing the above, PW5 complied and drove the car to where the accused was. On arrival, he found the accused tying a handkerchief on the legs of Njoya who was bleeding from the back. **The PW5 stated that he had clearly heard the accused telling Jeff to take the police** to the scene since he had shot somebody by mistake. PW5 heard that conversation after he gave his mobile phone to use in ringing Jeff Mitto. Consequently, the accused told PW5 that they had to take the injured man to the hospital and he picked him up. In addition to the above, PW5 later saw the accused picking up the carcasses of two dogs, an impala, panga and rifle. He later put all the above in the car ? all at once. PW5 reckoned that the incident took about ten to fifteen minutes. After the accused and PW5 drove for a distance, they met Jeff Mitto who was driving a Peugeot van while accompanied by a police officer and two other people. At that stage, the accused transferred the victim to another car and directed Mitto and the other people to take him to the hospital. Besides the above, the other witness who was present during the incident was PW9 ? Joseph Kamau Muthoni. PW9 conceded that the deceased had requested that he should accompany him to the Delamare Estate to check on the traps that they had set. PW9 conceded that he was carrying a panga, a rungu and was accompanied by a black male dog. He also testified that the late Robert Njoya was carrying a panga and was accompanied by two white dogs. In addition to the above, PW9 explained how they collected a dead gazelle from a trap that never belonged to them. While they were heading towards a tree of their choice, PW9 heard gun shots before he escaped on his left. PW9 testified that he saw the late Robert Njoya running straight on. Thereafter, PW9 recalled that while they were running away, he heard five gun shots. After managing to run away from the scene of the crime, PW9 was later informed that the late Njoya had been killed in the Delamare Farm.

From the evidence of the above key witnesses, it is crystal clear that there were several gun-shots at the Delamare Farm on the material day. Both PW4 and PW9 conceded that they did not know who actually fired the gun shots. That in effect means that none of them actually saw the accused shoot and kill the deceased. The only witness who saw the accused shooting was PW5 Carl Tundo. He was the only eye-witness who saw the shooting from a distance of about 15 to 20 metres away. Though PW5 was cross-examined very vigorously by the lead defence counsel, his evidence was not shaken. He remained firm and steadfast. It was only during that cross examination that the issue of the second-gun was raised. That was raised several months after the commission of the offence. At this stage, I do agree with the submissions of the learned DPP that the issue of the second gun was an afterthought since the same should have been raised at the earliest opportunity. That was not done. Apart from the above, I also concur that human conduct is usually led by self-preservation and self-interest. I would also wish to use my own words and state that the survival principle is very basic to human beings. Other principles flow thereafter. Besides the above, the court notes that immediately after the incident, the accused voluntarily recorded a statement on 12<sup>th</sup> May, 2006 – Ex. 33 – and he never mentioned to SSP Mwangi that Carl Tundo had a pistol that he used to shoot the white dog. Besides the above, the accused had the chance and opportunity to talk to PW1, PW13, PW16 and explained that he had shot somebody “by mistake”. That apart, when the accused was being video-taped, he also conceded that he had shot the deceased by mistake. It is **not** lost on this court that when the video-recording was being done, the accused was accompanied by an experienced Nakuru lawyer who was identified as Mr. Kagucia. Assuming that this court rejects the evidence of PW10, PW13, PW16 and the video-recording, I still find that the evidence of PW5 – Carl Tundo is credible and without any malice. His evidence did **not** only place **the accused at the scene but also proved that he had fired several bullets**. More importantly, his evidence clearly showed that there was only one firearm at the scene. And that is the Winchester rifle of the accused. Though there is no love lost between Carl Tundo and the accused, the court does **not** wish to intervene in their personal differences. In addition to the above, the court has observed that the sworn evidence of Carl Tundo tallied up with the statement of the accused to PW3 and the video-recording. Apart from the above, it is apparent that the three spent cartridges – Ex. 19, 22, 23 and the live ammunition Ex. 20 were examined by PW34 – Mwongela and found to have been fired from the Winchester rifle – Ex. 12 (a) that belongs to the accused. Significantly, the searching party never found any spent cartridges belonging to any other firearm at the scene. The search party was led by the former Deputy Commissioner of Police viz, Mr. Mutua. Having observed his manner and demeanour, I do believe his evidence that the above

exhibits were recovered under his supervision. Since he never had any interest in the matter, I am convinced that he availed all the exhibits that he collected at the scene. Had a pistol been used by Carl Tundo, then obviously some spent cartridges would have been found at the scene. Besides the issue of a second-gun, the defence counsel raised the issue of a white fluffy dog that was said to have been killed by Carl Tundo. With due respect to the learned counsel, the sequence of events as depicted in his submissions are contradictory. On the day that Carl Tundo and his father went to the scene, the police tactfully and diplomatically arrested two suspects. These were the accused and Carl Tundo who were given a lift to Nakuru Police Station by Frank Tundo. Thereafter, they were put in custody on arrival in Nakuru. Assuming that Carl Tundo picked the white dog, how did he dispose off the same under police escort? In addition to the above, it seems strange and amazing that the accused never collected the white fluffy dog that he claimed was killed by Carl Tundo. Had the accused done that, then the examination of the said dog would have revealed that the same had different gun shot wounds. In turn, it would also have proved that there were two guns that were used during the incident. Since the accused never collected that particular dog, the court is entitled to assume that his version of the story was not correct nor accurate. Subsequently after the incident, the accused had several opportunities to reveal that Carl Tundo had killed a dog. **Unfortunately, the accused decided to conceal what now to him seems very vital information.** That apart, the fact that the bullet fragments were *not* suitable for microscopic examination does *not* in any way suggest that there was a second gun at the scene. In view of the above, I hereby find that there was only one Winchester rifle that was at the scene. It was the said weapon that was used to shoot the impala, two dogs and the deceased.

In the case of DPP –vs- SMITH (1960) 3 ALL ER The House of Lords held as follows:

***“The objective test that the trial Judge had applied, viz, the test of what a reasonable man would contemplate as the probable result of his acts and, therefore, would intend, was, as stated at letter D above, the right test.”***

As far as the cause of death is concerned, the post-mortem report – Ex. 29 that was prepared by Dr. Gachau and counter-signed by Dr. Gachie state as follows:

***“haemorrhage due to illial laceration due to a single gun shot wound to the pelvic”.***

Though Dr. Gachie consequently prepared an independent report, he also reached the same conclusion. Though Dr. Gachie gave expert evidence on the injuries, the court wishes to state that the same is *not* binding to the undersigned. I also note that his evidence was also contradictory. Whereas he stated that he expected more bleeding if a high velocity weapon was used, the deceased died within a few hours of the incident. He died due to haemorrhage!!

In the case of TRACY PEERAGE CASE (1843) 10 Cl. & F 191, the court stated as follows:

***“It is often quite surprising to see what facility, and to what extent (expert witnesses’) views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed willfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion.***

***With rather less delicacy, Lord Campell declared in the Tracy Peerage Case that ‘skilled witnesses come with such bias on their minds to support the case in which they are embarked that hardly any weight should be given to their evidence’. Modern variations on this venerable theme continue to be recycled by commentators, and to the rounds in practitioners’ anecdotal tales of ‘cowboys,’ ‘hired guns,’ ‘instant experts,’ and ‘liars for hire.’***

As far as the issue of malice afterthought is concerned, the court has to examine deeply the total circumstances of the case. In the first place, the accused and Carl Tundo had specifically gone to look for a suitable site for construction of a residential house. It was Carl Tundo who was desperate for that site. The accused never carried the Winchester rifle because he knew that he would meet the deceased.

Specifically, he stated that he wanted to guard himself and friend from wild animals. He also recalled how three people had been killed by buffaloes ? including Simon Combes. Those facts have **not** been contested. On the other hand, it was obvious that the deceased, PW4 and PW9 had trespassed into the Soysambu Farm for poaching purposes. Both PW4 and PW9 were candid on that issue. That means that their entry was illegal and that they had no business to enter the said farm. Having stated the above, PW4 and PW9 also conceded that they were armed with pangas, rungas, a small iron bar – and were also accompanied by several dogs. Though the accused explained that he was confronted by five people who were accompanied by several dogs, **the medical evidence on record show that the dogs were hit from behind. Further to the above, the medical evidence also show that the deceased was shot from behind. That shows that the dogs were fleeing from the scene. Similarly, it also shows that after the first shot, the deceased was also running away from the scene.** The above analysis is consonant with the stories of PW4 and PW9 that when they heard the first bullet they all took off. The above facts also prove that the story of the accused that he was confronted by poachers who dared him is **not** correct nor accurate. Having stated the above, the conduct of the accused after the shooting clearly show that the accused shot the deceased by mistake and became extremely remorseful on what he had done. Towards that end, the accused gave the deceased first-aid by use of his own handkerchief. **Secondly**, he caused the deceased to be taken to the hospital and even offered his own medical card. Subsequently, the accused fully co-operated with the police by going back to the scene and explaining what had happened. The above is not the conduct of a vengeful and malicious person. The accused had aimed to kill the dogs and succeeded in finishing two of them. That was a risky decision because he ended up shooting the deceased and killing him. Having seen the dogs accompanied by human beings, the accused must have been aware of the dangers posed at shooting at them. With the benefit of hindsight, he should have shot in the air. I find as a fact that it was the accused who shot the deceased resulting in his death. In view of the above analysis, I hereby find, which I do that the accused did **not** have any malice afterthought to kill the deceased. In the final analysis, this case has been proved beyond any reasonable doubt, both through direct and circumstantial evidence as outlined above. Due to lack of any malice aforethought, hereby, I reduce the charge to Manslaughter, contrary to Sec. 202 as read with Sec. 205 of the Penal Code, Cap 63, Laws of Kenya. The circumstantial evidence adduced irresistibly lead to the “guilt” of the accused.

In the case of **KIMEU –VS- REPUBLIC** 1 KLR (2002), 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.***

In the case of **R –vs- TAYLOR, WEAVER AND DONOVAN** (2) the court stated that the principle as regards the application of circumstantial evidence was enunciated in these words:

***“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”***

As stated earlier, due to the total circumstances of the case, I hereby reduce the charge to that of Manslaughter, contrary to Sec. 202 as read with Sec. 205 of the Penal Code, Cap 63, Laws of Kenya. The accused is hereby found “guilty” of the offence of Manslaughter, contrary to Sec. 202 as read with Sec. 205 of the Penal Code, Cap 63, Laws of Kenya. In the same breath, I hereby reject the defence case since the same has no merits at all. Obviously, the defence of the accused was an afterthought on realizing the gravity of the offence. The accused is convicted accordingly. In the same breath, I hereby wish to set aside, the verdict of the two assessors due to the above analysis and reasons. Lastly, the court is immensely grateful to all the counsels for their contributions. Similarly, I am also grateful to the assessors for their contributions and participation.

**MUGA APONDI**

**JUDGE**

Judgment read signed and delivered in open court in the presence of the accused:

***TOBIKO, GUMO & IMBALI*** for Republic

***OJIAMBO, MRS. SHAW & MUTHUI*** for the Accused

***MBIYU*** watching brief for deceased family

***Assessors:***

(a) Linet Boyani Nyachio

(b) Raphael Chege Kamau

***Order:***

The two assessors to be paid allowances.

**MUGA APONDI**

**JUDGE**

**7<sup>TH</sup> MAY, 2009**