IN COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MARAGA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 314 OF 2011

BETWEEN

DICKSON MWANGI MUNENE…….....1st APPELLANT

ALEXANDER CHEPKONGA FRANCIS…….….2nd APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from the Conviction and sentence of the High Court of Kenya at Nairobi (Warsame, J) dated 12th October, 2011)

in

HCCRC NO. 11 OF 2009)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of Warsame J (as he then was) delivered on 5th October 2011 in Nairobi HCCRC. No. 11 of 2009 in which the learned Judge convicted both the appellants for the offence of murder and sentenced them to death.
2. The facts of the case are that on 23rd January 2009 Dickson Mwangi Munene, the 1st appellant went to the residence of Alexander Chepkonga Francis (the 2nd appellant) along Elgeyo Markwet Road in Kilimani Area of Nairobi. Other friends of theirs including Mark Sagini Monyenye, PW6, and Melvin Waruhiu Gitau, joined them. After exhausting the alcoholic drinks that were in the 2nd appellant's residence, they went in two cars, with 1st appellant apparently alone in his car, to Florida Club in the City Centre where they continued drinking until about 4.00 a.m. of 24th January 2009. From Florida Club, they went to another drinking joint in Westlands known as Mobile from where they ended up at Crooked "Q" bar and Restaurant along Woodvale Grove in Westlands (the Crooked Q or the Club).
3. On arrival at Crooked Q, it would appear that the 1st appellant did not go into that bar. He remained with a woman in his car outside the Club. It is not clear what time they arrived at

Crooked Q. What is, however, clear from the evidence of Jedida Ahawa Okuo, PW14, is that when she arrived at Crooked Q a few minutes before 6.00 a.m. all was well there.

4. Inside the Club, the 2nd appellant, in the company of Mark Sagini, PW6 and Melvin Waruhiu Gitau, sat at the centre of the bar. Shortly thereafter, they were joined by another friend of theirs, whose name was given simply as Ken. As they took their drinks, the deceased who had insulted a patron in the Club by the name Tish, went to Sagini, tapped his (Sagini's) chest and asked him twice if he was gay. Sagini was infuriated by that question which implied he was gay. As he confronted the deceased, the 2nd appellant went to Sagini's aid while Jedida joined the fray on the side of the deceased. Punches were thrown and the Crooked Q bouncers stepped in and separated the two warring groups. One of the bouncers took the 2nd appellant downstairs to the ground floor of the Club while others held Sagini and the deceased in the bar.
5. A few minutes after that the deceased was released and he went downstairs with his brother, John Gachera Muiruri, PW13, who had been with him followed by Jedida.
6. Upon landing on the ground floor and getting outside the Crooked Q building, the deceased again punched the 2nd appellant throwing him down and continued to kick him. On seeing that the 1st Appellant who, as we have stated, had been sitting in his car outside Crooked Q, got out, allegedly with the aim of arresting the deceased but the latter was driven off by his brother. The 1st appellant claimed that having witnessed the deceased punching and kicking the 2nd appellant, which is a cognizable offence, as a police officer he got into his car and followed the deceased with the aim of arresting him. He caught up with him in a traffic jam near Sarit Centre and patked on the side of the road ahead of the deceased's car. In an attempt to arrest and handcuff the deceased, the deceased grabbed the 1st appellant's pistol from his waist and in the struggle shot himself. To avoid being lynched by other motorists who had gathered around them, the 1st appellant drove to Buru Buru Police Station where he reported the incident and surrendered his gun with 11 rounds of ammunition.
7. According to Jedida and the deceased's brother, however, after getting out of the Club, the deceased was driven off by his brother towards Sarit Centre heading to their home. Before they went far, the 1st appellant overtook and blocked the deceased's vehicle. He then got out and threw handcuffs at the deceased and asked him to handcuff himself. The deceased refused demanding to know what he had done and who the 1st appellant was. Without responding the 1st appellant shot the deceased twice or thrice and drove off. With the assistance of a good Samaritan, Eliud Kimani Mwangi PW17, they rushed the deceased to MP Shah Hospital where he was pronounced dead on arrival.
8. Thereafter the matter was reported to police who later charged the two appellants with the murder of the deceased. As we have pointed out, after hearing the case, Warsame J, (as he then was) convicted the two appellants and sentenced them to death thus provoking this appeal.
9. In his 30 grounds memorandum of appeal the 1st appellant complains mainly that the learned trial Judge erred in failing to treat with circumspection the prosecution witnesses' further statements which contradicted the first ones; that the learned Judge erred in ignoring the evidence that the intention of the 1st appellant was to arrest the deceased and instead went ahead to find that both the appellants had a common intention to "execute an unlawful purpose"; that the learned Judge erred in dismissing the 1st appellant's defence that, in resisting arrest, the deceased accidentally shot himself; that the learned Judge erred in failing to appreciate that the evidence on record did not support the conviction.
10. Presenting the 1st appellant's appeal, Mr. Kigano, learned counsel teaming up with Mr. Kilukumi for the 1st appellant, abandoned the grounds on sentence and argued the rest in five clusters: on the murder weapon; who killed the deceased; whether the 1st appellant had authority and right to arrest the deceased; that the learned trial Judge shifted the burden of proof to the 1st appellant; and that there was no evidence to support the conviction.
11. On the first cluster of the murder weapon, Mr. Kigano argued that while the exhibit memo did not have the serial number of the gun and although the correct pistol issued to the appellant was T275989K, the prosecution gave various serial numbers: T275989, T275989KG, T275990K and T275989 with some witnesses referring to it as a ceska pistol while others called it a "browing"

pistol. On ammunition, Mr. Kigano argued that the 1st appellant had been issued with 13 rounds of which he surrendered 11. If, as the pathologist testified, three shots were fired at the deceased while the ballistic examiner test fired four and the appellant surrendered11 live, where did the four extra come from? On those contradictions and on the fact that the officer who issued the 1st appellant with the gun was not called to testify, counsel invited us to draw an adverse inference that the murder weapon was not the 1st appellant's gun.

12. On the ground of who killed the deceased, Mr. Kigano argued that the 1st appellant having denied pulling the trigger and the gun having not been dusted for fingerprints, any of the many people at the scene including the deceased himself could have pulled the trigger. On arrest, counsel argued that the 1st appellant having witnessed the commission of a cognizable offence, he was obliged and had authority to pursue and arrest the deceased. He therefore faulted the learned Judge for failing to appreciate that his only reason for pursuing the deceased was to arrest him and the evidence of the prosecution witnesses that he had handcuffs supports that assertion. Instead, he found that if indeed the 1st appellant was attempting to arrest the deceased, he should have followed the legal guidelines, which are at any rate non-existent. And by claiming that the 1st appellant should have called for reinforcement, the learned Judge shifted the burden of proof to him.

13. On common intention, Mr. Kigano cited the case of **David Nduati Njogu v. Republic Cr. App. No. 25 of 2010** and argued that common intention arises where two or more people are shown to have had a plan to pursue a common unlawful objective. In this case, there is no evidence of the appellants having an intention to execute any unlawful objective. Instead the evidence on record points to the 1st appellant's attempt to make a lawful arrest. On those submissions, counsel urged us to allow the appeal of the 1st appellant.

14. The 2nd appellant listed 23 grounds of appeal which can be paraphrased and summarized as follows: that the learned Judge erred in finding that the two appellants had a common intention of murdering the deceased; that the 2nd appellant had malice aforethought for the offence of murder; being unarmed and having been held by the Crooked Q Club bouncers for five minutes, the learned Judge erred in finding that the 2nd appellant participated in the shooting of the deceased; that the learned trial Judge erred in failing to appreciate that with the contradictions in the testimonies of the prosecution witnesses who had been couched to make further statements and secure false testimony from PW17 who was nowhere near the scene, the conviction of the appellant had no basis; and that the learned Judge erred in relying on dock identification and imposing an illegal sentence upon the 2nd appellant.

15. In their submissions, Messrs Monari and Wagara, learned counsel for the 2nd appellant, took issue with the testimonies of PW13, PW14 and PW17. They argued that in their first statements to police, PW13 and PW 14 never placed the 2nd appellant at the scene. They did that in their further statements which curiously are in identical phraseology. They dismissed PW17 as a gun for hire because he was not mentioned in PW13 and PW14's first statements. Although he claimed he was a hawker in Westlands, he could not identify even one of the other flower hawkers in the area or the Sarit Centre itself. As the scuffle in Crooked Q Club was between the deceased and PW6, they said there was no evidence of malice aforethought on the part of the 2nd appellant.

16. Counsel for the 2nd appellant further submitted the 2nd appellant having been held outside the Club for about five minutes there is no way he would have been able to reach the scene of murder and blocked the deceased's vehicle from the rear to facilitate the shooting of the deceased. And with no iota of evidence on common intention the learned Judge erred in failing to appreciate that the 2nd appellant had followed the deceased and 1st appellant to ensure that the former, who had assaulted him, was arrested. They urged us to find that there is no evidence linking the 2nd appellant with the crime and accordingly allow his appeal.

17. Messrs Monda and Mule for the State urged us to dismiss these appeals as unmeritorious. They argued that the Judge having read PW13 and PW14's first and further statements, and having observed their demeanor, he was justified in believing their evidence and rejecting the defence case. The appellants having placed themselves at the scene, the Judge had to determine their role there. He correctly found that when the 2nd appellant was assaulted outside the Crooked Q Club

house, he called the name "Munene" and the 1st appellant, who had admittedly not been in the Club house, responded by pursuing and shooting the deceased.

18. Relying on the case of **Francis Ngina Kagiri v. Republic**, **Cr. App. No. 264 of 2009, [2009] eKLR,** Mr. Monda argued that common intention can arise in the course of commission of an offence. He said in this case the act of the appellants blocking the deceased's vehicle was clear evidence of common intention having arisen in the course of the commission of an offence. He also urged us to infer that the 1st appellant's malice aforethought from the shots he aimed at vital organs of the deceased's body and find that the appellants' coordinated acts resulted in the death of the deceased. Contending that the case of **David Nduati** (supra) was distinguishable, they urged us to rely on the authorities on their list.

19. In reply, Messrs Kilukumi and Monari made brief submissions. Mr. Kilukumi faulted the Judge for failing to realize that the murder weapon was central to unraveling the issue of who committed the offence. He said the Judge failed to appreciate that the prosecution failed to account for the ammunition and identify the gun that had shot the deceased given the several serial numbers its witnesses gave. He also faulted the Judge for failing to appreciate that with handcuffs in his hand, the 1st appellant cannot have pursued the deceased for any other purpose but to arrest him. As a result of the deceased resisting arrest, there was a struggle for the 1st appellant's gun and there was no clear evidence as to who pulled the trigger. Lastly, counsel censured the learned Judge for believing the evidence of PW13 and PW14 but ignoring the fact that those witnesses had changed their story after talking to the father of the deceased who is a former police officer. He urged us to find that there was no evidence to support the 1st appellant's conviction and accordingly allow his appeal.

20. Mr. Monari's reply on behalf of the 2nd appellant focused on the deceased's role in the whole episode. He urged us to find that as PW1, PW2 and PW5 testified, the deceased was the aggressor.

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

22. With these principles in mind, and having considered these rival submissions and carefully read the record of appeal, it is clear to us that some aspects of the case are not in dispute. It is not in dispute that at about 5.30 a.m. of 24th January 2009, the deceased and the 2nd appellant as well as others including some prosecution and defence witnesses in this case were at Crooked Q Club along Woodvale Grove in Westlands all having consumed considerable amounts of alcohol; that the 1st appellant remained with a woman in his car outside the Club; that the deceased made some unsavory remarks to Sagini, PW6, which implied that the latter was gay leading to an altercation and a scuffle between the deceased and his group on the one hand and PW6 and his on the other; and that the Club bouncers intervened and both groups eventually got out of the club house; that as the deceased was being driven home in the direction of Sarit Centre, the 1st appellant followed him and upon catching up with him there was some argument between the deceased and the 1st appellant ending up with the shooting of the deceased.

23. What is in dispute in this case is whether or not the deceased punched and kicked the 2nd appellant outside the Club house before he was driven away; whether or not the 1st appellant, an inspector of police, pursued the deceased with the sole objective of arresting him for committing a cognizable offence (assaulting the 2nd appellant) in his presence; whether or not the 2nd appellant also followed and blocked the deceased's car from the rear; and who shot the deceased and with which gun.

24. As we have stated, the first disputed fact is whether or not the deceased punched and kicked the 2nd appellant outside the Crooked Q Club house. The evidence on this was mainly from the Club bouncers, PW1, PW2, PW3, PW4 and the waiter PW5. They were not quite clear on the time but their testimony was that at about 7.00 am of 24th January 2009, PW1, at the time they heard a commotion in the Club, PW2 and PW3 were at the entrance on the ground floor of the Club house

and PW4 had strolled to a nearby restaurant. On hearing the commotion, they all rushed upstairs where they found two groups in a scuffle. They intervened and separated them. PW1, PW2 and PW4 took the 2nd appellant downstairs while PW3 held back the deceased and his group. PW1 and PW2 testified that when they got out of the Club house, they forced the 2nd appellant into his car. Shortly thereafter the deceased and his group insisted on going away and they were allowed out of the club. When the 2nd appellant saw the deceased and his group get out of the Club, he got out of his car and confronted them. At that time the 1st appellant in the company of an identified woman was seated in his car with his windows rolled up.

25. The four witnesses are not agreed on what exactly happened after that. PW1 testified that when the deceased was about to enter his car, the 2nd appellant "tried to hit him" but the bouncers pushed the 2nd appellant back. The 2nd appellant "then shouted calling names like Munene". Munene got out and the two were ready to fight the other group but the bouncers separated them. As they went to their cars "Alex (the 2nd appellant) tried to hit James (the deceased) but he hit him slightly". Later in cross-examination, PW1 said "[i]t is Alex who threw the punch."
26. PW2 on his part said that when the two groups were outside there was a commotion between the 2nd appellant and the deceased. "They were almost fighting. James pushed Alex and I then moved in and separated them." The 2nd appellant then knocked the 1st appellant's car window and the 1st appellant came out. On his part PW3 said "[d]ownstairs, I did not see the deceased strike anybody."
27. What we make of this evidence is that there was some confrontation between the deceased and the 2nd appellant outside the Club house. We are however, unable to find any evidence of the deceased hitting and kicking the 2nd appellant as the appellants claimed.
28. When the deceased was driven away from the Club house, in his testimony the 1st appellant said he pursued the deceased to arrest him for committing a cognizable offence in his presence. He claimed that he caught up with the deceased at the lower Kabete junction because the deceased's car got into "a small jam" and was forced to stop. He then parked his vehicle in front of the deceased's and came out with handcuffs.
29. Regarding the 1st Appellant's pursuit of the deceased, the prosecution case is different. It is from the evidence of the deceased's brother, John Gachera Muiruri, PW13, and the deceased's neighbuor Jedida Ahawa Okuo, PW14 and a flower vendor around Sarit Centre by the name Eliud Kimani Mwangi, PW17. According to them it is a silver Mercedes Benz, the registration number of which PW13 gave as No. SFN 223 B, which was driven by the 2nd appellant that overtook and blocked the deceased's vehicle. Another vehicle said to be a big car like a Pajero sped and went in between PW14's car and the deceased's blocking the latter from the rear. We will later in this judgment revert to the issue of the vehicles blocking the deceased's.
30. PW13, PW14 and PW17 claimed that, at the scene, after overtaking and blocking the deceased's vehicle, the 2nd appellant, Sagini PW6, and another person came out of the Mercedes Benz and started beating the deceased. The 1st appellant who was in the vehicle that blocked the deceased's from the rear approached the warring groups and threw handcuffs to the deceased to handcuff himself. The deceased refused to do that and demanded to know who the 1st appellant was and what he (the deceased) had done to warrant being handcuffed. Shortly thereafter they heard 2 to 3 gunshots as the deceased fell down and the two vehicles which had blocked the deceased's sped away.
31. The appellants' account of pursuing the deceased and what happened at the scene of crime is different. The 1st appellant testified that he caught up with the deceased's vehicle in a traffic jam at the Lower Kabete round about and parked in front of the deceased's vehicle. He then came out of his vehicle with handcuffs, identified himself to the deceased and told the deceased he was arresting him for assaulting the 2nd appellant. Emboldened by the shouts of PW13 and PW14 as to why he should be arrested, the deceased resisted being handcuffed. In the struggle to arrest him, the deceased grabbed the 1st appellant's gun and shot himself twice.
32. On his part the 2nd appellant testified that when the deceased was driven off from Crooked Q Club, the bouncers restrained him for 5 minutes. He complained and they eventually released him. He then got into PW6's Mercedes Benz registration number SFN 8223 B and followed the

1st appellant who had pursued the deceased. The 2nd appellant said he wanted to ascertain if the 1st appellant managed to arrest the deceased who had assaulted him. On arrival at the scene he found the 1st appellant's vehicle parked in a "tilted manner" in front of and blocking the deceased's. He himself parked behind the deceased's vehicle although he did not block it.

33. The 2nd appellant further testified that at the scene he saw the 1st appellant and the deceased struggling for handcuffs and Jedida PW14 trying to separate them. In a matter of seconds he heard a loud bang like a gunshot. He jumped into the vehicle and drove away.

34. At this stage we would like to determine who shot the deceased and with which gun. We would like first to identify the gun.

35. Counsel for the appellants made heavy weather of the identity of the gun. They took us through the record and pointed out the various serial numbers of the gun given by the prosecution witnesses and the number of the ammunition used and those surrendered by the 1st appellant.

36. It is true the prosecution witnesses gave different serial numbers of the gun that the 1st appellant surrendered. Patrick Kiswii, PW7 gave two serial numbers: T27590K and T275989K. At one point, he said to have given the serial number as *"No. T275989K with h at the head."* The ballistic examiner CIP Alex Mudindi Mwandawiro, PW16, testified that he examined a Belgian Browning pistol serial No. T275989. IP Joseph Muguna, PW19, testified that according to the Arms Movement Book, the 1st appellant was issued with a ceska pistol serial No. T275989 K. The Arms Movement Book, which that witness produced, shows that the 1st appellant was issued with "a 9 mm Brown pistol serial No. T275989 K." The 1st appellant gave the serial number of the gun issued to him as No. 27598 K.

37. We are surprised that all these different serial numbers were given by Senior Police Officers who are supposed to know better the importance of stating the correct serial number of a gun alleged to have been used in the commission of a crime. This confusion, deliberate or inadvertent, notwithstanding, we are on our part not in any doubt on the murder pistol in this case.

38. The 1st appellant testified that in the cause of struggling with the deceased to handcuff him, he realized that his gun, which was not in its holster but was strapped on his waist, was not secure. As he attempted to secure it, *"the deceased grabbed it and immediately one shot got fired and another one"*. PW13 and PW14 confirmed that they heard gunshots during that struggle. There is no evidence at all of any other gun being at the scene. As we have stated, out of the 13 rounds of ammunition supplied to him, the 1st appellant surrendered 11. Having not claimed to have used two in any other incident, we find that the gun used to shoot the deceased was the one the 1st appellant had.

39. Before we determine who fired the fatal shots, we would like to dispose of the issue of the number of ammunition in this case.

40. The Arms Movement Book shows that the 1st appellant was issued with 13 rounds of ammunition. PW7 testified that the 1st appellant surrendered 11 rounds of ammunition and 2 empty cartridges were recovered from the scene. The ballistic examiner testified that out of the 11 rounds of live ammunition submitted to their lab, he testified 4. That would have left 7 rounds of live ammunition but in court that witness is recorded as having produced 11 rounds of live ammunition. If we go by the testimony of the pathologist who found that 3 shots were fired at the deceased, only 6 rounds of live ammunition should have been produced in court.

41. Although we agree with counsel for the 1st appellant that these figures do not add up, that does not change our above finding that it is the 1st appellant's gun that fired the fatal shots at the deceased. This is because PW7 and PW16 testified that the magazine attached to the 1st appellant's gun had a capacity of 13 bullets but the gun itself could hold one more bullet. The Arms Movement Book talks of 13 rounds of ammunition and *"C. House appurtenance"* which we understand to mean the magazine. It does not state whether or not all the 13 rounds were in the magazine or one was in the pistol itself. There is a great possibility that the gun itself had one more bullet. The court record shows that 11 rounds of ammunition were produced but it made no mention of the cartridges of the 4 test fired rounds. From all these pieces of evidence, we are satisfied that there is a mistake on the number of the rounds of ammunition in this case but as we have said this does not change our position that the deceased was killed by the gun the 1st appellant had at the scene.

The 1st appellant himself testified that at the material time 2 bullets were fired from his gun

42. This brings us to the crucial issue of who fired the fatal shots. Was it the 1st appellant or the deceased?

43. We accept the evidence of the 1st appellant that there was a struggle between him and the deceased when he attempted to handcuff him. That evidence was corroborated by that of PW17, the hawker of flowers around Sarit Centre and the 2nd appellant both of whom testified that they saw the 1st appellant struggle with the deceased immediately prior to hearing gunshots and that of Dr. Zephania Kamau PW8 who testified that on 24th January 2009 the 1st appellant suffered soft tissue injuries to his right wrist.

44. We, however, reject the 1st appellant's contention that the deceased shot himself for two reasons. One, this contention came from only the 1st appellant who, obviously wanted to exonerate himself. And he made it in his defence in court. There is nothing to show that he made it to any of the police officers who investigated this case. That in our view explains why the pistol was not dusted for fingerprints. The 1st appellant having not claimed that anyone else gained possession of his gun at the material time, there was no need of dusting it for fingerprints. Secondly, the pathologist testified that the deceased was shot at close range from a higher level in front. Although we do not accept his opinion that *"the shooter must have [necessarily] been a person who knows how to use the weapon,"* we nonetheless agree with him that the trajectory of the shots was "downwards". Neither the appellants nor any of the prosecution witnesses testified that the deceased and the appellant struggled for the gun while they were both on the ground. It follows that they struggled when they were both on their feet. This view came out clearly from the 1st appellant's own testimony:

> ***"From my assessment, the deceased got a lot of courage to continue with the attack from the lady. The lady was pulling my hand, which had the handcuffs. At this point I was on the road and the deceased and others were on the pavement. So, he pulled me to the pavement, which was <u>on a higher ground</u>. It was at that point my firearm, which did not have a waster (sic), this I removed it to secure it and wanted to subdue the deceased who was resisting arrest. When I removed the firearm, the deceased grabbed the firearm and immediately one shot got fired and another one" [Emphasis supplied].***

45. This testimony talks of the pavement being on a higher level than the road ground. If the deceased was on the pavement which was on a higher level and he pulled the 1st appellant there and while struggling there the deceased grabbed the 1st appellant's gun and accidentally shot himself, the trajectory of the gunshots could have been horizontal and not vertical and not downwards as the pathologist found. We are satisfied that it is the 1st appellant who, while on the pavement, shot the deceased who must have been on the road on a lower level. That explains the "downward" trajectory of the shots fired at him.

46. Having found that it is the 1st appellant who shot the deceased, the next issue for our determination is whether the 1st appellant had the *mens rea,* that is the malice afore thought, for the crime of murder.

47. The definition of malice aforethought in **Section 206** of the **Penal Code** comprises of not only the intentional but also of reckless acts causing grievous harm committed with indifference of their consequences. The 1st appellant did not claim and it cannot be supposed that his intention of shooting the deceased was to subdue him. As we have pointed out his claim was that it was the deceased who accidently shot himself, which claim we have rejected. If the 1st appellant intended to subdue him, he could have aimed the shots at his legs or hands. It follows that by shooting the deceased on the stomach, the 1st appellant either intended to kill the deceased or recklessly shot him indifferent of the consequences of that act. As stated, either of these acts, intentional or reckless, constitutes malice aforethought under **Section 206** of the Penal Code which is the *mens rea* of the crime of murder. In the circumstances we find that the 1st appellant had malice aforethought and the learned trial Judge was therefore justified in convicting him for the offence

of murder and we accordingly dismiss his appeal against conviction.

48. The next issue flowing from this finding is whether or not the 2nd appellant is liable for the 1st appellant's act of shooting and killing the deceased. In other words did the two appellants have a common intention to murder or cause grievous harm to the deceased? Before we determine that issue, we would like to dispose of the contention by the appellants' counsel that Eliud Kimani Mwangi, PW 17, was a gun for hire who was nowhere near the scene at the material time.

49. In our view that contention has no basis. True the deceased's brother, PW13, and neighbor, PW14, never made mention of a good Samaritan being at the scene and assisting them to take the deceased to MP Shah Hospital. It is also true that PW17 claimed to have been a flower vendor around Sarit Centre but did not know the "place called Sarit Centre" although he said he heard his fellow flower hawkers call a nearby building "Sarit Centre." It is also true that he did not know any of the other flower hawkers around Sarit Centre and none of them knew him. He is, however, not a fictitious fellow. In his statement to the police he gave his home address as Gaturi Sub-location in Muranga District. Charles Njuguna Mbugua, DW5, a private investigator who the 2nd appellant's lawyers engaged to verify the authenticity of PW17's claim, confirmed that PW17 indeed came from Gaturi Sub-location in Muranga. DW5 also testified that hawkers are like nomads. Having been at or around Sarit Centre for only 7 days, it is possible he would not have known his competitors in the business of hawking flowers and none of them would have known him. At the time DW5 interviewed him he was hawking pineapples in Thika. In the circumstances we find that PW17 was indeed at the scene at the material time and he witnessed the struggle between the 1st appellant and the deceased. True, the further statements by PW13 and PW14 were intended inter alia to bring him into the picture and introduce his evidence but it should be recalled that those witnesses made their first statements on 24th January 2009 immediately after the crime but PW17 said immediately after the shooting he went away. When he returned to his place of work after one day, he was told police were looking for the person who witnessed the crime and he went and made a statement.

50. Although a witness's first statement made soon after the incident he witnesses is supposed to contain all the details, a lot also depends on the questions put to him by the officer who records his statement and the circumstances under which such statement is made. In this case therefore, depending on the questions put to them, PW13 and PW14 could have omitted some details from their first statements. It should also be noted that the witnesses must have been still under shock from the events which had just taken place.

51. PW17 said he did not know who shot the deceased. Even if his evidence were to be excluded all together, that would, in our view, not make a difference because by their own testimonies the appellants placed themselves at the scene and, as we have demonstrated herein, it is the 1st appellant, who with malice aforethought, shot the deceased. We now therefore turn to the 2nd appellant's role in the murder of the deceased and to determine that issue we need to restate the law on what common intention is.

52. The law is well settled on the definition and in what circumstances common intention can be inferred if it is not express or obvious. Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act.

53. **Section 21** of the **Penal Code** defines common intention as arising:-

> **"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 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."**

This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In **Solomon Mungai v. Republic [1965] E.A. 363**, the predecessor of this Court

held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

In **Njoroge-Vs-Republic, [1983] KLR 197 at p. 204**, the Court of Appeal stated that:-

> **"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."**

As to its proof, referring to its earlier decision in **R-Vs- Tabulayenka s/o Kirya (1943) EACA 51,** it continued to state that:-

> **"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."**

56. As we have stated, common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In **Dracaku s/o Afia Vs R [1963] E.A.363** where *"there was no evidence of any agreement formed by the appellants prior to the attack made by each"* it was held that *"that is not necessary if an intention to act in concert can be inferred from their actions"* like *"where a number of persons took part in beating a thief."*

57. It is evident from the above definition and authorities that in order to secure a conviction on the basis of common intention, the prosecution must prove that the accused had (a) a criminal intention to commit the offence charged jointly with others, (b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and that (c) the accused was aware of this when he or she agreed to participate in that joint criminal act.

58. In the light of these principles can the two appellants in this appeal be said to have had a common intention to kill or cause grievous harm to the deceased? In other words is there evidence to hold the 2nd appellant liable for the 1st appellant's act of shooting the deceased?

59. We find the nexus between the 1st appellant's act of shooting the deceased and the 2nd appellant's role in the whole crime extremely tenuous. It therefore behooves us, which we are at any rate legally obliged to do (see **Okeno v. Republic),** to carefully re-evaluate the evidence on record and determine whether or not the two appellants had common intention to commit the crime they were convicted of. Needless to say that that determination will itself determine the fate of the 2nd appellant in this appeal.

60. It is immaterial whether or not the 1st appellant saw the deceased hit and kick the 2nd appellant outside the Crooked Q Club and that the 1st appellant pursued the deceased with the sole purpose of arresting him. There is evidence, as we have stated above, that either the deceased attempted to hit the 2nd appellant or vice versa and that there was a scuffle or attempted scuffle between them. There is also evidence that the 2nd appellant called out the name "Munene" and, in response, the 1st appellant came out of his car. Before the 1st appellant took any action, the deceased was driven off by his brother, PW13. By his own testimony the 1st appellant said he pursued them.

61. It also does not matter for how long the 2nd appellant was held by Crooked Q bouncers outside the Crooked Q premises after the deceased was driven off. The fact remains that by his own testimony the 2nd appellant said when he was eventually released he also pursued the deceased and got to the scene just before he heard gunshots.

62. After the warring groups got out of the Crooked Q Club, as we have said, there was a scuffle or attempted scuffle between the deceased and the 2nd appellant. When the deceased was driven off,

the 1st appellant followed him immediately. The 2nd appellant also wanted to follow in hot pursuit but the Crooked Q bouncers restrained him. PW2 said he was restrained for "a while." PW1 said it took about 5 minutes before they released the 2nd appellant. When he was eventually released, according to PW5, the 2nd appellant jumped into his car and drove off *"in high speed trying to follow the group of James (the deceased) and Jeddy (PW14)."*

63. On this evidence, we reject the contention by PW13, PW14 and PW17 that it is the 2nd appellant in the company of Sagini, PW6, and another who, in the Mercedes Benz registration number SFN 223B, overtook the deceased's car, blocked it and proceeded to beat him. Having been restrained for about five minutes or less after the deceased had been driven off with the first appellant in hot pursuit, we accept the defence evidence but find that it is the 1st appellant who overtook and blocked the deceased's vehicle and the 2nd appellant followed up and blocked it from the rear. Then comes the crunch: the sound of gunshots. In these circumstances, even bearing in mind that common intention can arise in the course of commission of a crime, is the 2nd appellant liable for the 1st appellant's act of shooting the deceased? We do not think so.

64. In **Abdi Alli Vs R., 23 (1956) E.A.C.A. 573** where it was also held that the test for joint responsibility is common intention, this is how the court, relying on **R Vs Cheya [1973] E.A. 500 at p. 204,** expressed itself on the criteria that must be met before holding one liable for the act of another**:-**

> **"[T]he existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under this section, the former by itself is irrelevant to the section. It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can he applied."**

65. In the light of this principle and after a careful re-evaluation of the evidence on record, we have come to the conclusion that there was no common intention between the appellants to kill or shoot and thereby cause actual bodily harm to the deceased.

66. Let us go back to the facts of this case. The two appellants appear to have been great buddies. The 1st appellant went to the 2nd appellant's home or place of work along Elgeyo Markwet Road on the afternoon of 23rd January 2009, a Friday afternoon. They were later joined by other friends including Mark Sagini, PW6. They drunk all the alcohol that there was at the 2nd appellant's place. After that they went to various clubs or bars in town and ended up at the Crooked Q Club in the wee hours of Saturday 24th January 2009. There the deceased insulted one Tish and asked PW6 if he (PW6) was gay. Infuriated by that remark PW6 confronted the deceased and there was a scuffle between them. The 2nd appellant joined the fray on the side of PW6 and the deceased insulted the 2nd appellant asking the 2nd appellant *"who the fucking are you."* It would appear that before the 2nd appellant reacted to that insult, the Crooked Q bouncers separated the two groups and took the 2nd appellant out of the club.

67. It did not take long before the deceased also got out of the club and a scuffle ensued but the 2nd appellant was again restrained. In that anger the 2nd appellant called the 1st appellant, in our view to discipline the deceased and avenge him (the 2nd appellant). Before the 1st appellant did anything, the deceased was driven away and the 1st appellant pursued him. When released the 2nd appellant followed the deceased and the 1st appellant. With what intention? In our view with the sole object of catching up with the deceased and giving him a few punches for insulting him. Remember these are young people who had had too much to drink in the previous 14 hours or so. Remember also that the 2nd appellant and the deceased did not appear to have known each other.

So other than the insult the deceased hurled at the 2nd appellant there was nothing between them that would have caused the 2nd appellant to enlist the 1st appellant's assistance to shoot and thereby cause actual bodily harm to the deceased leave alone kill him. As a matter of fact there is no evidence that the 2nd appellant knew that the 1st appellant was armed. In our view, the first appellant's act of shooting the deceased was not a probable consequence pursuing the deceased to give him a few punches for assaulting the 2nd appellant or arrest him, even if we were to accept the 1st appellant's contention.

68. The above reasoning cannot avail the 1st appellant. True he may also have been pissed up. But, like the 2nd appellant, he was able to drive and pursue the deceased proving that both of them knew what they were doing. We believe that is why he did not raise the defence of drunkenness. It would not have held even if he had raised it.

69. Further more, police officers know better than anyone else that guns are dangerous weapons. And we believe they are trained to sparingly use them only when it is absolutely necessary. In this case it was not necessary for the 1st appellant to shoot for whatever reason. A simple brawl in a bar with no visible injury to the 2nd appellant who sought his help did not warrant the use of a gun even if we were to accept the 1st appellant's contention, which we do not, that he pursued the deceased with only one object of arresting him. We therefore find that the 1st appellant intentionally or recklessly shot the deceased knowing that would cause him grievous harm or kill him. And as we have said we accordingly dismiss the 1st appellant's appeal against conviction.

70. Counsel for the 1st appellant wisely abandoned the appeal against sentence. In view of this Court's recent decision in Joseph Njuguna Mwaura v. Republic, Cr. App. No. 5 of 2008, reversing its earlier decision in **Ngotho v. Republic, Cr. App. No. 17 of 2008,** there is no way we would have done anything about the death sentence imposed upon the 1st appellant in this case. In the circumstances, we have no choice but to uphold it with the consequence that the 1st appellant's appeal is hereby dismissed in its entirety.

71. As regards the 2nd appellant, for the reasons stated above, we allow his appeal, quash the conviction and set aside the death sentence imposed upon him. We direct that the 2nd appellant be set free forthwith unless he is otherwise lawfully held.

DATED and delivered at Nairobi this 28th day of February, 2014

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

REGISTRAR