IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:KOOME, OUKO,& M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 23 OF 2016

BETWEEN

I.P. VERONICA GITAHI…….....…….....……1ST APPELLANT

P.C. ISSA MZEE.....2ND APPELLANT

AND

REPUBLIC.……..…….……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa

(Muya, J.) dated 10th February 2016

in

H.C.CR.C. No. 41 of 2014)

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JUDGMENT OF THE COURT

This appeal arises from the tragic events that occurred at ***[particulars withheld] Village*** in ***Kinango Sub-county***, ***Kwale County*** in the early hours of 22nd August 2014. On that morning the two appellants, ***Inspector of Police Veronica Gitahi (1st appellant)*** and ***Police Constable Issa Mzee (2nd appellant)***, while on a mission apparently to apprehend suspected criminals, shot and killed ***K M (the deceased),*** a 14 year old girl in circumstances that the prosecution contends constitute the offence of murder. On their part the appellants maintain that they killed the deceased without malice aforethought and in self-defence and were therefore entitled to an acquittal.

Save for the circumstances of the death of the deceased, the other facts in the appeal are fairly straightforward. At the material time, the 1st appellant, a police officer of about 25 years standing, was the District Criminal Investigation Officer, Kinango, where she had served for barely two months. The 2nd appellant was a police constable, also based in Kinango, and was under the command of the 1st appellant.

Following what the appellants call a spate of murders in Kinango, the police decided to launch an operation to apprehend suspects in the wee hours of 22nd August 2014. A joint team of 13 criminal

investigation officers and administration police officers were assembled and deployed for the purpose. The team was divided into two groups, one led by ***Sergeant Said Mwinyi Bakari*** of Administration Police ***(PW10)*** and the other by the 1st appellant. The 2nd appellant was in the group led by the 1st appellant and was armed with an ***AK 47 rifle serial No. 4914030***and 30 rounds of ammunition. On her part the 1st appellant was armed with a ***Jericho pistol serial No. 40305198*** and 15 rounds of ammunition. On getting to *[particulars withheld]* Village at about 1.00 am, the teams alighted from their two vehicles and proceeded to different houses. PW10's group was able to accomplish its mission without incident, at the end of which they apprehended a suspect, ***Mambo Dalu*** who was subsequently charged in court. On its part, the 1st appellant's group went to the home of ***S C Z*** alias ***G Z (PW4),*** one of the suspects who also happened to be an uncle of the deceased. It was a rainy and pitch-dark night and the police had to use their torches to navigate their way.

At exactly the same time, the deceased and two children of PW4, ***M Z (PW8)*** and ***R Z (PW9),*** both aged about 9 years old, were soundly asleep in PW4's house. It is a hotly contested issue whether PW4 was in the house at the material time or whether he was at Kikambala, several kilometers away. According to PW8 and PW9 who gave affirmed evidence after *voir dire* examinations, the door of their house was kicked open in the dead of the night and the deceased went to the veranda and spoke to a policeman. Suddenly there was a blast and the deceased was shot dead before the police tear-gassed her. It was their evidence that at the material time PW4 was not in the house; that the deceased was not armed with a *panga*; and that she did not resist arrest or attack the police. They also claimed that the appellants kicked PW8 and forced him to kneel down, threatened to shoot him and scooped soil and covered the blood stains left behind after the deceased was shot.

It is apt to note that the Court found PW 8 and PW9 to be vulnerable witnesses and assigned them a counselor. When PW9 was cross-examined on his evidence, he readily admitted that he had been counseled on what to say as regards the teargas, PW8 being kicked by the appellants and being forced to kneel down and the covering of the bloodstains.

According to the appellants on the other hand, upon getting to PW4's house they knocked on the door three times, identified themselves as police officers, and requested the occupants to open the door and turn on the lights. In response the appellants heard a scraping sound against the wall, as though someone was sharpening a *panga*, followed by a male voice threatening to kill a person. The 1st appellant then shot twice in the air as a man ran out of the house. In the process she stumbled and fell down, and when she was assisted by her colleagues to get up, she found the deceased had been shot and next to her was a *panga*.

On his part, the 2nd appellant testified that when the 1st appellant stumbled and fell down, he tried to cover her but someone cut his gun with a *panga*. It was at that point that he fired his gun. According to the evidence of the armourer, ***Sergeant Adam Boru Shore (PW 13)***, the 1st appellant returned the ammunition assigned to her less 2 rounds while the 2nd appellant returned his minus 3 rounds. He also confirmed that when the 2nd appellant returned his gun, it had what looked like a *panga* cut.

To complete this aspect of the evidence, ***Charles Koilage (PW8),*** the ballistics expert testified that the Jericho pistol assigned to the 1st appellant as well as the AK 47 rifle in possession of the 2nd appellant at the material time, were firearms within the meaning of the ***Firearms Act*** and were capable of firing. In addition, he concluded that four spent cartridges recovered at the scene of the deceased's shooting were fired respectively from the 1st appellant's Jericho Pistol (2 cartridges) and the 2nd appellant's AK 47 rifle (2 cartridges). That was also the evidence of ***Onesmus Towett (DW3)*** who was in charge of the police investigations under inquiry**.**

Back to the scene of the shooting, the appellants and their fellow police officers tried to administer first aid to the deceased in vain. Ultimately they recovered her body, put in one of the police vehicles, and transported it to Kinango Hospital. A postmortem examination was conducted the next day, 23rd August 2014, and the body was released to her family through the Chief, ***Samson Charo Joho (PW14)*** and

buried the same night. However, following public hue and cry and the involvement of the ***Independent Police Oversight Authority (IPOA)***, the Court issued an exhumation order on 12th September 2014 and on the same day ***Dr. Emily A. Rogena (PW15)*** conducted a second post mortem examination of the body of the deceased. According to this witness, the deceased sustained bullet wounds in the head and chest and in her opinion the cause of death was a head injury due to gunshot from a high velocity firearm.

The other relevant evidence that was adduced by the prosecution, in a bid to prove that PW4, who was allegedly being sought by the police, was not in his house at the material time and that he had not threatened or attacked the police before the shooting, related to data from his cellphone. According to ***Joseph Leruk (PW21)***, a data analyst and fraud investigator seconded to ***Safaricom*** mobile service provider, PW4's cellphone number 0704 997 434 was traced to Kikambala on 21st August 2014 where it made a call at 9.38 pm. It was not used again until 22nd August 2014 at 6.30 am, still at Kikambala. We shall revert to this evidence later.

For completeness of this background, it is important to observe that according to ***Evans Okaya (PW22)***, an investigator from IPOA and ***Onesmus Towett (DW3)*** from the Kenya Police, after the shooting the police conducted investigations under inquiry and recommended the holding of a public inquiry to determine the circumstances under which the deceased died. On its part, IPOA was of the view that there was enough evidence to charge the appellants with murder. After considering the evidence and all these views, the Director of Public Prosecutions decided, as he is entitled under the Constitution, that the appellants be charged with the offence of murder contrary to ***section 203*** of the ***Penal Code***, which was ultimately done vide an information dated 9th October 2014. The appellants pleaded not guilty to the charge.

Muya, J. heard the case, in which the prosecution called 23 witnesses while the appellants gave sworn evidence and called two witnesses. By a judgment dated 10th February 2016, the learned judge held that the prosecution had failed to prove beyond reasonable doubt the offence of murder against the appellants. Instead, he invoked ***section 179*** of the ***Criminal Procedure Code***; convicted them of the offence of manslaughter contrary to ***section 202*** of the Penal Code; and sentenced each to seven years imprisonment. In convicting the appellants for manslaughter, the learned judge concluded that they were not justified to use firearms in the circumstances of the case and that they had not made any efforts to avoid use of firearms against a child as required by ***rule 3*** of ***Part B*** of the ***Sixth Schedule*** of the ***National Police Service Act***.

Both the appellants and the prosecution were aggrieved by the judgment and lodged their respective appeals. The two appellants filed their memoranda of appeal dated respectively 8thApril 2016 and 18th April 2016, while the State filed its on 26th April 2016, all of them challenging both the conviction and sentence. Somehow, both appeals were given the same number, namely ***Criminal Appeal No. 23 of 2016***. At the hearing of this appeal and for convenience, the parties agreed by consent to treat the appeal by the State as a cross-appeal, subject to determination first, whether in the circumstances of this case, the State has a right of appeal.

The memoranda by the appellants raise common grounds of appeal impugning the judgment of the High Court for convicting the appellants even after the learned judge found that they had no intention to kill or cause injury; for finding that the appellants were reckless when they shot the deceased; for failing to consider all the surrounding circumstances, for relying on PW4's cellphone data which did not rule out the possibility of his presence in the house where the deceased was shot; and for imposing a sentence which was manifestly excessive.

Mr. Magolo, learned counsel for the appellants, argued the grounds of appeal globally, submitting that at the material time the appellants who were police officers were on official duty to try and apprehend dangerous criminal suspects. He contended that the appellants did not set out with the intention to kill but that they were forced to shoot in self defence. Learned counsel urged that the learned judge erred by failing to consider ***section 17*** of the Penal Code which requires the defence of self defence to be determined in accordance with principles of English Common Law. Relying on the judgment of the Privy

Council in ***Solomon Beckford v. The Queen*** ***[1987] 3 All ER 425,***and of this Court in ***Ahmed Mohammed Omar & 5 Others v. Republic, Cr. App. No. 414 of 2012***, counsel submitted that the test in self defence is subjective rather than objective and that in this case the appellants believed that they were under attack and that use offorce was necessary to defend themselves. The judgment of this Court in ***Athony Njue v. Republic, Cr. App. No. 77 of 2006*** was also cited and it was submitted that just as in that case where the court reversed a conviction for manslaughter, the shooting in this case was justified.

To emphasize their belief that they were under attack, the appellants submitted they were on duty in an area that was notorious for murders; that they were lawfully armed; that it was at night and it was raining; that one suspect was arrested in the vicinity; that previously a female police office had been attacked in the area, cut on the hand with a *panga* and dispossessed of her firearm; that a male voice issued a threat to kill someone from the house; that they believed the scraping sound was made by the sharpening of a *panga*; that indeed a *panga* was recovered at the scene; and that the 2nd appellant's firearm was cut with a *panga*.

As regards the evidence on the usage of PW4's cellphone at the material time, the appellants submitted that it did not prove that PW4 was not in the house at the time of the shooting because the last call in Kikambala was made at 9.38 pm on 21st August 2014 while the shooting took place at *[particulars withheld]* at about 2.00 am on 22nd August 2014. It was contended that there was sufficient time for PW4 to travel from Kikambala to *[particulars withheld]*, even by *boda boda,* because the distance is approximately 20 km and be back in Kikambala by 6.30 am. In any event, the appellants further urged, the prosecution did not adduce any evidence to show that the phone was in the possession of PW4 when it was in use in Kikambala.

The appellants also faulted the trial court for what they termed reliance on irrelevant issues and considerations such as the presence of children in the house. In their view, there was no evidence that the appellants had prior knowledge of the presence of children in the house. On the contrary, they contended, the evidence showed that PW4, whom the police were seeking, lived in the house. Accordingly, it was submitted the appellants could not be faulted for relying on that evidence. Lastly the appellants submitted that the learned judge erred by considering only rule 3 of Part B of the Sixth Schedule of the National Police Service Act rather than considering the Schedule as a whole, because it allows use of firearms by the police in situations such as those that confronted the appellants.

The State opposed the appeal, contending that it had adduced sufficient evidence to convict the appellants of the offence of murder. ***Mr. Muteti***, learned Senior Assistant Director of Public prosecutions (DPP), teaming up with ***Mr. Monda***, Senior Assistant DPP and ***Ms. Ngina***, Prosecution Counsel, submitted that there was no justification for reduction of the charge from murder to manslaughter because the offence of murder was proved beyond reasonable doubt. He added that there was no dispute that the deceased died as a result of injuries sustained from bullets fired by the appellants.

As regards malice aforethought, the State urged that the same was adequately proved by reference to ***section 206*** of the Penal Code because the appellants, by firing shots into the house where they knew there were people, intended to cause grievous harm. It was also contended, on the authority of the judgment of this Court in***Morris Aluoch v. Republic, Cr. App. No. 47 of 1996,*** that the weapon used and the part of the body injured must be considered in determining whether malice aforethought was proved. Counsel submitted that two guns were used presumably against a person armed only with a *panga* and that the deceased was shot in the head and the chest.

It was the State's further submission that between the appellants, 5 bullets were fired, which in the circumstances of the case amounted not only to wanton recklessness, but also excessive force. It was emphasized that on the material night, other police officers were able to effect an arrest in the same neighbourhood without having to resort to use of their firearms. We were urged to find that where a child is involved, the duty of care of the police in the use of firearms is heavier and that the police used firearms while it was clear that PW4, who they were after, was not in the house. In the State's view, the data from the mobile phone service provider established that at the material time PW4 was away in Kikambala, rather than in his house at *[particulars withheld]* village. In addition, when PW4 testified, he

confirmed that at the material time he was in Kikambala where he was employed as a watchman and not in his house at *[particulars withheld]*.

For all those reasons, we were urged to dismiss the appellant's appeal and allow the cross-appeal. On whether the State had a right of appeal in the circumstances of this case, Mr. Muteti submitted that ***section 348A*** of the Criminal Procedure Code as amended by the ***Security Laws (Amendment) Act, 2014***allowed the DPP to appeal to this Court from an acquittal by the High Court in the exercise of its original jurisdiction or from an order of the High Court refusing to admit a complaint or formal charge or an order dismissing a charge. In his view the learned judge had acquitted the appellants of murder, and in so doing had made an "order", against which the DPP was entitled to appeal to this Court.

Counsel further invoked the overriding objective and contended that section 348A as amended in 2014 was intended to eradicate the disadvantages suffered by the DPP by removing the restrictions placed on the right of the State to appeal to this Court against acquittals by the High Court in the exercise of its original or appellate jurisdictions. We were urged to find that the spirit of the amendment was to shift focus from the offender to the victim.

Learned counsel further argued that by dint of ***section 361(4)*** of the Criminal Procedure Code, where an appellant is convicted of an offence but he ought to have been found guilty of a different offence, this Court is empowered, instead of allowing or dismissing the appeal, to substitute the conviction with one for the offence which the appellant should have been convicted and to pass such sentence in substitution of that imposed, as may be warranted by the offence for which this Court has convicted him. In this appeal counsel urged us to invoke section 361(4), convict the appellants of the offence of murder and impose the prescribed sentence of death.

Lastly it was contended for the State that the rules of this Court recognize the right of a party to file a cross-appeal, which is what the State had done.

Responding to the cross-appeal, the appellants contended that even under the Criminal Procedure Code as amended in 2014, the State did not have a right of appeal in the circumstances of this case because the DPP is only allowed to appeal to this Court against an ***acquittal*** by the High Court in the exercise of its original jurisdiction. As far as the appellants were concerned, the High Court did not acquit them; it convicted them of manslaughter and sentenced them each to 7 years imprisonment.

We have duly considered the record of appeal, the judgment of the High Court, the memoranda of appeal by the appellants and the State, submissions by the respective learned counsel, and the authorities that they cited. On 17th June 2016, on the application by ***Mr. Harun Ndubi***, learned counsel acting as the victim's representative, we allowed him to participate in this appeal in that capacity, limited to making submissions on sentence. It is very regrettable that Mr. Ndubi found it fit not to appear and address the Court as he had requested.

Before we consider the merits of the appeal and the cross-appeal, it is imperative first to dispose of the question whether in the circumstances of this case the State has a right of appeal. In ***Republic v. Danson Mgunya, Cr. App. No. 21 of 2016,*** this Court considered at length the changes introduced by the Security Laws (Amendment) Act, 2014 as relates to the right of appeal by the State from an acquittal by the High Court in the exercise of its original jurisdiction. The Court stated thus:

> ***"As regards appeal to this Court against an acquittal by the High Court in the exercise of its original jurisdiction, the law (before 2014) did not recognise such a right. By dint of section 379 (5) of the Criminal Procedure Code, all that the Director of Public Prosecutions was permitted to do was, within one month from the date of the acquittal or such other period as extended by this Court, to sign and file a certificate with the Registrar of the High Court certifying that the decision of the High Court involved a point of law of exceptional public importance and that it was desirable in the public interest that the point be determined by the Court of Appeal. On its part the Court of Appeal was empowered to review the case and to deliver a declaratory judgment. Section 379(6) of the Code provided expressly that such a declaratory judgment could***

not operate as a reversal of the acquittal, but it was thereafter to bind all courts subordinate to the Court of Appeal.

A fundamental change was introduced by the Security Laws (Amendment) Act, 2014 as regards the right of appeal to this Court from an acquittal by the High Court in the exercise of its original jurisdiction. Section 19 of the Act repealed section 348A of the Criminal Procedure Code and replaced it with a new section providing as follows:

"348A (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where anorder refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or the Court of Appeal, as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately."

The effect of the new amendment is to enable the Director of Public Prosecutions to appeal to the High Court against an acquittal in a trial by a subordinate court and to this Court against an acquittal in a trial by the High Court, on both matters of fact and law. For the record it is important to point out that the Security Laws (Amendment) Act, 2014 did not repeal or affect section 379 (5) and (6) of the Criminal Procedure Code, which continues side by side with the new section 348A of the Code."

In our view, the terms of ***section 348 A*** of the Criminal Procedure Code as amended in 2014 are very clear. The section confers on the DPP a right of appeal to this Court where an accused person is ***"acquitted"*** by the High Court in exercise of its original jurisdiction. The central question therefore is whether the appellants were acquitted by the High Court in its judgment of 15th February 2016. This is how the learned judge expressed himself on page 15 of the judgment:

"In the present case, I am satisfied that the two accused persons werereckless negligent in the act of shooting in darkness without establishing who the victims were. Whereas I find the offence of murder contrary to section 203 of the Penal Code has not been proved, I find that the evidence adduced before the Court proves the offence of manslaughter beyondreasonable doubt. By dint of the provisions of section 179 of the Criminal Procedure Code, I find the two accused persons guilty of the offence (of) manslaughtercontrary to section 202 of the Penal Code and Convict themaccordingly under section 322 of the Criminal ProcedureCode." (Emphasis added).

We have no doubt in our minds that the appellants were not acquitted by the High Court so as to entitle the DPP to appeal to this Court. In terms of the High Court judgment, the evidence adduced by the prosecution did not prove the offence of murder but the offence of manslaughter for which the appellants were convicted and sentenced. To agree with the submissions by the State is to beg the question, how were the appellants acquitted and convicted at the same time in the same trial? And if the appellants were acquitted, how come they have preferred an appeal? Are they appealing against their acquittal? Can a conviction following invocation of section 179 be disaggregated into an acquittal for one offence and conviction for another?

Section 179 of the Criminal Procedure Code, which the learned judge invoked, is headed ***"Conviction for offences other than those charged."*** Clearly when section 179 of the Criminal Procedure Code is successfully invoked, the result is a conviction rather than an acquittal. In ***Robert Mutungi Muumbi v. Republic, Cr. App. No 5 of 2013***, this Court considered the circumstances under which section 179 of the Criminal Procedure Code may be invoked and stated thus:

"***An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related***

or alike; of the same genus or species. To sustain such a conviction,the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."

The import of the above passage is that under section 179 the offence with which the accused person is charged and the offence for which he is convicted are closely related or alike and of the same genus or species that it is not possible to speak of acquittal of one and conviction for the other. Under that section the accused person is not acquitted of one offence and convicted of another. He is only convicted of the minor offence that is disclosed by the evidence that was led in an endeavour to prove the major offence.

Section 215 of the Criminal Procedure Code, which provides for the decision of the court after hearing evidence provides as follows:

"The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."

In our view the above provision does not contemplate both an acquittal and a conviction in the same decision. The court has either to convict or acquit the accused person. In the appeal before us, the High Court convicted, rather than acquitted the appellants.

With respect, section 361(4) of the Criminal Procedure Code has no relevance in the circumstances of this appeal as urged by the State. That provision applies only in second appeals, from decisions of the High Court in the exercise of its appellate jurisdiction. What is before us is a first appeal from a decision of the High Court in the exercise of its original jurisdiction. In addition, the order of the High Court contemplated by section 348A as amended from which the DPP is allowed to appeal is an order refusing to admit a complaint or formal charge or one dismissing a charge. Again, the provisions of the Court of Appeal Rules regarding cross-appeals cannot confer the right of appeal on the State. Those are rules of procedure, which kick in where the appellant has a right of appeal. There is no basis for the claim that the right of State to appeal in this case is conferred by those rules of procedure.

Ultimately, we agree with the appellants that in the circumstances of this case, the State has no right of appeal simply because the High Court did not acquit the appellants as contemplated by section 348A of the Criminal Procedure Code as amended in 2014.

We now turn to consider the merits of the appellants' appeal. In our view, the appeal turns on whether the learned judge misapprehended the terms of section 17 of the Penal Code and the appellants' defence of self-defence. Section 17 of the Penal Code provides as follows:

"17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

The common law position as regards the defence of self defence was well articulated by the Privy Council in ***Solomon Beckford v. The Queen (supra).*** After a comprehensive review of previous decisions, the Council rejected the view that for an accused person to be availed the defence of self defence, his belief that he was in imminent danger should not only be genuine but also based on reasonable grounds. Instead they approved the view that if the accused person held the belief, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant and that the accused had to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view reasonable or not. The Council further quoted with approval the following passage from the judgment of Lord Lane in ***R. v. Gladstone Williams (1984) 78 Cr App. R 276*** at page 281:

"***The reasonableness or unreasonableness of the defendant's belief is material tothe question of***

whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, isneither here nor there. It is irrelevant...In other words the jury should be directed first of all that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective view, a reasonable mistake or not.

In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.

Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it."

This Court, in ***Ahmed Mohammed Omar & 5 Others v. Republic (supra),***accepted the above statement of the common law as regards the defence of self defence. In the pertinent part of the judgment, the Court stated:

"It is acknowledged that the case of DPP v. Morgan...was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self defence is raised from an objective test to a subjective one...Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law where there are express provisions to the contrary in the Code or any other law in operation in Kenya. In the appeal before us, the trial court rejected the appellants'defence because it applied an objective test. The learned judge's attention was not drawn to the current position of the English Common Law as regards the defence of self-defence. We believe that had the judge's attention been drawn to the case of DPP v.Morgan...his decision would have been different."

As is patently clear, the application of the principles of the Common Law regarding the defence of self defence in Kenya is ***subject*** to any express provision in the Penal Code or any other law in operation in Kenya. Where there are express provisions in the Penal Code or any other law in operation in Kenya, those provisions will apply in lieu of the Common Law.

In our view both the ***Constitution*** and ***the National Police Service Act, No. 11A of 2011***are relevant laws in this regard. ***Article 239 (1) (c***) of the Constitution recognizes the National Police Service, in which the appellants were serving at the material time, as one of the national security organs in Kenya. By dint of ***Article 238 (2) (b)*** of the Constitution national security is to be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. In ***Attorney General & Another v. Randu Nzai Ruwa & Others, CA. No. 275 of 2012***, this Court emphasized that even where national security is implicated, it has to be pursued while strictly observing and respecting the rule of law, democracy human rights and fundamental freedoms.

One of the objectives of the National Police Service Act is to give effect to, among others, Article 238 of the Constitution and Article 244, which sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms. In addition the Act makes express provisions regarding self defence by police officers and the use of force, in particular the use of firearms. ***Sections 49(5)*** and ***61*** of the Act as read with the Sixth Schedule sets out the circumstances under which a police officer may resort to the use of force and firearms. Part A of the Sixth Schedule provides for use of force by the police in the following terms:

"1. A police officer shall always attempt to use non-violent meansfirst and force may only be

employed when non-violent means areineffective or without any promise of achieving the intendedresult.

2. The force used shall be proportional to the objective to beachieved, the seriousness of the offence, and the resistance of theperson against whom it is used, and only to the extent necessarywhile adhering to the provisions of the law and the StandingOrders.

3. When the use of force results in injuries—

(a) the police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and

(b) shall notify relatives or close friends of the injured or affected persons. (Emphasis added).

Part B of the same schedule makes provisions on the use of firearms by the police 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 threatof 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.

3. A police officer shall make every effort to avoid the use of firearms, especially against children."

In our view in light of the above express provisions of the National Police Service Act regarding use of force and firearms by the police in self defence, there is no room for invoking section 17 of the Penal Code and applying the principles of the Common Law on self defence. 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.

Turning to this appeal, the appellants justify the shooting of the deceased on the grounds that they believed that they were under attack; they were on official duty and duly introduced themselves; the area was notorious for murders; it was a dark and rainy night; a suspect was arrested in the vicinity the same night; previously a female police office had been attacked in the area and dispossessed of her firearm; a

male voice in the house threatened them; they heard the sound of a scraping *panga*; a *panga* was indeed recovered in the house; and the 2nd appellant's firearm was cut with a *panga*.

First we agree with the appellants that there was no credible evidence that they had used teargas against the deceased and PW 8 and PW9, or that they had ordered PW8 and PW9 to kneel down while threatening to shoot them. It also does not look possible that the appellants were scooping soil to cover bloodstains in the house when both the prosecution and the defence agreed that it was raining heavily at the material time. Secondly we would also agree with the appellants that the mobile phone data could not conclusively prove that at the material time PW4 was at Kikambala. The timeframes could not rule out the possibility that he could have travelled from Kikambala to *[particulars withheld]* after 9.38 pm on 21st August 2014 and back again to Kikambala by 6.30 am on 22nd August 2014. In any event, we agree that there was no conclusive evidence in whose possession the mobile phone was when it was used in Kikambala.

However the reason why we are satisfied that PW4 was not in the house at the material time is his own evidence. He testified that he was nowhere near his house on the material night and his evidence was really not shaken. What we find most baffling about the mission of the police to PW4's house that fateful night is why PW4 was never subsequently arrested if indeed he was the dangerous suspect that the police wanted to arrest in the dead of the night. At the hearing of the appeal, it was common ground that after the death of the deceased, PW4 was never apprehended or even questioned in relation to the offences that he had allegedly committed and in respect of which the police were going to arrest him on the material night. Yet this is a person who was readily available and was even interviewed and called by the police as a witness in the trial of the appellants. The finding that PW4 was not in the house at the material time puts paid to the appellants' claim regarding the male voice in the house that allegedly threatened to kill a person.

The other thing, which does not appear to add up at all regards the alleged scraping sound, which they took for *panga* being sharpened. This sound was allegedly against the wall of the house. Yet when the learned judge visited the locus in quo, he found the house to be "a *makuti* thatched mud house", begging the question whether really a *panga* was being sharpened against a wall of mud.

In considering whether the use of force and firearms was justified in the circumstances of this case, account must be taken of the fact that the police raid was in the dead of the night at a home where a family was living or was reasonably expected to be living. The use of firearms in such a situation is not consistent with the imperatives of the Constitution and the National Police Service Act and in particular the express requirement that police officers must make every effort to avoid using firearms on children.

Even assuming for once that the deceased, a girl of 14 years was indeed armed with a panga, she was up against a big group of police officers, who were all armed with firearms. The evidence on record shows that the 13 police officers who went to apprehend the suspects were divided into two groups. The first group led by Sergeant Said Mwinyi Bakari (PW10) had five police members, namely PW10, Ismail Muga (PW11) Daniel Talam (PW12), John Wanjala and PC Nyakundi. That would mean that the group led by the 1st appellant had no less than 8 police officers armed with AK 47 riffles. It is difficult to believe that such big number of police officers could not disarm the child or whoever else they assumed was there, without shooting them in the head and chest.

In the end, we are not persuaded that the learned judge erred in finding that the use of lethal force by the police in the circumstances of this case was not proportional to the threat that they allegedly faced and that the killing of the deceased was contrary to the National Police Service Act and therefore an unlawful killing justifying conviction for the offence of manslaughter.

As regard the sentence that was imposed, we reiterate that sentencing entails exercise of discretion by the trial court and this Court is slow to interfere with the exercise of that discretion, unless it is satisfied that it was not exercised judiciously. In ***Bernard Kimani Gacheru v Republic*, *Cr App No. 188 of 2000 (Nakuru)*** this Court stated its approach 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."***

The appellants were sentenced to serve seven years imprisonment. The prescribed sentence for manslaughter is life imprisonment. The learned judge

made elaborate sentencing notes and took into account the prescribed sentence; the fact that the appellants were first offenders; their personal circumstances and the many years they had served in the police service; the prevalence of cases of unjustified use of lethal force by the police; the victim impact statement by the mother of the deceased; and the fact that the deceased was a young girl. Lastly by a ruling dated 1st December 2014, the learned judge allowed Mr. Ndubi, learned counsel, limited participation in the proceedings as a victim's representative and heard him on the issue of sentence. We are satisfied that the learned judge considered all the relevant factors, as he was duty bound to do. See***Felix Nthiwa Munyao v. Republic, Cr. App. No. 187 of 2000.*** We do not see any basis for interfering with the sentence.

In the result, the appellants' appeal fails and is hereby dismissed. As regards the cross-appeal, the State had no right of appeal in the circumstances of this case. Accordingly the same is hereby struck out. It is so ordered.

Dated and delivered at Mombasa this 17th day of February, 2017

M. K. KOOME

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR