IN THE COURT OF APPEAL

AT NAIROBI

SITTING AT NAKURU

(CORAM: NAMBUYE, MWILU & GATEMBU, JJA)

CRIMINAL APPEAL NO. 340 OF 2012

BETWEEN

MILTON KABULIT.....1ST APPELLANT

JAMES KABULIT……...……..……..…2ND APPELLANT

FRANCIS KARENGA ……...……....3RD APPELLANT

DAVID EIPA ……...……4TH APPELLANT

KOIKOI ENONI ENONO ……....……..5TH APPELLANT

AND

REPUBLIC …….....……RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru (Emukule, J) Dated 11th November, 2011 and the Ruling on sentence dated on the 26th January, 2012

in

H. C. Criminal Case No. 115 of 2008)

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JUDGMENT OF THE COURT

1. This is a first appeal arising from the judgment of M. J. Anyara Emukule, J delivered at Nakuru High Court in Criminal case No. 115 of 2008 in which the five appellants namely ***Milton Kabulit, James Kamais, Francis Karenga, David Eipa and Koikoi Enoni Enono*** with two others had jointly faced a charge of murder contrary to Section 203 as read with Section 204 of the Penal

Code. The particulars of the information were that the appellants and the two others on the 7th day of May, 2008 at Lokichogio Township in Turkana North District of the Rift valley Province jointly murdered ***Silence Chirara*** hereinafter referred to as the deceased.

2. At the time the murder was committed, there were various United Nations organs, private non-governmental organizations and other service providers operating within ***Lokichogio Town*** in what was popularly referred to as the U.N. Camp. (The United Nations Camp with the "host" or Land Lord U.N. body being the United Nations Children Education Fund (UNICEF). The World Food Programme (WFP) then headed by the deceased was one such UN Agency. Unicef received rent from the Agencies it hosted in return for locally contracted labour services from 3rd parties for the supply of Water, Sewerage, Electricity, maintenance of the camp and security. ***Lokichogio Multipurpose Co-operative Society*** Limited (hereinafter referred to as LMCS) whose key officials at the time were ***David Eipa*** the 4th appellant as the chairman, ***Samwel Kataboy*** PW6, as its vice chairman, and ***Isaac Akoi Nariamao*** PW7 as its Treasurer.

3. On or about the 31st March, 2008 Unicef issued a three months' notice to its esteemed clients that it would be relocating its services to Juba in South Sudan. According to ***David Eipa*** LMCS stood to lose nothing by Unicef's relocation, contrary to what ***Samwel Kataboy*** PW6, and ***Isaac Akoi Nariamao*** PW7, said that this information was received with reservations by LMCS members for fear of loss of jobs as Unicef was the major consumer of their security services. This threat of relocation forced LMCS officials to scout around for another possible major consumer of their services. They settled for WFP. It was said LMCS officials received a hostile response from the deceased hence the hatching of the plot that he (the deceased) needed to be frightened even with the use of a gun to create the impression that Lokichogio was insecure without the security services of LMCS.

4. On the 7th day of May, 2008 ***Moses Gachuru Kahura*** (PW9) (Moses) a Rader controller with the Kenya Civil Aviation Authority Lokichogio was mandated by his employer to hold a party for the launching of the ***Lokichogio New control Tower***. The selected venue for the party was the ***748 Hotel*** within ***Lokichogio Township***. His guest list comprised the names of who was who in Lokichogio then. The deceased was such person. He drove to the venue in his official motor vehicle Registration No. 45UN114K, accompanied by a female friend ***Rosemary Wawira Njue*** PW8 (***Rosemary***).

5. Coincidentally just as the deceased was picking up Rosemary at 8.00pm for the party, ***David Eipa*** also picked up ***Peter Koriko Lopua (Peter Kori)*** PW1 from his home (***Peter***'s) and both headed for the Town in a taxi hired by ***David Eipa*** for an evening out. They were allegedly headed elsewhere but when they saw a gathering at 748 Hotel they decided to find out what it was all about and on learning that a party was going on there, they decided to pitch camp there as well. As the merry making continued, ***Peter Kori*** recalled seeing ***David Eipa*** scroll his mobile phone till he reached the name and number of ***Francis Karenga*** the 3rd appellant whom ***Peter*** knew very well as a fellow guard employed by WFP. ***Peter*** recalled seeing ***David Eipa*** step aside to talk to the person who answered that number but did not get the conversation as ***David*** had stepped aside.

6. ***Peter*** recalled seeing the deceased leave 748 Hotel in the company of ***Rosemary*** at about 10.00pm. As soon as the deceased and ***Rosemary*** stepped out of the hotel, ***Peter*** recalled seeing ***David Eipa*** once again scroll his mobile phone and the name of ***Francis Karenga*** came up on the screen. ***David Eipa*** stepped aside and talked to the person who answered the number he had just scrolled. ***David Eipa*** came back and the two continued having their drinks. Shortly thereafter, **Peter** heard gun shots from the direction of the UN camp. He is on record as having received the news of the deceaseds' fatal shooting while still at the 748 Hotel with **David Eipa**. He is said to have inquired from **David Eipa** if that was what he **David Eipa** had engaged **Francis Karenga** on the phone to do and **David Eipa** is said to have indifferently retorted "Yes" "Ndio." On hearing that response **Peter** parted company with **David Eipa**. He (**Peter**) however never reported to anyone what had transpired between him and **David** at 748 Hotel on that night.

7. **Rosemary** had hardly gone for twenty meters from when she heard gun shots from the direction the deceased had headed to. She rang the deceaseds' mobile number severally, got through but there was no response. Meanwhile, when the gun shots rang out near the UN Camp main gate **Ekupe Achok Ewoi** (**Ekupe**) PW4 in the company of **Michael Aieng (Michael**) and **Patrick Ekidoi (Patrick**) were manning the said gate. The gate the deceased had intended to use to gain entry. When it all went quiet, they went to check they saw a vehicle approach slowly. It hit an object and then stopped. **Patrick** knocked at the driver's window but there was no response from inside. He opened the door and saw the deceased on the steering wheel not talking and bleeding profusely from the lower limbs. The three security guards reported immediately to **Mr. David Mwatha** and **Shadrack**. **Caren Wambui Mburu (Caren**) PW11, the then medical officer attached to the AAR medical facility in **Lokichogio** was called to attend to the deceased which she did but could not resuscitate him and pronounced him dead.

8. CIP **Peter** PW13 who had been at the party with the deceased received the report of the shooting incident. He immediately left for the police station, mobilized security personnel and left for the scene of the shooting where he found motor vehicle Reg. No45 UN 114K a Toyota land cruiser station wagon, which had hit a stationary container. The driver's door had three (3) bullet holes. The rear door on the left side had two (2) bullet holes. There was another bullet hole on the left mudguard. One bullet had ricocheted on the left mud guard and flew off. There was a lot of blood on the driver's seat and on the left door as the vehicle was left hand driven. PW13 then left for the clinic where he found the deceased already dead. CIP **Peter, Caren and Rosemary** all stated that the deceased had bled from the lower limbs where he had bullet wounds on the left thigh. **Caren** PW11 handed PW13 a metallic bullet head which she had recovered from the deceased's jeans trouser. PW13 returned to the station, booked the incident in the OB book, reported to his seniors who instructed him to mount an operation to comb the area to net the culprits. The operation team moved to the scene where PW13 recovered seven (7) spent cartridges of an AK47 Rifle.

9. The body of the deceased was airlifted to Nairobi for post mortem under the escort of PW14 P.C. **Samwel Nzioka** (.P.C. **Samwel**). Post mortem was carried out on the 10th day of October, 2008 by a Dr. Wasike whose findings were tendered in evidence by pw17 **Dr. Titus Nyalingu (Dr. Titus**). The observations made in the said report were that there were bullet fragments attached to the left thigh, entry exit gunshot wounds on the left central thigh; a bullet head lodged in the knee which was removed and handed to P.C. **Samwel**. The cause of death was massive hemorrhage.

10. Investigations into the murder of the deceased span over a period of six (6) months before any arrests were made. CIP ***Peter*** recovered 7 spent cartridges from the scene of the murder.

11. PW10 ***Robert Kitili Muindi (Robert***) and one ***Johnstone Nzioka (Johnstone***) who were UN personnel arrived at the U.N. Camp on the 8th and left on the 15th of May, 2008 having recorded many statements from potential witnesses. On the 9th day of June, 2008 P.C. ***Samwel*** (PW14) on instruction from CIP ***Peter*** PW13, escorted motor vehicle Reg. No. 45 U.N. 114K to Toyota Kenya where mechanics removed a total of seven (7) fired bullet heads from the left hand side of the vehicle also from the driver's side which were handed to P.C. ***Samwel*** for purposes of ballistic examination.

12. The second and final phase of investigations into the murder of the deceased kicked off towards the end of October, 2008. On the 28/10/2008 SSP ***Gideon Nyale*** PW19 received instructions from his seniors at CID Headquarters Nairobi to revisit and unravel circumstances leading to the murder of the deceased. He arrived in ***Lokichogio*** on the 31st day of October, 2008 as the leader of the investigation team. On the 2/11/2008 SSP Gideon Nyale and his team went to the office of PW13 who briefed them on the progress so far made in the said investigations and then took the team to 748 Hotel, the scene of the fatal shooting. Thereafter the team went over the information that had been gathered from intelligence reports, informers and potential witnesses. This exercise led to the arrest of eleven (11) suspects on 4/11/2008 among them the appellants. After interrogations nine (9) were but five (5) were charged with the murder of the deceased.

13. The information gathered from the suspects led to the recovery of the murder weapon. PW15 relayed this information to PW13 with instructions to PW13 to organize for its recovery. PW13 sent a contingent of seventeen (17) Kenya police Reservists (KPRS) under the command of Snr**.** ***Sgt. Adona Lotira*** PW3 to a Manyatta in Lorimet area located about fifty (50) km away from Lokichogio the home of ***Koikoi Emoni Enono*** the 5th appellant, the then alleged owner of the murder weapon. PW3 and his team left Lokichogio police station on 12/12/2008 at 9.00am arriving at Lorimet the evening of that same day. On arrival at the said manyatta, they sent for Looteme a community leader of the Manyatta. They explained the mission of the police reservists was explained. It was PW3's testimony that ***Mzee Lootome*** and his co-elders seemed to be already aware of the murder. PW3's intention had been to ask the 5th appellant to voluntarily hand over the murder weapon. PW3 was however informed that the 5th appellant had gone into hiding. ***Mzee Lootome*** informed PW3, that a brother of the 5th appellant by name ***Albert Loperito*** was around. He was sent to get the gun and hand over to PW3 which he did. Since it was already late PW3 and his contingent spent the night at this joint and left for Lokichogio the following day, the 13th day of December, 2008 and handed over the murder weapon to PW13 who in turn caused it to be handed over to PW16 who thereafter forwarded it to PW12 for ballistic examination.

14. This same information led to the identification of ***Benjamin Ebongo Ejore*** PW2, Peter Koriko Lopua PW1 as material witnesses. PW2 stated that both PW2 and the 1st appellant ***Milton Kabulit*** were at the material time employed by LMCS working as security guards seconded to Unicef. He had rented a living room from one Ngasike, a niece of ***Kabulit*** the 1st appellant and a sister to ***James Kamais*** the 2nd appellant, both of whom were known to PW2 since childhood as the trio went to Lokichogio primary school together.

15. On the morning of 8th May, 2008 PW2 was seated at the verandah when one ***Ngasike*** his landlady approached him and requested him to make safe a gun which had been kept in her room for safe custody safe as she viewed at dangerous to her children. PW2 acceded to Ngasike's request and followed her to her room which was adjacent to his. On entering ***Ngasike*** pulled out a grey bag from underneath her bed which she unzipped and showed the gun to PW2. PW2 removed the gun from the bag and held it. He removed the magazine from its chamber, cocked it and removed a live bullet from the gun, placed it in the magazine and then replaced the magazine back into its chamber, placed the gun in the grey bag zipped it and gave it back to ***Ngasike*** who returned it beneath her bed and then he went back to the verandah.

16. While PW2 was still seated at the Varandah he saw Kabulit the 1st appellant arrive at about 7.00am riding a bicycle with a few items in a green paper bag tied on it. Kabulit placed his bicycle a side, entered Ngasike's room and came out with a grey bag which PW2 identified to be the bag Ngasike had unzipped, showed PW2 the gun he had wanted PW2 to make safe for her, the bag in which PW2 removed the gun, made it safe and then returned it. Kabulit tied it on the bicycle and rode away. It was PW2's further testimony that he had registered two identification marks on the said gun namely, a yellow pin and a welded spent cartridge. He used these to identify the gun tendered in evidence as the murder weapon as the gun he had made safe, at the request of Ngasike, placed it in the grey bag which he saw Kabulit tie to a bicycle and ride off with although he admitted not to have opened the said grey bag to see what it contained as at the time Kabulit tied it on to the bicycle and rode away with it. But he was firm it was the same grey bag that had contained the gun. PW2 admitted that he had no basic training on the handling of guns but according to him every Turkana boy of 10 years and above knows how to handle guns. PW2 added that he did not report the incident to anyone because guns are common in the area. On the 15th day of November, 2008 police questioned him about the incident and he narrated the above story. On the following day of the 16th he recorded a statement to that effect. He later identified the gun when shown to him in court during the trial as the one he had made safe at the request of Ngasike from the yellow in and welded empty cartridge.

17. With regard to forensic ballistic examination of the murder weapon, it is on record that PW13 CIP ***Peter Njoroge*** forwarded the seven (7) empty cartridges recovered at the scene of the fatal shooting to the ballistic expert for forensic examination via an exhibit memo form through a CPL

Eric Kinyua. These were received by SSP ***Lawrence Nthiwa***, (PW12) who microscopically examined and found sufficient matching firing and ejector markings from which he formed an opinion that all the seven (7) fired empty cartridges had been discharged from the same rifle, chambered for ammunition in Calibre 7.62x39 mm such as an AK 47 or Simolov self-loading rifles.

18. On the 15th December, 2008, PW12 received an AK47 rifle serial number 82KQ 3426, two rounds of live ammunitions and two bullet fragments through a Mr. ***Gideon Nyale*** PW19 and ***CIP Peter Njoroge*** PW13, accompanied by an exhibit memo form which he all examined and formed an opinion that the rifle was an AK 47 chambered for ammunition in calibre 7.62X39 mm, which was in good general mechanical condition and capable of being fired. He used the two exhibit live ammunition and an additional one from their old stock to test fire the rifle. It indeed fired. He retrieved the fired empty cartridges and microscopically examined them. He found these to have similar matching firing and ejector markings as those of the seven (7) empty cartridges he had examined earlier on in July, 2008. PW12 formed the opinion that the AK 47 rifle serial number 82KQ3426 was infact the same rifle that had discharged the seven (7) cartridges he had examined earlier on. He also examined, the two bullet heads fragments and apart from forming an opinion that these were components of bullets, they were incapable of being examined microscopically. PW12 produced the two reports he had prepared, the Rifle, empty cartridges and bullet fragments to court as exhibits.

19. When cross-examined PW12 was firm that indications in the exhibit memo form of 9.62x39mm and 6.62x39mm were erroneous as the only ammunition calibre he examined were those of 7.62x39 mm; he also conceded that the date of the recovery of the fire arm had been changed from 12th December, 2008 to 13th December, 2008 but he had no answer for it. Lastly that the correct serial number of the fire arm he examined was 82KQ 3426 although the digit 6 appeared to have been overwritten on top of what appeared to be digit 5.

20. On the 27th day of August, 2008 SSP ***Wellington Choka*** a UN official left for Lokichogio on an investigation mission. On arrival he headed for the offices of CIP **Francis Kipsang** PW16 and CIP **Peter Njoroge** PW13 who briefed him about the progress in the investigations into the murder of the deceased. He was handed a total of twenty five (25) mobile numbers in two note books which he neither signed for nor entered in the OB, with a request from PW16 & 13 to assist them in procuring data from the mobile subscribers headquarters in Nairobi that is Orange, Safaricom and Airtel to assist in profiling the mobile conversations of those numbers just about the time the murder took place. PW18 did a letter to the CID Head Quarters requesting for assistance to procure the said data. PW18 stated that he sought assistance through the CID headquarters because mobile conversations are treated as confidential and it was only the CID who could get them from the mobile subscribers and for purposes of investigations only. He subsequently received the data from the service providers via the CID which he handed to the lead investigator SSP **Gideon Nyale** PW19. No signatures were exchanged when these were received from the CID headquarters nor when handed over to SSP **Gideon Nyale**. Neither were those details entered in any OB.

21. SSP **Gideon Nyale** PW19 confirmed receiving the mobile service providers' data from PW18 on a sheet of paper with no signatures exchanged for the receipt of the same. He analyzed the same and he managed to identify mobile phone number 0733-748253 as belonging to **David Eipa** the 4th appellant, mobile phone Number 0736124085 as belonging to **Francis Karenga** the 3rd appellant. It was SSP Nyale's testimony that the data revealed that there were three instances of communication between the above two numbers on the material date i.e 7th May, 2008 between 9.00pm and 10.30pm. There was one communication during that period between **David Eipa** and **Joseph Chacha** on **Joseph**'s mobile number 0734600573. Lack of a formal communication from the CID to the mobile subscribers and likewise lack of a formal letter forwarding the data from the mobile subscribers notwithstanding, PW19 had no reason to doubt the authenticity of the information contained therein although he admitted to not having made efforts to obtain the handsets themselves and confirm that these had been registered in the names of the appellants affected.

22. The first appellant **Milton Kabulit** stated in his sworn testimony that at the material time he was a security guard attached to Unicef Lokichogio and a member of LMCS. He had knowledge that Unicef gave a notice earlier in 2008 that it would be relocating but he was not bothered by that move. On the 7th May, 2008 he reported to duty as usual and worked till 8.00pm when he signed off and left for his house located four (4) km away. He had no knowledge of the alleged party at 748 Hotel. He learnt of the murder of the deceased the next day when he reported for duty on the morning of 8th May, 2008. He worked till 1.00pm and signed off in the register. He was a stranger to PW2's allegations that he took a gun and rode away with it on a bicycle. He knew **David Eipa** and **Francis Karenga** the 4th and 3rd appellants respectively as fellow employees of Unicef then and members of LMCS. He also knew **Benjamin Ejore** PW2 as a fellow guard. He denied going to **Lokichogio Primary school** with **Benjamin**. He came to know the other appellants in the course of their interrogations into the murder of the deceased by the police. He was arrested on 4th November, 2008 and charged in court on the 18th November, 2008 with the murder of the deceased he knew nothing about.

23. The second appellant **James Kamais** in his sworn evidence disowned the name **James** and gave his correct name as **Moru Kori Nginuoe**. He recalled arriving at Lokichogio two days to his arrest, prior to which he had spent six months (6) at a place called **Lotere** near **Kakuma** on the Kenya Uganda border herding his goats. He did not know the other appellants before his arrest. He was beaten and tortured to admit involvement in the murder of the deceased but he refused to give in. He denied any knowledge of guns or how to handle them. He saw the murder weapon in court for the first time.

24. The 3rd appellant **Francis Karenga** admits that at the material time, he was employed as a security guard with the 1st and 4th appellants at the UN Camp through LMCS. He had taken five (5) days off from work effective 4th May, 2008 to take care of a sick wife. On the date of the incident that is 7th May, 2008 his wife developed bleeding at 4.30pm. He rushed her to hospital where he remained till the next day as the wife lost her baby during the night. It was not until the morning of 8th May, 2008 that persons visiting patients at the facility where his wife had been admitted told him that the deceased had been murdered by thugs. He was subjected to interrogations by the police into the murder of the deceased between 9th May, 2008 to 4th November, 2008 when he was arrested. He was tortured to admit both his own involvement and to implicate others in the said murder but he refused. He denied knowing the deceased prior to his death. Neither did he have any issues with him and he had no reason to murder him. He was not near 748 Hotel on that date. He did not conspire with any of the appellants or any other person to murder the deceased. He met the 2nd and 5th appellants at the police station after his arrest. He had no knowledge of the murder weapon. Neither had he ever seen it anywhere in his life time. He produced a sick sheet for his wife to show that he spent the night in hospital with her on the fateful night though he confirmed the wife was a house wife and was not employed anywhere.

25. The 4th appellant ***David Eipa*** admitted that he was the chairman of LMCS at the material time. He was aware Unicef gave notice in March 2008 signaling its relocation to South Sudan in June of the same year but denied the suggestion that Unicef's impending relocation ushered in fear over alleged dwindling employment opportunities for LMCS members. In his view life would have continued as usual. He recalled inviting ***Peter*** PW1 for an evening outing intending to spend the evening at North camp. They took a taxi for the identified destination but on reaching 748 Hotel they saw a crowd of people there and they decided to find out what it was all about and upon inquiring they were told that it was a party organized by the Kenya Civil Aviation (KCA) to launch the new Aviation Tower at Lokichogio. He and PW1 went in, sat at the counter and ordered drinks. He did not bother to find out who was and who was not present. He did not see the deceased or ***Chacha***. All he recalls of this day is that CIP Peter PW13 greeted them on his way out. At the end of the party people started leaving. He and his companion PW1 also left and took a lift from a GTZ vehicle. On boarding the said vehicle he learnt that the deceased had been shot. It was not until June, 2008 when police started interrogating him on his knowledge about the murder of the deceased which he all along denied. On 4th November, 2008 he was arrested and later charged with the murder of the deceased which he knew nothing about. He confirmed knowing the 1st and 4th

appellants who were his work mates. He came to see the 2nd and 5th appellants for the first time while in police custody. He denied talking to the 3rd appellant ***Francis Karenga*** on the fateful night. Neither did the said 3rd appellant get through to him on his mobile phone as alleged. He denied any knowledge of cell phone number 0733-248 253 that PW19 attributed to his ownership. His cell phone number at the time was 0736538342. He was tortured to admit the offence but he refused.

26. The 5th appellant whose name appeared in the information as ***Koikoi Enoni Enono*** gave his name during his testimony as ***Emoni Enono***; denied any knowledge of any gun allegedly owned by him as he has never handled any. He left his home at ***Nakwamoru*** a distance of 3 ½ days walk to ***Lokichogio*** for ***Lokichogio*** accompanied by his two sisters going to buy maize. He was arrested upon arrival in Lokichogio and later arraigned in court jointly with the co-appellants whom he met for the first time after their arrest. He was tortured to admit ownership of the alleged murder weapon but he refused. He is a stranger to the alleged ***Lorimet*** or the name ***Koikoi***. Neither did he know Snr. Sgt ***Adona Lotira*** PW3 whom he saw for the first time in court when PW3 testified.

27. Upon the learned trial Judge assessing, evaluating and analyzing the totality of the evidence tendered before him and applying the law to the said facts, he arrived at the conclusion that the prosecution's evidence had met the threshold for proof beyond reasonable doubt of the commission of the offence of murder. On that account he found the appellants herein guilty of the offence as charged, convicted them accordingly and sentenced them to suffer death in the manner prescribed by law.

28. The appellants were aggrieved by that conviction and sentence. They are now before us with five (5) separate Memoranda of Appeal raising fourteen (14) grounds of appeal each which are all similar in content and material particulars and will be summarized as follows:

That the learned trial judge fell into an error;

- when he relied on the testimonies of PW15, PW16 and PW19 as a basis for the appellants convictions;
- When he failed to note that the prosecution had withheld both material witnesses and evidence which if tendered would have been adverse to the prosecution's case;
- In failing to note that possession of the alleged murder weapon had not been established as against any of the appellants;
- When he completely misunderstood the relationship between LMCS and World Food Program (WFP) and used this as evidence of motive in support of the alleged murder of the deceased by the appellants;
- In failing to reconcile the discrepancies, in consistencies and contradictions in the prosecution's case in favour of the appellants as these created a doubt in the prosecution's case;
- In failing to note that there was no evidence linking the appellants to any of the mobile phone numbers given to SSP Choka PW18 by CIP Njoroge PW13;
- In failing to analyze the evidence tendered by both sides, properly and thereby arrived at a wrong conclusion on the matter not supported by evidence in the record
- In failing to note that there was no circumstantial evidence proved to the required threshold linking the appellants to the commission of the alleged murder?

29. In his submissions to us ***Mr. Gordon Ogola*** learned counsel for all the appellants urged us to allow the appellants' appeals on several grounds. **First** that the learned trial Judge should not have relied on the testimonies of CIP ***Amos Omwenga*** (***Omuga) PW15, CIP Francis Kipsang PW16***, and ***SSP Gideon Nyale*** PW19 to found a conviction against the appellants because (i) their testimonies were based on the statements under inquiry recorded from the appellants and other suspects whose admission was rejected by the learned trial Judge for failure to meet the thresh hold set in **section 25A** of the Evidence Act Cap. 80 Laws of Kenya; (ii) PW15, 16 and 19 admitted that they never warned the appellants nor the other suspects that the information so

gathered could be used in evidence against them or any other person who may be charged with the offence relating to the murder of the deceased; (iii) PW15, 16 and 19 admitted that they had no other independent evidence into the murder of the deceased besides what they had gathered in the course of the interrogations of the appellants and other suspects.

30. **Second,** the prosecution had failed to tender in court material witnesses that is ***Ngasike*** who was related to both the 1st and 2nd appellants and in whose house the murder weapon was kept; the woman who called ***Benjamin*** PW2 a neigbour to come and make the gun safe; the gun police produced in evidence as the murder weapon and which PW2 identified in court as the gun he had handled and made safe on the morning following the murder of the deceased at the request of ***Ngasike.*** The Elders in Lorimet Manyatta and ***Albert Loperito*** a brother of the 5th appellant whose help ***Snr Sgt Lotira*** PW3, solicited to assist him in the recovery of the murder weapon. Lastly the mechanics from Toyota Kenya who removed the bullet heads from the vehicle the deceased was driving on the night of the fatal shooting.

31. **Third** the prosecution also failed to tender crucial evidence that is the seven (7) bullets heads recovered from the vehicle the deceased was driving on the material night of the fatal shooting. **Four,** possession of the murder weapon was not established as against any of the appellants in the absence of the testimony of ***Albert Loperito*** and ***Lootome*** and the other elders who assisted in its recovery at Lorimet. It amount to nothing but hearsay in so far as possession by the appellants was concerned.

32. **Five,** the learned trial Judge fell into an error when he misunderstood the relationship between LMCS and the WFP which he erroneously used as proof of existence of a motive for the murder of the deceased by the LMCS members. **Six,** the mischief in the discrepancies in the serial numbers of the alleged murder weapon that is 82KQ3425 & 82 KQ 3426; the date of its recovery as entered in the OB that is 12th December, 2008 & 13th December, 2008; the calibre of the recovered gun that is 9.62x39 mm & 7.62x39mm which were never reconciled by the learned trial Judge should have raised a reasonable doubt that there was a possibility for the existence of two (2) guns making it doubtful as to which of the two guns was the murder weapon on the one hand, and on the other hand doubt as to whether the fire arm examined by the ballistic expert ***Lawrence Nthiwa*** PW12 was in fact the gun that had been recovered by ***Snr Sgt Lotira*** PW3 as the murder weapon.

33. **Seven,** there is no evidence connecting any of the appellants to the mobile phone numbers given to ***SSP Choka***, PW18 by ***CIP Peter Njoroge*** PW13 as no evidence was adduced with regard to their ownership by the appellants through provisions of the registration numbers of the owners of those handsets or the exact content of the conversation retrieved to show that the said conversation had any link to the murder of the deceased.

34. To buttress his arguments ***Mr. Ogola*** relied on the case of ***Judith Achieng Ochieng versus Republic; Kisumu Criminal Case No. 218 of 2006*** for the propositions on the threshold required to be met by circumstantial evidence before it can be accepted as a basis for a conviction of an accused person.

35. In response to the appellants' submissions ***Mr. A.J. Omutelema*** senior assistant Director of Public prosecutions urged us to dismiss the appellants' appeals on several grounds. On the identification of the murder weapon, it was his submission that it was positively identified because besides the serial number, there was identification through the yellow pin on it and the used cartridge welded on it. This was the very gun that ***Benjamin*** PW2 had made safe at the request of ***Ngasike*** on the 8th of May, 2008, the day following the fatal shooting; **Snr Sgt Lotira** PW3 identified it as the gun he had recovered from Lorimet as the alleged murder weapon; PW13 identified it as the weapon he received from PW3, while PW12 identified it as the weapon he test fired and upon comparison of the test fired empty cartridges he found matching similarity with those recovered at the scene of the shooting by PW13 and which had been discharged by the murder weapon

36. Regarding the alterations in the recording of its serial number, Mr**.** ***Omutelema*** invited us to find that these were mere errors and we should go by the serial number given by the ballistic expert PW12 that is 82KQ3426 as the correct serial number. We should also find that errors in the recording of the correct serial number cannot justify the appellants' assertion that two guns may have been involved when it is on record that the witnesses who handled the gun, that is PW2, PW3, PW13 and PW12 all mentioned only one gun.

37. Regarding recovery, ***Mr. Omutelema*** urged us to believe the testimony of Snr Sgt ***Lotira*** PW3 and CIP Peter PW13 that they had been given specific instructions on who to look for, the (5^{th} (appellant); what to look for (the murder weapon); and where to look for (Lorimet) in connection with the murder weapon. That is why they went straight to the Manyatta they were directed to at Lorimet and that is where they recovered the murder weapon.

38. As for the discrepancies on the recovery dates**,** ***Mr. Omutelema*** urged us to find that these had been sufficiently explained by PW3 ***Snr Sgt Lotira*** and ***CIP Njoroge*** PW13 when he testified that the alterations in the entries were made in order to reflect that the weapon was in fact recovered on 12^{th} December, 2008, but it was handed over to him at the police station on the 13^{th} December, 2008 because ***Snr Sgt Lotira PW3*** and his contingent (the KPRS) though they recovered it on the 12^{th} December, 2008 they had to spend the night at the place of recovery and only handed it over to PW13 on the next day of 13^{th} December, 2008.

39. On the calibre of the fire arm and its ammunition ***Mr. Omutelema*** urged us to find as did the learned trial Judge that the entry in the records of 9.62x39mm as the calibre of the murder weapon was infact an error. We should go by the corrected entry of 7.62x39mm as the correct calibre of both the gun and its ammunition as this was the calibre that SSP ***Lawrence Nthiwa*** PW12, found when he test fired the murder weapon and compared the test fired cartridges with those found at the scene of the murder and confirmed that they had similar matching ejector and firing markings and concluded that both the test fired cartridges and those found at the scene of the murder had been discharged by the murder weapon.

40. On the failure to call certain witnesses, we were urged not to draw an adverse inference against the prosecution as the evidence tendered by the prosecution was never controverted; it came out from the investigations that the witnesses who were relatives of the appellants had proved unco-operative and reluctant to testify in court; PW2 should be believed in his testimony that he knew ***Ngasike*** and the 1^{st} and 2^{nd} appellants very well as he had no reason to tell lies about this fact; the learned trial judge looked at the totality of the evidence on the record, analyzed it; applied correct principles of law onto it and arrived at a correct and faultless conclusion that the prosecutions' evidence had met the required threshold which we should affirm.

41. On motive, ***Mr. Omutelema*** urged that this was not a necessary ingredient for the proof of the offence of murder although evidence adduced on the record demonstrated clearly that there was a motive for the elimination of the deceased as he was viewed as a stumbling block in the provision of services by LMCS members to the Agencies operating in Lokichogio.

42. On the mobile phone data, we were urged to find that these were accessed in the course of the investigations as forming part of the circumstances surrounding the murder of the deceased. They were properly analyzed by PW19 whose evidence was accepted by the learned trial Judge which acceptance we should affirm as there is no justification for faulting it.

43. To buttress his arguments, ***Mr. Omutelema*** relied on the case of ***Geoffrey Nguku versus Republic [1982-88] 1KAR 818*** for two propositions. **First`** that it is proper for a court of law to base its decision on the totality of the evidence on the record subject to such a court bearing in mind the fact that throughout that exercise the onus of proof in respect of evidence so assessed lies with the prosecution. **Second** that evidence constituting a chain of events leading up to the commission of an offence is admissible as "*res gestae"* forming the same set of transactions. The case of ***Ratten***

versus Reginam [1971] 3 ALL ER 801 also for two propositions; **First** that evidence of a telephone conversation is not hearsay and it is admissible as evidence of fact relevant to the issue especially where it is made shortly before the fact such as a shooting. Second it may be admitted as "*res gestae"* where there was ample evidence demonstrating a close connection between the telephone conversation and the occurrence of the event that occurred shortly thereafter in connection with the commission of the offence being inquired into. Lastly the case of ***Douglas Thiog'o Kibocho versus Republic [2009] eKLR*** for the holding that:-

> "**Section 25A of the Evidence Act (supra) when read together with section 111 (1) of the same Act does not make a confession and an admission, inadmissible unless made before a judge, magistrate or a police officer above the rank of an inspector and who is not an investigating officer because in section 111 (1) of the Evidence Act Parliament recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. This is necessary as the prosecution would not otherwise be able to conduct full investigation in such cases, a situation likely to lead to an accused person escaping punishment even when the circumstances suggest otherwise. In this regard section 111 (1) of the Evidence Act therefore places an evidential burden on an accused person to explain those matters which are especially within his own knowledge."**

44. The learned trial judge took note of the provisions of law set out in **sections 203, 206, 20** and **21** of the Penal Code; he drew out a total of six (6) issues for determination which in the learned judges view could be summed up into two major issues that is first, whether the prosecution had on the basis of the evidence on the record before him established malice afore thought on all the appellants or any of them; and second, whether the offence had been committed jointly as provided for in **section 20** of the penal code and then concluded thus with regard to the culpability of each of the appellants now before us:-

> ***Turning to the other personae dramatis, the perpetrators of the tragedy that befell Silence Chirara, I will commence with the 4th accused David Eipa he was the cog and prime mover in the web to eliminate Silence Cirara on the pretext of procuring jobs and therefore, better lives for members of the LMCS. He told his lieutenants that some stumbling blocks in WFP must be scared with even the use of a gun. He gave commands to his lieutenant, Francis Karenga to procure a firearm. He gave command to proceed with the execution of the deceased after monitoring his movements at the 748 hotel. He gave command for the execution at the appropriate arena.***
>
> ***In terms of Section 20 (1) (c) of the Penal Code, he aided and abetted and counseled the commission of the offence of murder against the deceased. I find him guilty, and I convict him of the offence of murder contrary to section 203 of the Penal Code.***
>
> ***Milton Kabulit was the procurer of the weapon or the firearm, from the friend Koikoi, the 7th accused. He is the person who picked up the weapon after the execution of the deceased and 'took it to his relative "Ngasike" the neighbour and Landlady of PW2, from whom he picked it up on 8.5.2008 and returned it to the 7th accused Koikoi.***
>
> ***In terms of section 20(1) (b) of the Penal Code, he aided the 1st and 2nd accused to commit the offence, and I find him guilty of the offence of murder contrary to section 203 of the Penal Code, and I convict him accordingly.***
>
> ***The 2nd accused, was the executioner. In terms of Section 20(1) (a) of the Penal Code, he is the person who shot the deceased seven times to ensure that the "stumbling block" is eliminated, and I find him guilty of the offence of murder contrary to section 203 of the Penal Code, and I convict accordingly.***

Francis Karenga 3rd accused was the 4th accused errand man. He is the one "who received command messages from the 4th accused and he carried out to the letter. If there was any doubt, the forensic evidence of the telephone calls made just before and after the execution as tabled PW19 is clear. He and the 4th accused worked in tandem, and ensured that the horizon was clear and mission accomplished before handing back the weapon to Milton Kabulit for safe delivery to Koikoi the owner of the weapon.

In terms of Section 20(1) (a) and (b) of the Penal Code he was the person who carried out instructions which constituted the offence, and enabling the 2nd accused to execute the deceased. I find him guilty of the offence of murder contrary to section 203 of the Penal Code and I convict him accordingly for the said offence of murder.

The 7th accused was the elusive pastoralist and nomad in a far place on the Ugandan/S. Sudan border. He was known to the 1st accused. He was known to PW3. He was no bushman. He was the owner of the gun the AK 47 Rifle, the weapon, James Kamais used to pump 7 bullets into the lower limps of the deceased. In terms of section 20(b) & (c) of the Penal Code he aided and abetted the other three in committing the offence of murder. I find him guilty of the offence of murder contrary to Section 203 of the Penal Code, and I convict him accordingly.

These are the conclusions we have been invited by the appellant to overturn.

45. This is a first appeal. Our mandate is as was set out by the predecessor of this Court in the case of ***Okeno versus Republic [1972] EA32*** at page 36 this follows:-

> "***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic) [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantatilal M Ruwala Vs. Republic [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See Peters versus Sunday Post [1958] EA 426".***

46. We have on our own revisited the entire record, re-assessed, re-evaluated , re-analyzed and considered it in totality in the light of the learned trial Judge's findings set out above and the rival arguments presented to us and we now proceed to respond to the appellants' complaints against those findings. The appellants have raised a total of fourteen (14) grounds of appeal which learned counsel ***Mr. Gordon Ogola*** basically reduced into four (4) or so major grounds. We find it prudent to determine the appeal based on those broad grounds.

47. **Section 203** of the Penal Code spells out clearly that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellants committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought (see ***Nyambura & others versus Republic [2001] KLR 355*).** The death of the deceased through gunshot wounds was proved beyond reasonable doubt through the testimony of PW8, PW10, PW13, PW14 PW15 and PW17. The 1st, 3rd and 4th appellants also affirm that they had reliably learned that the deceased died of gunshot wounds. What they have moved to contest is the learned trial Judge's finding that they and the other 2 appellants, that is the 2nd and 5th appellants had an unlawful hand in the causation of that death.

48. On the elements of malice afore thought, the learned trial Judge rightly took note that these are

well set out in section 206 of the Penal Code. He identified three of these as applicable herein. These are:-

i. ***An intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not.***
ii. ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not even if that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or even by a wish that it may not be caused; and lastly***
iii. ***An intent to commit a felony.***

49. In ***Bonaya Tutut Ipu and another versus Republic [2015] eKLR*** this Court stated that "***Malice aforethought"*** is the *mens rea* for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. (see ***Moris Aluoch versus Republic Cr. App. No.47 of 1996)*** where the court went further and drew inspiration from a persuasive authority in the case of ***Chesakit versus Uganda CR App. No.95 of 2004*** wherein the Court of Appeal of Uganda held thus:-

> "***In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."***

The court also drew inspiration from a decision of the predecessor of this Court in ***Rex versus Tuper S/O Ocher [1945] 12EACA63*** wherein, it was ruled thus;-

> "***It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."***

50. It is on record that the vehicle the deceased was driving on the fateful night was a left hand drive. ***CIP Peter PW13, CIP Omwenga PW15, CIP Francis Kipsang PW16*** and ***SSP Nyale*** PW19, as well as personnel from the UN Security team among them SSP ***Choka PW18*** were categorical that the shooting had been directed at the left side of the vehicle obviously where the driver was seated. The person doing so must have had first-hand knowledge that the vehicle was left hand driven. A total of seven (7) bullets were directed at the said spot. This is borne out by the fact that seven empty cartridges were recovered at the scene of the shooting, while five fragments of bullet heads were recovered from the same vehicle by mechanics from Toyota Kenya concentrated on the left side- the driver's side, the other two, one having been removed from the deceased's jeans trouser and one from the deceased left knee during post mortem. The deceased's injuries were concentrated in the lower limbs as borne out from the testimonies of the prosecution witnesses named above. The Doctor's findings were that the cause of death was due to massive hemorrhage from bullet wounds. All the above points to one conclusion only, the person inflicting those injuries had an intention to cause grievous harm or to kill, both of which are elements of malice afore thought as defined in **section 206** of the penal code. We therefore agree with the findings of the learned trial Judge that the prosecution had established malice aforethought beyond reasonable doubt.

51. The appellants are more than one. The prosecution evidence is that they acted jointly in the commission of the deceased's murder. They therefore had a common intention. The learned trial Judge invoked **sections 20, 21** and **22** of the Penal Code in determining the existence or otherwise of the common intention among the appellants. Section 20 (1) provides:-

> **20(1) "when an offence has been committed, each of the following persons is deemed to**

have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say-

a. Every person who actually does the act or makes the omission which constitutes the offence;

b. Every person who actually does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.

c. Every person who aids or abets another person in committing the offence.

d. Any person who counsels or procures any other person to commit the offence and in the last mentioned case he may be charged either with committing of an offence or with counseling or procuring its commission.

(2) A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do an act or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

Section 21 provides

"when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence.

Section 22 (1) provides

"when a person counsels another to commit an offence and an offence is actually committed after such counseling by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counseled or a different one, and whether the offence is committed in the way counseled or in a different way provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

(2) In either case the person who gave the counsel is deemed to have counseled the other person to commit the offence actually committed by him."

52. In the case of ***Wanjiro d/o Wamario versus Republic 22 EA CA 521***, the predecessor of this Court, the Court of Appeal for Eastern Africa defined this doctrine as follows:-

"***Common intention generally implies a premeditated plan but this does not rule out the possibility of common intention developing in the course of events though it might not have been present to start with."***

53. According to the learned trial Judge, the doctrine of common intention was applicable in the commission of the deceased's murder because the actors involved in the chain of its commission were more than one. It was his finding that the appellants were part of that chain. He considered that each one of them had an assigned role. The 4th appellant ***David Eyala Eipa*** was part of the planning team in the course of which they settled for the use of a gun in the execution of their plan. The 1st appellant ***Milton Kabulit*** was brought on board because he could secure both the gun

and the person who would pull the trigger. The murder weapon was procured from the 5th appellant ***Koikoi Enono Emoni*** from a place PW3 Snr Sgt Lotira said was about fifty (50) km away from Lokichogio. The person identified to pull the trigger was the 2nd appellant ***James Kamais.*** According to the learned Judge, the planners needed to pick on an opportune moment when the plan would be executed which fell on the day the Kenya Civil Aviation Authority hosted a party at 748 Hotel in Lokichogio to launch the opening of a new Radar in Lokichogio which happened to fall on the 7th day of May, 2008.

54. It was further found that since the 2nd appellant who was to pull the trigger was not an employee of any of the UN or other Agencies operating in Lokichogio, there was need for someone to assist in pointing out the target to him. That is how the lot fell on the 3rd appellant ***Francis Karenga*** who was brought on board for that purpose and according to the judge pointed out the target to the 2nd appellant who pulled the trigger fatally wounding the deceased.

55. From the above there is no doubt that indeed the actions mentioned formed a chain which no doubt satisfies the application of the doctrine of common intention. The appellants have vehemently protested their innocence and lack of involvement in the formation of that chain and that is why they are before us seeking a second opinion on their alleged culpability in the murder of the deceased, a matter we can only comfortably pronounce on at the conclusion of this appeal.

56. Interrogations into the doctrine of possession arose from the allegations that the 5th appellant ***Koikoi Enono Emoni*** was the owner of the murder weapon and even though he is not the person who pulled the trigger he had possession of the gun as he had either hired it out or simply lent it out for the commission of the offence. "Possession" is defined in section 4 of the Penal Code. It has been invoked by this Court in numerous of its decisions. See ***Gacheru versus Republic [2005] 1KLR 688*** in which it was adopted, and ***Joseph Wafula Mukenya versus Republic, Nairobi Criminal Appeal No.96 of 2005 (UR),*** where it was restated. Possession is defined under Section 4 to mean this:-

a. ***"Be in possession of" or "have in possession" includes not only having in own personal possession, but also knowledge having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of one self or of any other person if there are one or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each of them....."***

With regard to possession, the finding of the learned trial Judge was that all the appellants had possession of the murder weapon because the person found to have been the owner, that is the 5th appellant ***Koikoi Enono Emoni*** knew that he had either hired it out or lent it out; the 1st appellant ***Kabulit*** as the person who transported it from and to Lorimet; the 3rd appellant ***Karenga*** as the person who escorted the 2nd appellant who pulled the trigger and knew that someone would pull the trigger; and the 4th appellant ***David Eipa*** who was aware of the sourcing, transportation of the gun to and from the scene of the murder was also deemed to have had possession of the said gun. This too will be determined at the conclusion of the appeal.

57. Allegations of existence of material contradictions, inconsistencies and discrepancies in the prosecution evidence allegedly not reconciled by the learned trial Judge centered mainly on the discrepancies in the serial number of the recovered murder weapon which was given as 82KQ3425 with a digit 6 over written on the digit 5. Second on the calibre of the alleged murder weapon, some documents gave its calibre as 7.62x39mm while others gave its calibre as 9.62x39mm. Also in controversy was the date of the recovery of the said murder weapon. Initially an entry for 12th December, 2008 was made in the records among them the OB but this was later changed to read 13th December, 2008.

58. The role of a court of law when confronted with allegations of existence of contradictions, discrepancies and inconsistencies in the prosecution's case has long been settled. In ***Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,*** the court ruled that

> "***In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"***

In ***Njuki & 4 others versus Republic [2002] 1KLR 771*** the court went further to state that

> "***Where discrepancies in the evidence do not affect an otherwise proved case against an accused a court is entitled to ignore those discrepancies."***

In ***Vincent Kasyula Kingo versus Republic Nairobi Criminal Appeal No.98 of 2014*** this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See ***Josiah Afuna Angulu versus Republic CRA. No.277 of 2006 (UR***) where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants commission of the offence charged and proceeded to substitute conviction for the disclosed offence. Also the case of ***Charles Kiplang'at Ng'eno versus Republic CRA. NO.77 OF 2009 (UR***) in which this Court also sitting as a first appellate court reconciled contradiction's, discrepancies and inconsistencies in the prosecutions' case and found that these went to discredit the prosecution's evidence as they created doubts as to the appellant's commission of the alleged offence and allowed the appellant's appeal in its entirety.

59. Applying the above to the rival arguments on this issue, it was the testimony of PW13 that from his knowledge of handling guns in the line of duty the seven (7) empty cartridges, he had recovered at the scene of the fatal shooting could only have been fired by an AK 47 Fire arm or a Simolov rifle. These were subsequently confirmed by PW12 following ballistic forensic examination of both the firearm, the seven (7) cartridges recovered at the scene and those test fired.

60. With regard to the dates for the recovery of the murder weapon, the uncontroverted testimony of ***Snr Sgt Lotira*** PW3 was that indeed they were handed the fire arm on 12th December, 2008. They started their journey back to Lokichogio but since it was late, they decided to spend the night at Lorimet and then left Lorimet very early on 13th December, 2008. They arrived back in Lokichogio the same 13th December, 2008 when they handed over the murder weapon to ***CIP Njoroge*** PW13. PW13 confirmed that testimony and he explained that indeed an entry of 12th December, 2008 had been made in the OB but changed to 13th December, 2008 based on the explanation given by PW3.

61. Turning to the serial number of the murder weapon, it is correct and as was conceded by PW13 an entry of 82KQ 3425 had been changed to read 82KQ 3426 with digit six (6) being overwritten on digit five (5). PW13 explained that the overwriting was simply to correct the error made in the writing of the last digit in order to put the record straight. ***SSP Nthiwa*** PW12, the ballistic expert stated that the fire arm he examined and which he identified in court was serial number 82KQ 3426; that he examined only one fire arm and not two. Besides the evidence assessed above with regard to the recovery of the alleged murder weapon no other fire arm featured in the prosecution's case. We therefore agree with the respondent's assertions that only one fire arm was involved in the deceased's murder and that the overwriting of digit (6) over digit 5 was simply to rectify the error committed by whoever was making the entry in the police records for the recovery of the said fire arm and the noting of its correct serial number. In view of the above findings on the alleged unreconciled contradictions, discrepancies and inconsistencies in the

prosecution evidence, we agree with the respondents assertions that these were well explained by the testimonies of Snr ***Sgt Lotira***, PW3, CIP Peter PW13 and ***SSP Nthiwa*** PW12 which explanation were accepted by the learned trial Judge of which we see no reason to overturn.

62. With regard to allegations of failure to call material witnesses and tender material evidence, the witnesses allegedly withheld were Lootome and other elders that PW3 talked to to enlist their support in the recovery of the murder weapon, **Albert Loperito** a brother of the 5th appellant ***Koikoi Emoni Enono*** who was sent by the elders to collect the gun from the 5th appellant's manyatta and handed it to the elders who in turn handed it to PW3; ***Ngasike*** the woman in whose house the murder weapon was kept after the commission of the murder and the woman who called PW2 to come and make the murder weapon safe; and lastly the woman from whose house the first appellant is alleged to have removed the bag PW2 Benjamin said contained the firearm he had made safe, placed it on a bicycle and rode away with it. Lastly the mechanics from Toyota Kenya who removed the bullet heads from the vehicle the deceased was driving on the night he was murdered.

63. As for the evidence the appellants argued that neither the seven bullet heads recovered from the vehicle by Toyota Kenya mechanics nor a ballistic report respecting them were tendered in evidence.

Section 143 of the Evidence Act cap. 80 Laws of Kenya stipulates that "**no particular number of witnesses shall in the absence of any provision of law to the contrary be required in the proof of any fact**." The role of the court when confronted with such a complaint is as was set down in **Bukenya & others versus Uganda [1972] EA549**, wherein the predecessor of this Court, the Court of Appeal for Eastern Africa laid down the following cardinal principles, first, that "the prosecution must make available all witnesses to establish the truth even if their evidence may be inconsistent and second, "that the court also has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case"; third, that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

64. Applying the above principles to the rival arguments on this issue, it is our finding that it is on record from the testimony of PW15 CIP Kipsang, PW16 CIP ***Omuga (Omwenga)*** and PW19 ***SSP Nyale*** that they interviewed and recorded several statements from intended potential prosecution witnesses but some of whom refused to come forward to testify mostly because they were related to the suspects then. We have no doubt that is why persons like ***Ngasike*** the niece of the 1st appellant and sister to the second appellant and ***Albert Loperito*** a brother of the 5th appellant did not come to testify. There was however no mention as to whether Lootome or any of the other elders from Lorimet Manyatta who were involved in the recovery of the murder weapon were approached to record statements. In the circumstances displayed above, we find the respondent's explanation as to why these witnesses were not tendered in court not only plausible but also reasonable. There is nothing to suggest that these intended witnesses were withheld by the prosecution because they had adverse evidence against it.

65. As for the mechanics from Toyota Kenya who removed the bullet heads from the vehicle that the deceased was driving on the fateful night,their role was simply to recover the bullet heads and then handed them to PW14 P.C. ***Samwel Nzioka.*** It is clear from the record that these five (5) bullet heads did not find their way to the ballistic expert as PW12 ***SSP Nthiwa*** the ballistic expert only mentioned handling two bullet heads. These comprised the one that had been recovered from the body of the deceased by the Doctor who performed the post mortem and one from his jeans trouser recovered by ***Caren PW10*** and handed to ***PW13. PW12*** examined these two and found that they were not fit for forensic examination. Indeed mystery surrounds what became of those recovered from the vehicle. In view of what PW12 said of the two that had been handed to him for forensic examination, that they were not suitable for such examination, it is our finding that those recovered from the motor vehicle would have suffered the same fate as the first two. On this account we find that the failure to factor them in the prosecution's evidence was inconsequential

to the success or otherwise of the prosecution case and no miscarriage of justice was suffered by the appellants for the failure to tender evidence on them. Neither do we find any proof that such evidence was withheld because had it been tendered it would have been prejudicial to the prosecution's case.

66. The appellants' complaints against the totality of the prosecution's evidence is that it was basically hearsay, incredible and incapable of being classified as either direct or indirect evidence. The respondents have countered that argument by arguing that the prosecution case fell within the acceptable limits for the application of principles on admission of indirect or as it is popularly known in law, circumstantial evidence as a basis for conviction of an accused person (s). As found by the learned trial Judge and as conceded by both sides there was no direct evidence to the murder. The parameters for admission of circumstantial evidence were well settled by the predecessor of this court, the Court of Appeal for Eastern Africa and subsequently reiterated by this court. In ***Rex vs. Kipkerring Arap Koske & 2 others [1949] EACA 135*** the principle laid was this;

> **"In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused**."

The court went further in **Simon Musoke versus Republic [1958] EA 71** to add that:

> ***"The circumstances must be such as to produce moral certainty to the exclusion for any other reasonable doubt....***
>
> ***It is also necessary before drawing the inference of the accuseds' guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference."***

67. In **Abanga Alias Onyango versus Republic CRA. No. 32 of 1990 (UR**). This court laid down three tests which such evidence must satisfy before admission namely:-

> **i. The circumstance, from which an inference of guilt is sought to be drawn, must be cogently and firmly established.**
>
> **ii. Those circumstances should be of definite tendency and unerringly pointing towards the guilt of the accused.**
>
> **iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."**
>
> See also **Dhaley Singh versus Republic CRA No.10 of 1997 (UR),** wherein the court went further and stated thus:-
>
> "**if there are other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proven beyond any reasonable doubt and an accused is entitled to an acquittal**."
>
> Further in ***Sawe versus Republic [2003] KLR 354*** *the Court added that*:-
>
> *"**Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt**." **In Musili versus Republic CRA No.30 of***

2013 (UR) *it was stated* that "***to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt. In*** **Mohamed & 3 others versus Republic [2005] 1KLR 722** the court went further to define what is meant by circumstantial evidence thus:-

"***Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.***" While in **Mwendwa versus Republic [2006] 1KLR 133** the court added that

"***To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. And that the said chain must never be broken at any stage***" And lastly in ***Ndurya versus Republic [2008] KLR 135*** it was held inter alia that:-

"circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence has always to be narrowly examined. It was necessary before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference...."

68. A determination as to whether the prosecution circumstantial evidence met the required threshold for admission of such evidence or otherwise cannot be conclusively determined in isolation to the consideration of the appellants' defences to that circumstantial evidence. The appellants' defences were basically Alibis. The applicable principles are also now well settled. In **Saidi S/O Mwaka Wanga versus Republic [1963] EA6**, the predecessor of this Court laid down the following principles:-

"***An accused person putting forward an alibi as an answer to a charge made against him does not in law thereby assume any burden of proving that answer and if the accused adducing evidence of an alibi introduces into the mind of the court a doubt that is not unreasonable then the court must acquit him.***"

It went further in ***Sekitoleko versus Uganda [1967] EA 531***to state this:

"As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else".

69. It is on record that the prosecution's circumstantial evidence was substantially contributed to by the information gathered in the course of the investigations from potential witnesses, other informers, suspects in general and the appellants in particular. What each appellant stated in his defence has already been summarized above. They assumed no responsibility in proving the truthfulness or correctness of those allegations. It was upto the prosecution to displace them. The learned trial Judge did find them displaced.

70. The appellants have argued further that the learned trial Judge having rejected the statements under inquiry recorded from the appellants, he ought not to have allowed the investigating officers to tender oral testimony of the contents of the rejected statements and then go further and act on it to found appellants' convictions. The respondent countered this argument by asserting that the rejection of the appellants' statements under inquiry did not preclude the state from adducing oral evidence of what the investigating officers had gathered in the course of their investigations. PW15 CIP ***Omwenga (Omuga)*** PW16 CIP ***Kipsang*** and SSP ***Nyale*** PW19 admitted in their testimonies to court that their testimonies were based on what had been gathered in the course of

their investigations; that the bulk of this evidence came from the appellants on the disclosures as to their respective roles in the commission of the murder; that no warning was administered to the appellants warning them that the information given may be used in evidence against them or any other person, and that the above notwithstanding, they were duty bound to tender that evidence in the form it had been gathered to enable the court arrive at a just decision on the matter.

71. This court was confronted with a similar argument in the case of ***Douglas Thiong'o Kibocha versus Republic [2009] Eklr (Nakuru CRA 335 of 2006***). In the resolution of the issue the court revisited both sections 25A(1) and 111 (1) both of the Evidence Act (Supra) construed them and then made the following observations:-

> ***"Section 25A (1) of the Evidence Act, does not make confessions and admissions inadmissible unless made before a judge or magistrate or a police officer above the rank of inspector, and who is not the investigating officer. However, how can one reconcile the provisions of section 25A and 111 (1) of the Evidence Act respectively? The latter provision requires the accused to offer a reasonable explanation on matters peculiarly within his own knowledge. Where an offence is alleged to have been committed he is obliged to offer an explanation to a police officer who is investigating the matter. Apparently if he gives such an explanation to the investigating officer which leads to discovery of incriminating matter, that evidence will not be admissible in a criminal trial without breaching the provisions of section 25A, above. There is an apparent conflict.***
>
> ***It is quite clear to us that when Parliament enacted section 25A, above, it had no intention of repealing section 111(1) of the Evidence Act. That section, as material provides as follows:-***
>
> ***"111(1) when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.***
>
> ***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.***
>
> ***Provided further that the person accused shall be entitled to be discharged if the court is satisfied that, the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."***
>
> ***A statute or a section or part of a section of a statute cannot be said to have been repealed by implication. Express words must be used. When parliament enacted section 111(1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters especially within his knowledge. Otherwise the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise section 111(1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact."***

72. Our understanding of this Court's reconciliation of the apparent conflict of law between **sections 25A** and **111 (1)** both of the Evidence Act (supra) as reasoned in ***Douglas Thiong'o Kibocha case*** (**supra)** is that admission of information from an accused person that does not meet the threshold in **section 25A** of the Evidence Act (supra) is not absolutely prohibited especially where circumstances envisaged by **section 111(1)** of the same Evidence Act are evidentiary demonstrated to exist. The role of a court confronted with such a conflict should not then be to seek to rely solely on such impugned evidence as a basis for founding a conviction against an

accused person. It should instead look for and rely on some other evidence that tends to demonstrate the truthfulness of the impugned statements.

73. In the circumstances of this appeal it is our considered view that the following are the factors that tend to confirm the truthfulness of the information that was given to the investigating officers by potential witnesses, witnesses who subsequently testified in court, the appellants and the undisclosed informers. **One,** allegations that the murder weapon was sourced from a place outside Lokichogio was demonstrated by the uncontroverted evidence of PW3, ***Snr Sgt Lotira*** who recovered the murder weapon from a place called Lorimet situated fifty (50) km from Lokichogio.

74. **Second**, that the chain in the deceased murder plot also comprised persons outside the LMCS membership has been demonstrated by the inclusion of the 2nd appellant ***James Kamais*** and the 5th appellant ***Koikoi Enono Emoni*** as outsiders who were also involved in the murder of the deceased. **Third**, that there appears to have been bad blood between the deceased and senior officials of the LMCS was borne out by the admission of ***Joseph Chacha*** and ***Jonathan Mermug in cross-examination*** that the deceased had expressed open displeasure at the work ethics and performance of the two who were members of the LMCS. While ***Joseph Chacha*** received a verbal warning, ***Jonathan Mermug*** received written warning.

75. **Four**, that the plotters waited for an opportune moment when the planned murder would be executed was borne out by the fact that there were no accounts of any other attempts on the life of the deceased. The only account of the successful attempt on the life of the deceased arose when the deceased attended the party at 748 Hotel on the fateful night, which party was hosted at night. The night offered the perfect opportunity for the executioners to comfortably hide their identities so as not to be caught by the long arm of the law. It is also clear that the plotters could not miss out on such an opportunity as there was no way they could have thought of penetrating the UN camp, we were told is fenced all round with an electric wall and all its entry and exit points manned by security guards.

76. **Five,** that the deceased died of gunshot wounds was confirmed by the testimonies of PW1, ***Peter*** who heard gun shots shortly after the deceased had left the party in the company of ***Rosemary*** PW8, Rosemary PW8 who heard the gun shots shortly after she had parted with the deceased, and the testimony of PW10 ***Caren***, PW13 CIP ***Njoroge,*** PW14, P***.C. Samwel*** all of whom stated that they saw gunshot wounds on the deceased's body concentrated on the left thigh and then lastly the content of the post mortem report produced by ***Dr. Titus Nyalingu*** PW17 which showed that the cause of death was massive hemorrhage from gunshot wounds.

77. **Six**, that the gun tendered in evidence was in fact the murder weapon has been demonstrated by the uncontroverted evidence of PW12 SSP ***Nthiwa*** who testified that he forensically examined the empty cartridges recovered at the scene of the murder and was of the opinion that these had been fired from an AK47 riffle. When the murder weapon was taken to him for forensic examination he test fired it using the two live ammunitions that had been submitted alongside it and one from their stock and when he carried out a comparison of the ejector and firing markings of the test fired cartridges and those of the empty cartridges found at the scene of the murder, he found matching similarities and formed the opinion that both sets were fired by the gun he had before him. This is the same riffle that PW3 had recovered from Lorimet.

78. **Seven**, we find nothing on the record to suggest that PW2, ***Benjamin*** had any reason to frame the 1st appellant ***Milton Kabulit*** that he (PW2) saw him (1st appellant) arrive at the home of ***Ngasike*** early in the morning of 8th May, 2008 the day after the night the deceased was murdered, pick up a grey bag from the house of ***Ngasike***; the very grey bag that PW2 recognized as the one he had removed from and returned the gun he had made safe at the request of ***Ngasike.*** We appreciate that PW2 admitted in cross-examination that he did not inspect the said grey bag at the time he saw the 1st appellant come out with it from the house of ***Ngasike,*** tied it on a bicycle and rode away with it. However, considering the short time that had lapsed between PW2 placing the gun

he had made safe in a grey bag, zipping it and the time it was picked up by the 1st appellant, tied on a bicycle and ridden off with it, it is safe to find that the colour and make of the bag were still fresh in the mind of PW2. There is nothing to suggest that he was distracted in any way.

79. We have no doubt that his curiosity was aroused more when he saw the first appellant walk out with it because of the fresh memory he had of its content. The learned trial Judge observed the demeanor of this witness (PW2) and believed the credibility of his testimony. The trial judge was in a better position to observe that demeanor and form the opinion he formed. We are enjoined by law to give the trial court that deference. See ***peters versus Sunday Post [1958] EA 426***. We therefore find no reason to interfere with that finding.

80. In addition to the above, there was also reliance on mobile conversation between the 3rd appellant ***Francis Karenga*** the party assigned the role of pointing out the target to the 2nd appellant ***James Kamais*** who was to pull the trigger, and the 4th appellant ***David Eipa*** who was to keep track of the movement of the target on the material night. True, it is on record that no efforts were made by PW13 to recover the handsets used. But we cannot lose sight of the fact that the mobile numbers were accessed in the course of investigations. A total of twenty five (25) mobile numbers were identified for forensic profiling. These were handed to the mobile subscribers who profiled them and identified the conversation between the 3rd and 4th appellants at the material time. These documents were tendered in evidence. It was also correctly contended that these numbers were never entered in any OB book and that they were never signed for by any one. The sheets of paper on which they were written were just exchanged between those handing over and those receiving them.

81. In the persuasive case of ***Ratten versus Reginam (supra***), it was stated that such evidence should not be dismissed as hearsay or inconsequential especially when it has a direct link to the events being inquired into. In such circumstances, it forms the "*res gestae*" evidence that connects the mobile conversation to the happening of the event being inquired into. In the circumstances of this appeal the trial Judge found ***Peter*** PW1 a credible witness. He is (Peter) the person who accompanied the 4th appellant ***David Eipa*** to the party. It was ***Peter's*** testimony that on that night he saw the 4th appellant scroll his mobile phone twice for the name of the 3rd appellant ***Francis Karenga,*** rung it and then stepped aside to converse with that number. PW1 said they were seated together. The 4th appellant admits he was seated together with PW1 at the counter. PW13 saw the 4th appellant and another seated at the counter. That other was the admitted PW1. There was nothing that could have made the trial court not to believe that ***Peter*** PW1 actually saw the mobile phone then in the hands of the 4th appellant scrolled twice and the name of the 3rd appellant came on to the screen and the two talked on both occasions. PW1 did not hear the conversation but that notwithstanding, the data from the mobile subscriber confirmed PW1's evidence. PW1 had no reason to tell lies about the 3rd and 4th appellants.

82. As for the alleged casual manner in which the evidence on the profiling of the mobile conversations was gathered, we agree that it was admitted that no entries were made in the OBs, nor was the sheet of paper on which the mobile numbers were written signed for. It is however our view that the mode of assembling that information may not have been perfect, however what was crucial was whether the details of the mobile numbers on the said sheets of paper could be profiled for evidential purposes. They were indeed profiled. It is correctly submitted by the appellants that the content of the conversations was not retrieved.

83. This is because as put by **PW19 SSP Nyale** such conversation is usually treated as confidential and could only be accessed for purposes of investigations. It was the testimony of PW18 that what he requested for and what PW13 asked for was profiling and not the content of the conversation. There is therefore nothing on the record to suggest that had PW18 asked for the content of the conversation these would not have been provided even though a court order was needed for the purpose. Failure to do so notwithstanding, the prosecution had no alternative but to use the

profiling data as circumstantial evidence to add credence to the testimony of PW1 that there was such conversation between the 3rd and 4th appellants shortly after the 4th appellant had sighted the deceased in the party at 748 Hotel and as soon as the deceased departed from the Hotel. Further link is provided from the conduct of the 4th appellant after learning of the fatal shooting of the deceased.

84. He sounded indifferent and retorted to PW1 in the affirmative when asked by PW1 if that was what he had engaged the 3rd appellant to do. His conduct negates his alleged innocent reason for re-routing their evening out with PW1 from North Camp to 748 Hotel. There was every reason to believe that the 4th appellant's reason for settling at 748 Hotel was simply to find the target there and to provide him an opportunity to monitor the deceased's movements and co-ordinate the execution of the murder plan.

85. With the above in mind, we find this stage of the re-assessment of the record as the opportune time to make final conclusions on the culpability or otherwise of each appellant in the commission of the offence, in the order they have appeared before us. With regard to the 1st appellant ***Milton Kabulit***, the evidence linking him to the commission of the offence is that which was tendered through PW2 ***Benjamin***. ***Benjamin*** identified the firearm PW12 confirmed as the murder weapon, to be the firearm he had made safe on the morning of 8th May, 2008 following the murder of the deceased on the night of 7th May, 2008. The firearm that he saw in a grey bag when ***Ngasike*** unzipped it, the firearm he removed from the said bag, made safe, returned it in the very grey bag, zipped it and ***Ngasike*** returned it under the bed. It is the very bag that shortly thereafter PW2 saw the first appellant ***Kabulit*** who had placed a side his bicycle, enter ***Ngasike's*** room and came out with, placed it on the bicycle and rode away with it.

86. It was early in the morning. There was no obstruction to PW2's view. No other person came to ***Ngasikke's*** room and left with any grey bag similar to the one that PW2 had zipped in the weapon he identified in court. No suggestion was made of any reason as to why PW2 could frame the 1st appellant. Even if it can be said that PW2 lied for saying that they went to primary school together, the admission by the 1st appellant himself that PW2 was a work mate and had been so for quite a while supports PW2's recognition of the 1st appellant as the person he saw on the morning of 8th May, 2008, as the person who took away the murder weapon. The above evidence places the 1st appellant not only in the know on how the deceased's murder was executed but also his involvement in it. The evidence also brings the 1st appellant into the ambit of the principle enunciated in the ***Douglas Thiongo Kibocha*** case (supra). We find no rebuttal for it. We find the 1st appellant's conviction safe and was based on sound evidence.

87. As for the second appellant ***James Kamaisi,*** the information gathered in the course of the investigation and which the learned trial judge believed to be true, which belief we have affirmed above was that he is the one who pulled the trigger; neither the learned trial Judge nor us have any reason to doubt this information. We have indeed and rightly so that it fell within the exemption in section 25A of the Evidence Act (supra) and into the circumstance, envisaged in **Section 111(1)** of the same Evidence Act. This appellant was therefore required to explain his presence at the scene of the murder, matters which were within his personal knowledge. In the absence of such an explanation the only logical conclusion for his presence at the scene was to pull the trigger which he did. That pulling of the trigger resulted in the death of the deceased whose consequences the second appellant has to be held responsible for.

88. As for the 3rd appellant ***Francis Karenga*** his a*libi* defence was sufficiently displaced for the following reasons. First, he admitted his wife was not an employee of any one. There was therefore no way a sick sheet could have been filled for her to show that she had been admitted in hospital on the night of the murder and that he was with her. **Second** the mobile phone subscribers' data placed him both in the knowledge and involvement in the murder of the deceased. PW1 gave the timings of the conversations between him and the 4th appellant ***David***

Eipa. This evidence fell into the category of evidence forming the "*res gestae"* into the murder of the deceased. There was nothing to show that there was any mischief in profiling his mobile conversation with the 4th appellant on that date. We also find nothing sinister about PW1's evidence that he witnessed the scrolling of the 3rd appellant's name on the 4th appellant's mobile phone twice that night and the 4th appellant, getting through to that number and then talking. PW1 had no reason to frame the 3rd appellant. The learned trial Judge found PW1 to be a credible witness. He also found the forensic evidence on the telephone calls profile made just before and after the murder of the deceased to be correct and also accurate. He drew a reasonable inference that the messages exchanged though not extracted could only have been command messages to the 3rd appellant to carry out the task as mandated which was to alert the executioner of the approach of the target. We find no reason to depart from that finding. We affirm it.

89. As for the 4th appellant's knowledge and involvement in the murder of the deceased, we adopt fully the trial court's reasoning with regard to the knowledge and involvement in the murder of the deceased by the 3rd appellant ***Francis Karenga.*** In addition, we wish to add that the evidence of PW1 believed by the trial court as credible was indeed unshaken and displaced the 4th appellants' plea of innocent presence at 748 hotel on the date of the murder of the deceased. It ousts the 4th appellants **David Eipa's** plea that he and PW1 ended up at 748 Hotel just by chance. It is our view that this was a deliberate move by him to monitor the movement of the deceased and ensure that their task was accomplished on that date. The holding of the reception at night offered him and his cohorts an opportunity to discretely carry out their mission. His offer to entertain PW1 at North camp and then involuntarily ending up at 748 Hotel was a clear made up self-serving story. However his 40th day had come and both his conduct and mobile phone gave him away. We find no reason to disturb the learned trial Judges findings in this regard that his conviction was well founded.

90. PW3 was categorical that Albert Loperito whom he knew as a brother to the 5th appellant and mzee Lotoome whom PW3 also knew as an elder in the said manyatta appeared to already know what PW 3's mission to the said manyatta was. That is why when he asked for the 5th appellant he was quickly informed that he had gone in to hiding but his brother was around. Loperito was sent to bring the gun. Both Loperito and mzee Lotoome had no reason to pin the murder weapon on to the 5th appellant. Their failure to attend court to give evidence has been satisfactorily explained above as on account of their close relationship with the appellant. Appellant's conduct of going into hiding is evidence of a guilty conscience. The finding of the murder weapon in the manyatta of the 5th appellant ropes him in the circumstantial chain. If he had indeed been away for six months as explained by him, his brother and mzee Lotome would have known. He was sufficiently linked to the murder of the deceased. He lent or hired out the gun to the 1st appellant well knowing of its consequences. He must take responsibility for those consequences.

91. The upshot of the above lengthy analysis is that, we find the 1st appellant ***Milton Kabulit***, the 2nd appellant ***James Kamaisi***, the 3rd appellant ***Francis Karenga,*** the 4th appellant ***David Eipa*** and ***Koikoi Enoni Enono*** the 5th appellant had a common intention jointly with others to murder the deceased. They also had possession of the murder weapon as they had knowledge of its procurement, the purpose for its procurement and also knowledge for its movement from the place of its procurement to the scene of the murder and, we also find that there was evidence of counseling of one another in the formation of the chain into the murder of the deceased. We find the conviction of these four was based on sound evidence. We affirm their convictions and sentences and dismiss their respective appeals in their entirety.

Dated and delivered at Nakuru this 17th day of December, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR