Chirchir & another v Republic (Criminal Appeal 31 of 2022)
[2025] KECA 1369 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1369 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 31 OF 2022

PO KIAGE, J MOHAMMED & WK KORIR, JJA

JULY 25, 2025

BETWEEN

WILLIAM KIPKORIR CHIRCHIR ..... 1ST APPELLANT

GODFREY KIPNGETICH KIRUI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Nairobi (S. N. Mutuku, J.) dated 11th May 2021 in HCCRC No. 28 of 2018)

JUDGMENT

1. In 2018, as the country entered the month of Ramadhan, the security sector heightened security vigilance on the backdrop of intelligence of possible terror attacks. William Kipkorir Chirchir ("the 1st appellant") and Godfrey Kipngetich Kirui ("the 2nd appellant") were among police officers sourced from various posts within the Nairobi Area Police Command to undertake heightened routine patrols to deter and detect any potential Al-Shabaab terrorism attack. The 1st appellant was drawn from Lungalunga Administration Police Post, while the 2nd appellant was stationed at Industrial Area Police Station. On 20th May 2018, the two were in a contingent of 5 police officers dispatched from Parklands Police Station to conduct patrols around Nairobi's City Park area.

   The patrol was eventful because at about 10.30 a.m. one Janet Wangui Waiyaki lay dead from bullet wounds arising from bullets discharged from the appellants' firearms. The appellants were subsequently charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars as per the information were that on 20th May 2018, at about 10.30 hours at City Park, Parklands in Westlands Sub- County, within Nairobi County, the appellants jointly murdered Janet Wangui Waiyaki. The appellants denied the information and were taken through a full trial.

2. The story that emerged at the trial was that the appellants were on patrol with Constable Christine Manga (PW8) and Constable Kenneth Kipngeno Kirui (PW9) under the command of Corporal Bramwel Adala (PW7) when they were alerted by Eustace Mureithi (PW4) of a suspicious vehicle parked next to Murumbi's grave within City Park. It is presumed that the grave belongs to Joseph Zuzarte Murumbi, the 2nd Vice President of the Republic of Kenya. We will let the witnesses, whose evidence we deem necessary for the resolution of this appeal, to speak for themselves.

3. Eustace Mureithi (PW4) was a guard with Nairobi City County stationed at Westlands Sub-County. He stated that on 20th May 2018, he was called by his colleague to resolve some issues at Murumbi quarters. While there, he saw a vehicle parked at the fence of Murumbi's grave. He was not concerned but his curiosity was aroused when someone informed him that the vehicle had been at that place for a while and may have been stolen. He immediately reported the presence of the vehicle to the police, and five police officers accompanied him to the scene where he pointed out the vehicle to them. While standing about 100 meters from the vehicle, he saw the officers knock on the vehicle without a response, after which they took time discussing the situation. Thereafter, he saw one of the officers in front of the vehicle, and it was then that the vehicle took off at a high speed, almost knocking down the officer. Shortly after the vehicle had sped off, he heard gunshots and saw the vehicle land in a ditch. It was his testimony that he could not tell which officer or officers fired at the vehicle.

4. PW7 was attached to Embakasi Police Station at the material time. He recalled the events of 20th May 2018, stating that he was dispatched to Parklands Police Station for deployment, where he reported for duty at 7.00 a.m. He was assigned to lead a team of four constables for routine patrols. Each of the four constables was armed with a rifle. His team was assigned to patrol the City Park area. He recalled that while on a patrol, PW4 approached them and informed them of a suspicious vehicle parked within the Park next to Murumbi's grave. He led his team, which included the two appellants, to the motor vehicle, a densely tinted Toyota Fielder registration number KBX 615H ("the vehicle"). He used his swagger stick to knock on the vehicle, but there was no response. He then informed the duty officer at Parklands Police Station to organize for the vehicle to be towed to the Station. Soon thereafter, while standing at the front of the vehicle, it was suddenly ignited and sped off, forcing him to jump out of its way. They shouted at the driver to stop, but the vehicle did not stop. At this point, one of the officers fired at the vehicle, bringing it to a stop. According to the witness, the bullets entered the vehicle through the rear windscreen. The witness testified that he never issued a command to shoot. He reported the incident to the Officer in Charge of Parklands Police Station, who, upon arrival, opened the vehicle, and that is when they realized that a female occupant had been killed and the male driver was injured.

5. On her part, PW8 recalled that on the material day, she was deployed under the Nairobi Area Police Command for an operation bringing together officers from the Administration Police Service and the Kenya Police Service. She recalled that she was on patrol in the company of the appellants, another officer, and PW7, who was leading them. She stated that she had an AK-47 rifle serial number 4848073 with 20 rounds of ammunition. She also testified that apart from PW7, the other officers were armed. Her account on how they were deployed mirrors that of PW7 and we do not find it necessary to regurgitate that evidence. As to the events at City Park, PW8 testified that when they arrived where the vehicle was, PW7 knocked on the vehicle using his swagger cane, but there was no response. After some time, the vehicle was ignited and drove off, almost knocking PW7. She then heard gunshots, and the vehicle stopped. Her evidence was that she never heard PW7 issue a command to shoot. She nevertheless clarified that one does not have to wait for the commanding officer to issue an order to shoot. The witness also stated that she saw a bullet entry point on the left back door and that, had there been an intention to kill, the driver would have been shot. She added that had PW7 not jumped out of

the way, he could have been run over by the vehicle as it sped off. She also stated that they spent about 10 to 15 minutes beside the vehicle before it attempted to speed off. She further testified that she heard 3 gunshots and that no warning was issued to the occupants of the motor vehicle before the gunshots rent the air. It was her evidence that she never fired her firearm on that day.

6. When PW9 took to the witness stand, he testified that on 20th May 2018 he was attached to Embakasi Police Station but on that day, he was deployed for a security operation under the Nairobi Area Command. He was in the company of the appellants and PW8. The team was led by PW7. He identified his rifle for the day by serial number KPB 49941. His account of the events pertaining to the incident was that as they were patrolling near the Park, a man who introduced himself as a security officer informed them of a vehicle that had been parked there for a while. When they approached the vehicle, he remained behind so as to provide cover for his colleagues. When his colleagues arrived at where the vehicle was, PW7 knocked at the driver's door with a swagger cane, but there was no response. The windows of the vehicle were dark, and one could not see what was inside the vehicle. After knocking on the vehicle for some time without response, they concluded that there was no one inside and called the duty officer at the Station to dispatch a tow vehicle to the site. PW7, who was still knocking on the vehicle, went towards its front. It was then that the vehicle was ignited and sped off, almost knocking down PW7. They commanded the driver to stop, but to no avail. It was then that he heard gunshots, saw the vehicle veer off the road and stop about 50 yards away. He stated that the entry points of the bullets were on the left and right of the rear side of the vehicle. He confirmed that when the vehicle was searched, no weapons were recovered. He further stated that every police officer was accountable for their own firearm and that he never discharged his firearm during the incident.

7. At the time of the incident, the person on the wheel of the ill-fated vehicle was Bernard Gathuma Chege (PW3) who testified that after work on 19th May 2018, he picked up his aunt, Janet Wangui Waiyaki, from Greenspan, Donholm and they drove in the vehicle to Pangani Shopping Centre where they chewed miraa from 8.00 pm until 6.00 am the next day. Thereafter, they drove to Viewpoint along the Nairobi-Naivasha Highway to catch the sunrise, but without success because of cloudy weather. They drove back to Nairobi, arriving at about 9.00 am, where his aunt proposed that they "go and chill" at City Park in Parklands. At the Park, he stationed the vehicle near the cemetery where, being tired, he opted to catch a nap in the front seat while the deceased hopped into the back seat to rest. They had hardly rested for about 30 minutes when he heard a loud bang on the vehicle doors and saw more than two people outside the vehicle wielding guns. He stated that he was confused and his first instinct was to ignite the vehicle and speed off. As he drove off, he heard gunshots and felt pain in his right ribs. He stopped the vehicle, opened the door, and screamed for help in vain. Soon thereafter, a police car came, and the lady officer from the vehicle helped him into the car and drove him to the Avenue Hospital. PW3 testified that as he was being taken to the hospital, his aunt was still responsive, but he was later told that she had died at the scene. He denied knowing that the people banging on the door were police officers and testified that after the shooting, he saw three police officers. It was also his evidence that while he was a frequent visitor to the Park, he had only been there five times in the company of his aunt. He also denied being naked or in a compromising position at the time. Asked to describe the vehicle, he stated that all the windows, including the windscreen, were tinted and that the interior of the vehicle was not visible from outside.

8. Administration Police Sergeant Ephraim Njuki Karanja (PW10) at the time was attached at the Kaloleni AP Post. He stated that on 20th May 2018, he issued PW8 with an AK 47 rifle serial number 4848073 and a magazine of 20 rounds of ammunition. He stated that the firearm was not returned to him as it was confiscated after the incident for ballistic examination. He produced the Kaloleni AP Post gun movement register as Exhibit 2.

9. Superintendent of Police David Maina Kabutha (PW11) was at the time of the incident the Deputy Sub-County Police Commander, Gigiri Police Division. He stated that on 16th May 2018, there was an operation order given to provide security in Nairobi, organised by the then Regional Police Commander, Ole Tito. The operation was to provide security during the month of Ramadhan because there was intelligence received that the Al- Shabaab militants were organizing terror attacks targeting key Government installations and diplomatic missions within Nairobi City. He was tasked with coordinating the operation. On the morning of 20th May 2018, he deployed a team led by PW7, and incorporating PW8, PW9 and the two appellants to patrol the City Park area. Later, at about 10.00 a.m., he received a report from the OCS Parklands Police Station informing him of a shooting incident at City Park. He went to the scene where he found the OCS Parklands Police Station and the duty officer already there. It is then that he was informed that 2 officers had shot at the vehicle. On reaching Parklands Police Station, he discovered that the appellants had discharged a total of seven bullets from their guns.

10. Chief Inspector Police Moses Shikuku (PW12) was the OCS, Parklands Police Station under whose jurisdiction the five officers had been deployed. He recalled that at around 10.00 am on the material day, he was called by the duty officer, Corporal Chereket and informed of a shooting incident at City Park. He immediately proceeded to the scene. Before reaching Murumbi's grave, he saw the vehicle in question and was briefed by PW7 on what had transpired. He also spoke to PW3, who informed him that he was escaping from the contingent of police officers out of fear. He called the OCPD, who dispatched DCI officers to the scene. Together with the DCIO, they combed the area and recovered five spent cartridges and also proceeded to disarm all the officers involved and realized that two firearms, an AK47 and a Scorpion, had been discharged. He also oversaw the towing of the vehicle to Parklands Police Station.

11. Sergeant Tedy Wambua (PW13) was at the material time in charge of the police lines and armoury at Embakasi Police Station. On 20th May 2018, he issued PW9 with a Scorpion firearm Serial No. 849941 with 25 rounds of ammunition. He produced the firearm as Exhibit 3 and the arms movement register for the station on that day as Exhibit No. 3a.

12. Dr. Oduor Johansen (PW14) conducted an autopsy on the body of the deceased on 22nd May 2018. He concluded that the deceased died as a result of multiple gunshot wounds from a high-velocity firearm. He also retrieved a bullet and fragments from the deceased's body.

13. Corporal Stephen Kiongora (PW15) was at the time in charge of the armoury at the Industrial Area Police Station. He issued the 2nd appellant with an AK47 rifle Serial No. 6003442 with 30 rounds of ammunition. He produced an extract of the arms movement register as Exhibit 3b and the firearm as Exhibit 6.

14. Superintendent of Police Alex Chirchir (PW16), a ballistics examiner, produced a report dated 4th June 2018 through which he established that AK47 assault rifles Serial No. 60034428 and Serial No. 59010679 had been discharged at the scene.

15. Corporal Geoffrey Chelugui (PW17) confirmed that he was present when a report of a suspicious vehicle was made. He, however, left after five officers on patrol at City Park area were led to the place where the vehicle was parked, only to be drawn back to the scene after hearing gunshots. At the scene, he found the driver of the vehicle injured and the deceased lying at the back of the vehicle. He noted that the bullets had entered the vehicle through the rear windscreen.

16. IP Mary Nderitu (PW18) testified about the arrest of the 1st and second appellants after it was discovered that they had respectively discharged 4 and 7 rounds of ammunition from their firearms. She also stated that PW8 and PW9 did not fire their firearms.

17. Muigai Kandia (PW19), a motor vehicle inspector from the National Transport and Safety Authority, produced an inspection certificate number VTA No. 940654 for motor vehicle No KBX 615H. He found that all windows had fixed glass and both windscreens were fitted with high-density tint film. He also established that the vehicle tires were serviceable and had no defects.

18. Sergeant George Mathu (PW20) was at the time in charge of the Lungalunga AP Post armoury. He testified that on 20th May 2018, he issued an AK-47 rifle SN. 59010679 with 25 rounds of ammunition to the 1st appellant. He produced the arms movement register as an exhibit.

19. Police Constable Obed Ballesa (PW21) processed the scene of the crime and produced pictures as exhibits.

20. Police Constable John Ngugi (PW22) on his part gave an account of his investigations into the matter culminating in the arraignment of the appellants for the offence of murder.

21. When placed on their defence, the appellants gave sworn testimony without calling any witness. The 1st appellant stated that on 20th May 2018, he was dispatched from Lungalunga AP Post for a counter-terrorism operation in Nairobi under Corporal Adala's command. He was armed with an AK-47 rifle with 20 rounds of ammunition. While patrolling City Park, they encountered a suspicious black vehicle, registration KBX 615H, with tinted windows. Despite repeated knocks from Corporal Adala, there was no response from the vehicle. When the vehicle sped off after Corporal Adala attempted to stop it, the officers fired warning shots in the air, then aimed at the tyres to disable the vehicle. They later discovered a male driver and a female passenger inside, both injured, with the passenger later passing away. The 1st appellant expressed regret, stating that their intention was to only stop the vehicle due to the high alert on terror threats at the time. He confirmed that he used four rounds of ammunition and that his gun was confiscated after the incident.

22. The 2nd appellant confirmed his participation in the operation. He stated that he was on duty that day, deployed from the Industrial Area Police Station. He was issued an AK-47 rifle, Serial No. 60034428, along with 30 rounds of ammunition. He confirmed that he was one of five police officers assigned to patrol the City Park area. He described the vehicle in question as black and heavily tinted, making it impossible to see inside or determine if it had any occupants. He recounted the police actions that led to the shooting at the vehicle and explained that it was only after the vehicle stopped that they realized that it had two occupants. The deceased was in the back seat. His evidence was that they did not open fire immediately. Instead, after attempting to persuade the occupants to exit the vehicle and after it sped away, he ordered them to stop and fired at the tyres in an attempt to deflate them. He could not recall the exact number of rounds he used, but confirmed that the vehicle eventually stopped after he shot at the tyre. During cross-examination, he stated that both he and the 1st appellant initially fired shots in the air before aiming at the rear tyres. He confirmed that he had not been instructed to shoot and that he made the decision to discharge his firearm independently.

23. At the conclusion of the trial that featured 22 prosecution witnesses and the appellants' defence testimony, S. N. Mutuku, J. convicted the appellants for the lesser charge of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*. She thereafter sentenced each appellant to 7 years' imprisonment.

24. In finding the appellants guilty of manslaughter, the learned Judge held that:

> "My careful consideration of this element of murder, I am persuaded to give the accused persons the benefit of doubt that their intention was not to kill the deceased even though this court finds that they acted against the law. This brings me to the conclusion that the offence proved by the evidence before me is that of manslaughter and not murder by dint of absence of the element of malice aforethought or mens rea. I will and do hereby invoke Section 179 of the *Criminal Procedure Code* that gives power to the court to convict an accused person on a minor offence where the major offence charged and the minor offence are cognate."

25. Dissatisfied with the conviction and sentence, they have moved this Court, raising eight grounds of appeal which we condense as follows: that the case was not proved to the required standard; that the source of the killer bullet was not established; that the reaction by the appellants was proportionate, reasonable and not excessive in the circumstances considering the magnitude of the terrorism threat and alert; that common intention was not established; and that the sentence was not legally justified. On the other hand, the respondent filed a notice of enhancement of sentence dated 26th March 2025, through which the State seeks to have the sentence of 7 years enhanced to 20 years.

26. This being an appeal emanating from a High Court sitting as a trial court, our mandate as drawn from rule 31(1) of the Court of Appeal Rules amounts to a retrial which involves a re-appraisal of the evidence and drawing inferences of fact. In exercising the said jurisdiction, we are therefore expected to accord the appellants a thorough and fresh examination of the evidence before arriving at our own independent conclusion. In doing so, we must, however, warn ourselves that, unlike the trial court, we did not have the opportunity to hear and observe the witnesses testify in order to gauge their demeanour. The mandate of the Court has been expressed in a plethora of decisions, including Dickson Mwangi Munene & Another v Republic [2014] KECA 774 (KLR), where it was held that:

> "This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record. See Okeno v. Republic [1972] EA 32 and Mwangi v Republic 2002] 2 KLR 28."

27. When the appeal came up for hearing, learned counsel, Professor Nandwa and Mr. Robert Onyango appeared for the appellants while Senior Assistant Director of Public Prosecutions (SADPP) Mr. O. J. Omondi represented the respondent. Counsel made brief oral highlights during the hearing to buttress the written submissions which they had earlier filed.

28. The submissions by counsel for the appellants focused on the prosecution's failure to prove the essential elements of the offence of manslaughter, the lawful nature of the appellants' actions in a high-threat situation, and procedural missteps by the High Court. In summary, counsel for the appellants submitted that the prosecution failed to establish a case against them beyond a reasonable doubt. At the centre of this argument was the assertion that the source of the killer bullet was not established. Counsel maintained that since it was not determined who between the appellants fired the fatal shot, convicting both of them amounted to convicting innocent persons. Counsel submitted that the appellants only opened fire when a suspicious vehicle, after no response to their attempts to knock on its doors and bonnet, drove off at a high speed, and against the backdrop of a heightened security operation. Counsel also submitted that mens rea was not established in this case as was required. According to counsel,

the appellants were performing their duties as police officers to prevent a terrorist act and only fired when their team leader was endangered, and that they never aimed at the driver, being unaware of the deceased's presence in the rear seat. They contended that the appellants' reaction was proportionate, reasonable, and not excessive given the circumstances and the magnitude of the terrorism threat. Counsel argued that appellants' actions were in line with section 61 of the *National Police Service Act* (No 11A of 2011), Part A of the Sixth Schedule of the Act, as well as Chapter 47 of the Service Standing Orders.

29. Learned counsel additionally argued that the element of common intention was not proved. Reference was made to section 21 of the *Penal Code* for the elements of common intention. According to counsel, common intention can only occur where the prosecution establishes that the accused persons had a criminal intention, that the act was a natural and foreseeable consequence of the common purpose, and that the accused persons were aware of this when participating in the unlawful act. Counsel referred to Dickson Mwangi Munene & Another v Republic [2014] eKLR to stress that common intention implies a premeditated plan to act in concert, notwithstanding that it can develop during the commission of an offence. The case of Republic v Francis Muturi Munene & Another [2021] eKLR was cited to identify the elements of the doctrine of common intention. Finally, counsel submitted that the sentence imposed was without legal justification and that, as police officers performing duties to protect Kenyans from terrorist threats, the appellants deserved to be rewarded and compensated, not punished.

30. Learned prosecution counsel Mr. A. J. Omondi for the State began his arguments by referring to Kamau v Munai [2006] 1KLR 150 and Njoroge v Republic [1987] eKLR to point out the duty of this Court on a first appeal. Turning to his opposition to the appeal, learned prosecution counsel submitted that there was sufficient evidence to prove the charge of murder and its ingredients. In support of this assertion, counsel pointed out that the deceased was shot while inside a vehicle and that she died from multiple gunshot wounds that resulted in significant blood loss caused by a high-velocity firearm. Counsel argued that the evidence of the eyewitnesses implicated the appellants in the commission of the offence. Mr. Omondi also submitted that by jointly opening fire at a speeding vehicle, the appellants' common intention was established. He referred to section 206 of the Penal Code and urged that malice aforethought was established within the precincts of this provision. Learned prosecution counsel referred to Jonathan Lemiso Ole Kini v Republic [2018] eKLR to elucidate the factors to be considered in determining whether malice aforethought existed in the circumstances of a case. Referring to section 21 of the *Penal Code*, Mr. Omondi urged that the circumstances of this case fell within the parameters of common intention. As for the sentence, Mr. Omondi submitted that the sentence of 7 years' imprisonment for manslaughter was insufficient and urged us to accept his request and enhance the penalty to 20 years' imprisonment.

31. Upon considering the record and submissions by all counsel, we are of the considered view that what arises for our determination is whether the offence of manslaughter was proved against each of the appellants, and if so, whether we should enhance the sentence as urged by the respondent.

32. In this case, there was no contestation as to the fact that the deceased died as a result of gunshot wounds. The locus in quo is not in question either. Additionally, the appellants have been placed at the scene of the crime. Even from their evidence, the appellants conceded that while at the scene of the crime and at the material time, they discharged their guns. In a charge of murder like that which faced the appellants at the beginning of the trial, the prosecution was required to prove beyond reasonable doubt the death of the deceased, that the death was caused by an unlawful act or omission by the accused and that the accused in causing the death had malice aforethought. On the other hand, manslaughter, for which the appellants were eventually convicted required the prosecution to prove the appellants'

unlawful action or omission that caused the death of the deceased, without malice aforethought. That the deceased died as a result of the appellants' actions is not in doubt. That the appellants had no malice aforethought or the intention to kill is not an issue for our consideration because the learned Judge's finding that the appellants did not have the intention to kill has not been challenged by the respondent. This, notwithstanding learned prosecution counsel's attempt to make it an issue through submissions. It is our firm view, therefore, that the only issues as regards conviction are whether the appellants' act of killing the deceased was unlawful and whether they had common intention.

33. There appears to be a discrepancy in the identification of the gun that fired the fatal shot or shots. Indeed, the evidence of Sergeant Alex Chirchir (PW16) was unsatisfactory with regard to the identification and numbering of the ammunition. We would agree with counsel for the appellants that none of the bullet fragments found in the body of the deceased was capable of microscopic examination, and therefore it could not be determined who fired the fatal bullet(s). However, this discrepancy cannot absolve the appellants for the reasons that we will shortly highlight. Corporal Stephen Kiogora issued the 2nd appellant an AK-47 rifle, Serial No.60034428, with 30 rounds of ammunition, as can be gleaned from the arms movement register from the Industrial Area Police Station. The evidence of PW11 and PW12 confirmed that only 23 rounds of ammunition were recovered out of the 30 issued. The 2nd appellant had therefore discharged seven rounds of ammunition. PW16 also gave evidence that the 2nd appellant's firearm, at the time of submission for ballistic examination, had 16 rounds of ammunition. On his part, Sergeant George Mathu (PW20) testified that he had issued the 1st appellant with 25 rounds of ammunition and an AK-47 rifle, SN. No. 59010679. However, going by the arms movement register of the armoury at Lungalunga AP Camp, the 1st appellant was issued with 20 bullets and not 25 as claimed by PW20. Indeed, the arms movement register dovetails with the evidence of IP Mary Nderitu (PW18), who testified that at the time of the 1st appellant's arrest, it was discovered that he had discharged four rounds of ammunition. We will therefore go by the arms movement register and find that the 1st appellant discharged four rounds of ammunition, thus remaining with sixteen unused bullets.

34. Further, Superintendent of Police Alex Chirchir (PW16) examined the spent six cartridges recovered from the scene, which he marked as Exhibit Ei-Evi and concluded that Exhibit Ei-Evi were fired from an AK47 Serial No. 59010679, which was issued to the 1st appellant, while Exhibit Eii, Eiii, Evi, Ev, G and F1(b) were fired from AK 47 Serial No. 60034428 at the time in the hands of the 2nd appellant. This evidence leaves no doubt in our minds that the rifles held by the appellants were discharged at the scene. We also observe that the evidence was never denied or contradicted by the appellants in their defence. Indeed, they both readily conceded having discharged their respective firearms, and, as we have already established, the evidence adduced by the prosecution confirms that fact. We therefore find that even though the evidence on record cannot pinpoint the gun which fired the fatal shot, the same evidence confirms that both firearms were used. Indeed, the pathologist confirmed that the deceased suffered multiple gunshot wounds. The record is also clear that none of the appellants distanced himself from the killer bullets or presented evidence to exclude his gun from the injuries that caused the death of the deceased.

35. In the circumstances, we associate ourselves with the holding of this Court in Mungai v Republic [2021] KECA 51 (KLR) that:

> " Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the *Evidence Act* permits the court to presume the existence of any fact which is likely to have happened, regarding being had to the common course of natural events and human conduct."

36. The above excerpt succinctly captures the law in this regard. In our view, therefore, the key issue should be whether the ensuing circumstances justified the use and discharge of firearms by the appellants.

37. Section 61 of the *National Police Service Act* (No. 11A of 2011),authorize the use of firearms by police officers by providing that:

> "(1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by *the Constitution* and this Act by use of non-violent means.
>
> (2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule."

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

39. Part B of the Sixth Schedule gives the conditions to be met before a firearm is deployed. The relevant provisions read as follows:

> "1. Firearms may only be used when less extreme means are inadequate and for the following purposes -
>
> a. saving or protecting the life of the officer or other person; and
>
> b. in self-defence or in defence of other person against imminent threat of life or serious injury.
>
> 2. An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed, except -
>
> a. where doing so would place the officer or other person at risk of death or serious harm; or
>
> b. if it would be clearly inappropriate or pointless in the circumstances."

40. In I.P. Veronica Gitahi & Another v Republic [2017] KECA 787 (KLR), the Court considered the foregoing provisions and held that:

> "The provisions of the Act are a complete and exhaustive code and demand that a police officer must resort to non- violent means as the first option and to use force only when non-violent means are ineffective. In addition, even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance, and still, only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.

To determine whether a police officer has used force or a firearm as required by the Act therefore cannot be a subjective issue. The court must evaluate all the circumstances surrounding the use of force or firearm so as to determine, for example, whether force was used as a last option; whether it was proportionate to the threat that confronted the police officer; or in a case involving a child, whether the officer had made all effort to avoid the use of firearms."

We are persuaded and adopt the above reasoning. Applying the test established therein, we are bound to assess whether the use of force was the last available option, and whether the force deployed was proportionate to achieving the intended result.

41. In this case, the security apparatus was on high security alert pursuant to intelligence received of a likely attack by the Al- Shabaab militia. The appellants, together with PW7, PW8, and PW9, were designated to patrol the City Park area. When they encountered the parked vehicle, it appears they intended to interrogate the occupants, inspect the vehicle, and if need be, effect an arrest. From the evidence on record, once the officers arrived where the vehicle was, PW7, who was the team leader, knocked on the vehicle several times using his swagger stick, but there was no response. PW4, PW7, PW8, and PW9 all testified that after knocking on the vehicle, the officers assumed there was no one in the vehicle and took time deliberating on how to have the motor vehicle towed to the police station. The evidence also shows that the motor vehicle was densely tinted and there was no way one could ascertain what was inside. PW3, PW4, PW7, PW8, and PW9 all testified that before the officers could ascertain who or what was inside the motor vehicle, PW3 attempted to speed off. In our view, the act of speeding off defeated the officers' intention of inspecting the motor vehicle. We would therefore agree with the trial court's holding that:

> " It is clear to me that the non-violent means were ineffective and were without any promise of achieving the intended result. The intended result here was to have the occupants open the windows or the doors of the vehicle and identify themselves to the police. This was not achieved. The vehicle drove off. It was said that it almost knocked CPL Adala down. But it did not. CPL Adala was quick on his feet and he jumped off the path of the vehicle. He was not knocked down nor was he injured. There was no danger to life or to injury on CPL Adala or any of the other police officers at the scene. The occupants of the vehicle did not shoot at the police. They did not drive the vehicle towards the police to perhaps run over them. They were fleeing from the scene. The police are trained. They know when they are under attack or under threat of attack. I am sure when a vehicle flees or when a suspect flees from the police the intention is normally clear to even an untrained person that the suspect is trying to avoid arrest or shooting by the police and not trying to attack the police officers. In my layperson thinking I doubt that the terror groups including Al Shabab would have reacted the way Bernard did. They would have been armed and the first instinct would have been to shoot or risk being shot at by the police.
>
> The rules further provide that the force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders (emphasis added). The objective to be achieved here was to stop the vehicle from leaving the scene and perhaps identity the occupants and know the motive of their being where they were found. The two accused persons shot at the vehicle. They told the court that letting the vehicle leave the scene was not an option. This means that they had to use whatever means possible to stop it from leaving the scene. Although they said that they shot in the air to warn the occupants and make them stop it is clear to this court that

they also shot at the vehicle. Their evidence is that they were shooting at the tyres aiming to deflate them. The evidence before this court does not agree with that statement."

42. Considering the evidence, which we have ourselves reviewed, the learned Judge did not err in her analysis and conclusion. There was no imminent threat to the life of any of the officers or any other person. Any trained police officer would have instinctively concluded that the driver was trying to flee. The appropriate action in the circumstances was not to fire at the vehicle but to try to deflate the tyres or even relay information to other police officers to be on the lookout for the vehicle. This was not the case. PW19, a motor vehicle inspector, testified that the tyres were in good condition at the time of inspection. This contradicts the appellants' testimony that they shot at the tyres in a bid to stop the motor vehicle. It is also noted that despite strongly asserting that they shot in the air, the appellants conceded that they shot at the vehicle with the intention of immobilizing it. Additionally, the number of bullets discharged was more than necessary to meet the stated objective of immobilizing the vehicle. Indeed, the evidence of PW14, Dr Johansen Oduor, was that the deceased died as a result of multiple gunshot wounds. In our view, the force deployed was excessive and resulted in unnecessary loss of life.

43. Just for clarity, we agree with the learned Judge that the appellants did not have the required malice. In N. M. W. v Republic [2018] eKLR, the Court, citing with approval the case of Bonaya Tutu Ipu & Another v Republic [2015] eKLR, stated that:

> " It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances..."

44. As already stated, the appellants were not from within the jurisdiction where the incident occurred. They were sourced from other bases in response to heightened security measures. The motor vehicle, on the other hand, was tinted, and there was no way of ascertaining the number of occupants, except for the knowledge that a moving vehicle must have had a driver at the wheel. Even though we find that the appellants were reckless in using their firearms, we do not think that they did so with malice aforethought. Their intention can be summed up as a resolve to effect an arrest at whatever cost, oblivious of the danger attendant to their actions. It could be that their actions though unlawful were driven by the circumstances prevailing at that time and it cannot therefore be said that they were driven by malice aforethought.

45. We are therefore persuaded that even though their unlawful acts resulted in the death of the deceased, theirs was not a premeditated intent to end life. In the circumstances, the outcome in this case is as was held in Roba Galma Wario v Republic [2015] eKLR, that:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

We, therefore, agree with the learned Judge that it was the charge of manslaughter and not murder that was proved against the appellants.

46. In arriving at the foregoing conclusion, we appreciate that the threshold for proving manslaughter is not as stringent as that of murder. Simply put, all that the prosecution needs to establish is the existence of a dead body linked to the accused person's unreasonable action or omission. For manslaughter, the state of the mind (here we are talking about premeditation) does not count. Thus, in Attorney-

General's Reference (No. 3 of 1994), the House of Lords in an opinion delivered on 24th July 1997 held that:

> " Nor is it necessary, in order to constitute manslaughter, that the death resulted from an unlawful and dangerous act which was done with the intention to cause the victim to sustain harm. This is because it is clear from the authorities that, although the accused must be proved to have intended to do what he did, it is not necessary to prove that he knew that his act was unlawful or dangerous. So it must follow that it is unnecessary to prove that he knew that his act was likely to injure the person who died as a result of it. All that need be proved is that he intentionally did what he did, that the death was caused by it and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result."

47. As regards sentence, we note that the appellants did not appeal against the severity of their sentences, but the respondent filed a notice seeking to have the sentences of 7 years imprisonment enhanced to 20 years imprisonment. It is trite that sentencing is a matter of discretion by the trial court. As an appellate Court, we are reminded to approach the issue of sentence with deference and only interfere where the sentence is manifestly excessive or where the trial court overlooked some material factor, or considered some wrong material, or acted on a wrong principle. In this regard, the holding of the Court in Bernard Kimani Gacheru v Republic [2002] eKLR persuades us thus:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

48. Aware that each case must be determined on its own circumstances, we have considered the circumstances of this case and conducted a comparative study with cases where police officers have been convicted of manslaughter arising out of the misuse of firearms. For instance, in Stephen Ariga & Another v Republic [2018] KECA 325 (KLR), the Court affirmed a sentence of 3 years imprisonment, while in I.P. Veronica Gitahi & Another v Republic (supra), a sentence of 7 years imprisonment was upheld. This is just to mention a few decisions and point out that the 7 years imprisonment was consistent with the subsisting jurisprudence on sentencing in similar cases. In doing so, we have had sight of Stella Mutuku J.'s meticulous ruling on sentence dated 26th May 2021 and delivered on her behalf by Lessit, J. (as she then was) on 27th May 2021, and we cannot find fault with the manner in which she went about the sentencing issue. In passing the sentences, the learned trial Judge considered that the appellants were first offenders, the number of years they had served the country, the circumstances under which the offence was committed, and the views of the victims of the crime. There is, therefore, no basis for concluding that she violated the sentencing principles, thus warranting our interference with the appellants' sentences. We do not think that, in the circumstances under which the killing happened, the sentences of 7 years were too lenient to warrant our interference.

In the circumstances, we decline to interfere with the sentences as urged by the respondent.

49. The upshot of all the foregoing is that, upon consideration of the record and the rival submissions before us, we are satisfied that the appellants were properly convicted and sentenced. We therefore uphold both the conviction and sentences. As such, we find no merit in the appellants' appeals and dismiss the appeals.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR