Case Number:	Criminal Appeal 414 of 2012
Date Delivered:	27 Jun 2014
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji, Daniel Kiio Musinga, Jamila Mohammed
Citation:	Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR
Advocates:	-
Case Summary:	**The reasonableness of belief in imminent danger during self-defence immaterial in determining the guilt or innocence of an accused person** **Ahmed Mohammed Omar & 5 Others v R** **Court of Appeal at Nairobi** **Criminal Appeal No. 414 of 2012** **E. M. Githinji, D. K. Musinga & J. Mohammed JJ.A** **June 27, 2014** **Reported by Emma Kinya Mwobobia** **Issues:** Whether the reasonableness or unreasonableness of the appellants' belief in the use of force was material to the question of guilt or innocence of the appellant Whether the test of culpability where self-defence

was raised was an objective or subjective test

Criminal law *– murder – defence – self defence – allegation that the use of force which led to death was an act of self defence – culpability test – objective vis a vis subjective test-whether the reasonableness in belief of imminent danger during self defence was material in determination of the guilt of an accused person – Penal Code section 17*

Held:

1. The shoot-out occurred at night when there was no good visibility. The appellants identified themselves as police officers and fired at least twice into the air to disperse the deceased but the deceased kept advancing. In the recent days when so many police officers were being killed in the line of duty by armed criminals, the appellants not knowing that there had been physical confrontation between the taxi operators and motor cycle operators, could have reasonably believed that their lives were in danger and decided to open fire.
2. The Appellants had not been dispatched to Kawangware to quell a reported commotion between two feuding groups of people. They had therefore not been issued with plastic bullets which were ordinarily used against rioters. They had been issued with guns and live bullets. The 1st, 2nd, 3rd and 6th Appellants were on patrol duties at night in an area that was famous for criminal notoriety at night. They heard someone screaming *"don't kill me, don't kill me"* at about 12.30 a.m and fired twice into the air. Undeterred by the warning shots, the deceased who were armed with pangas, swords and what looked like a gun, confronted the appellants. In the circumstances, the appellants reasonably believed that their lives were in danger or were in danger of serious bodily injury. A number of police stations have even been raided by criminals, police officers killed and arms stolen. There were also reported cases of armed police officers being attacked by

criminal gangs and robbed of their loaded guns.

3. The common law position regarding the defence of self-defence had changed over time. Prior to the decision of the House of Lords in *Dpp V Morgan [1975] 2 All Er 347*, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. However, in *Dpp V Morgan* it was held that if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.
4. The case of *Dpp V Morgan* was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one.
5. Section 17 of the Penal Code subjected criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there were express provisions to the contrary in the Code or any other Law in operation in Kenya. The trial court rejected the appellants' defence because it applied an objective test and was not drawn to the position of the English Common Law as regards the defence of self-defence. Had the Judge's attention been drawn to the case of Dpp V Morgan, its decision would have been different.
6. The abandonment of the objective standard demanded by the existence of reasonable grounds for belief would not result in the success of too many spurious claims of self-defence. Each case would have to be determined on its own merit

	and peculiar circumstances. Section 28 of the Police Act as well as the Kenya Police Manual of 1980 set out explicitly the circumstances under which a police officer may use a firearm. One of them was when the officer had reasonable grounds to believe that he or she or any other person was in danger of grievous bodily harm. 7. Taking into account the provisions of Section 17 of the Penal Code that imported application of the English Common Law into cases of such a nature, the appellants' defences of self-defence were improperly rejected because the trial court did not apply the proper test. *Appeal allowed, Convictions for murder quashed and death sentences set aside as against each of the appellants.*
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	14 of 2010
Case Outcome:	Appeal Allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 414 OF 2012

BETWEEN

AHMED MOHAMMED OMAR …….. 1ST APPELLANT

AHMED ABDALLA SHAFFI …….. 2ND APPELLANT

MICHAEL NGUNGU LEWA …….. 3RD APPELLANT

MOSES LOCHICH …….. 4TH APPELLANT

NELSON KIPCHIRCHIR TOO …….. 5TH APPELLANT

ERICK EBERE MELCHIZEDEK …….. 6TH APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Being an appeal from Judgment of the High Court of Kenya at Nairobi (F.A. Ochieng, J.) dated 18th December, 2012

in

HC. CR. C. No. 14 of 2010)

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JUDGMENT OF THE COURT

This appeal arises from the Judgment of Ochieng, J. in **Criminal Case No. 14 of 2010.** In the said case, each of the appellants herein together with one **Alex Muteti Mutisya,** were charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** Each count was in relation to one victim, and the said victims, hereinafter referred to as "**the deceased",** were **Harry Gideon Thuku, James Mugweru Mwangi, Joseph Maina Mwangi, George Ng'ang'a Kairu, William Gitonga Njau, Joseph Ngugi Chege and Joseph Thiong'o Njoroge.**

The particulars of the said offences were that on the 11th day of March, 2010 along Naivasha Road, Kawangware, within Nairobi area, the appellants jointly murdered the deceased persons. The prosecution called a total of 28 witnesses. At the close of the prosecution case, the trial court held that a prima facie case had not been established against Alex Muteti Mutisya and proceeded to acquit him at

that stage.

Each of the appellants gave unsworn statement of defence and denied having committed the offences as charged. In a lengthy judgment, the trial court convicted each of the appellants and sentenced them to death as by law prescribed.

Being dissatisfied with the said conviction and sentence, the appellants preferred an appeal to this Court. At the hearing of the appeal, the 1st appellant was represented by **Mr. Kioko Kilukumi** while the 2nd, 3rd, 4th, 5th and 6th appellants were represented by **Dr. Khaminwa, Senior Counsel**, assisted by **Mr. Lagat.** The respondent was represented by **Jacinta Nyamosi, Assistant Director of Public Prosecutions.**

This being the first appellate court, the Court is enjoined to re-evaluate, re-assess and re-examine the evidence that was tendered before the trial court and arrive at its own conclusion. See **OKENO v REPUBLIC (1972) E.A. 32.** The Court must however, remind itself that unlike the trial court, it did not have the benefit of hearing and observing the demeanour of the prosecution witnesses as well as the deportment of the appellants as they testified and must therefore make due allowance for that.

We will now summarise the evidence that was tendered before the trial court, the grounds of appeal, submissions by counsel and thereafter determine the appeal.

Wilson Mwangi Mugweru, the 1st prosecution witness (PW1), testified that on 10th March, 2010, he was asleep in his house at Kawangware when one of his neighbours known as “baba Elijah”, knocked on his door and informed him that he had been telephoned by a security guard, Mr. Maina, who was guarding Naivasha Bar along Naivasha Road in Kawangware. Apparently, Mr. Maina wanted to inform “baba Elijah” that there had been a shoot out in the area PW1 and his neighbor went to Naivasha Bar where they found Mr. Maina. He told them that there had been a fight between some taxi operators and motor cycle operators, commonly referred to as ‘boda boda’. The fight was near a Shell/Bp Station in the trading centre. Maina informed PW1 that his son, James Mugweru Mwangi (the second deceased person), was one of the people involved in the fight. The late Mugweru was a taxi operator. Mr. Maina and his neighbor went to the petrol station where they found a group of taxi drivers who had parked their vehicles. After a short while, PW1 and one Mariana Njeri Mugunyu proceeded to the place where the shoot out had occurred, which is about 300 metres from the petrol station. It was also near the office of the District Commissioner.

Gideon Mbogo Karanja, PW8, a taxi operator at Kawangware, testified that on the material night he was at the Shell BP petrol station. There were also several other taxi operators. The taxi operators asked the motor cycle operators to find another site from where they would conduct their business. At the time the motor cycle operators were engaged in a stiff competition for customers with taxi operators because the former were charging lower fares than the taxi operators. PW8 drove a client to Waithaka, about 3 kilometres away from the BP petrol station. When he was at Waithaka, he got a phone call from one of the taxi drivers who informed him that his colleagues had been arrested by Administration Police Officers. There was an Administration Police Camp about 100 metres from the said petrol station. Shortly thereafter, PW8 heard gunshots from the direction of Naivasha Road. He got scared and drove away to his house. On the following morning he went to the petrol station and found 7 taxis which belonged to some of the deceased persons. The witness did not see any blood stains at the petrol station, however there were blood stains about 100 metres from the petrol station near the Chief’s Camp where Administration Police Officers were staying.

Eunice Muthoni Kibuchi, PW9, the widow of Joseph Ngugi Chege, the 6th deceased person,

told the trial court that her husband was a taxi operator at Kawangware. On 10th March, 2010 her husband left the house at about 8 p.m. At about midnight she heard gunshots from the direction of Kawangware. She telephoned her husband but he did not answer. Later on she learnt that her husband had died. She could not tell the circumstances under which he had met his death.

Corporal James Wambua, PW10, was in-charge of Kawangware Administration Police Post. Ahmed Mohammed Omar, the 1st appellant, was stationed at the said police post. On 10th March, 2010, he issued the 1st appellant with a Ceska pistol F9215 and 15 rounds of ammunition caliber 9mm. The 1st appellant was proceeding to Riruta District Headquarters where he was to join other police officers who were deployed to work in civilian clothing.

On 11th March, 2010 at about 1 a.m. PW10 was at the said police post when he heard gunshots coming from the direction of the District Headquarters.

Together with two other Administration Police Officers, **Sergeant Moses Mokewa and APC Onduma,** they went to the area where the gunshots were coming from. On reaching Naivasha Road, the witness saw the 1st appellant as well as other officers from both the regular and Administration Police. He also saw 7 bodies that were lying on the ground. He heard the police officers saying that the bodies were of suspects who had been attacking motor cycle operators. **Chief Inspector Anthony Nderitu, PW11**, who was the OCS Muthangari Police Station, testified that on 11th March, 2010 at about 1.00 a.m. he received a call from the 1st appellant who informed him that a group of over ten people was attacking motor cycle operators along Naivasha Road. Together with **Sergeant Saleh Mulama,** PW12, and **P.C. Stanley Kirimi, PW16**, they rushed to the scene. They met over ten Administration Police Officers. At the scene PW11 saw broken helmets scattered on the road. He also saw seven bodies, two of them were under a truck and another one lay near the gate to a garage. PW11 also saw a simi, a panga and an iron bar lying next to the two bodies which were under the truck. Next to the other four bodies lay a wooden toy pistol.

The evidence of PW11 was corroborated in all material aspects by PW12, who added that the Administration Police Officers told them that they had ordered the deceased persons to stop attacking the motor cycle operators and to surrender but the deceased responded by firing at the officers, prompting the police officers to return fire. However, PW12 saw no functional gun at the scene.

Stephen Watene, PW14, a taxi operator, confirmed that there had been a disagreement between taxi operators and motor cycle operators over the low fares that were being charged by the latter to customers who sought their services, compared to the fares charged by the taxi operators. The two groups had met and tried to resolve the differences without much success.

On the material night, he saw a group of about twenty motor cycle operators approaching them. He then heard two gun shots. Some of the taxi operators ran away. PW14 further stated:

"Some people came from the direction of the petrol station. They had machine guns. I ran and hid myself. I then heard over 10 more gun shots."

In cross-examination, PW14 clarified that the first two gun shots were fired into the air when the motor cycle operators were advancing towards the police officers.

There is no dispute that each of the appellants had been issued with a gun and ammunition. Evidence to that effect was given by **Senior Sergeant Samuel Kiplagat, PW17** and **AP Sergeant Francis Siema, PW25**.

Medical evidence revealed that each of the deceased died of multiple gun shot injuries.

In their respective defences, each of the appellants admitted that on the material day they had been issued with a gun and several rounds of ammunition. The 1st appellant stated that at about 12.30 a.m. they were patrolling Kawangware area together with the 2nd, 3rd and 6th appellants when they heard screams. As they approached the place where the screams came from, they saw a group of more than ten people about 40 to 50 metres ahead of them. Among them, one person was pleading for his life.

The 1st appellant shouted aloud that they were police officers and asked the approaching men to surrender. Instead of surrendering or dispersing, the men fired at the appellants. The appellants took cover and fired in the air to disperse the crowd but the crowd was unmoved, they continued to fire at the appellants. The appellants fired in the air a second time but the crowd kept on advancing, whilst firing. The first appellant continued:

"I was scared for my life and the lives of my colleagues. I tried to guess the kind of weapons they had, from the sound of the gunfire. I knew that they had a more powerful firearm than what we had. I concluded that we could not stand up to them in that confrontation.

Shooting continued. I was forced to seek for help. I used my radio to reach the controller. I told him that we had been attacked. I asked for reinforcement…… After a short while, some police officers came to our help. Together with them, we fired at the thugs; while they too fired at us."

The 4th and 5th appellants were among the officers that were sent to assist the 1st, 2nd, 3rd and 6th appellants after they called for reinforcement. The Duty Officer told them that he had received a signal from the Radio Controller informing him that some officers on patrol at Kawangware had been attacked by armed men. All the appellants contended that they used reasonable force in self-defence and to protect lives of Kenyans, after the crowd refused to disperse and began firing at them. They asserted that they did so in the line of duty, that they are empowered by law to use firearms when they had no alternative ways to prevent crime.

The trial Judge rejected that line of defence. He stated, *inter alia:*

"…… if the taxi drivers were armed with more superior fire power than the officers, and if they fired towards the officers, it would have been expected that there should have been some injuries among the police officers. But none of the officers was injured at all.

And even after the police had shot dead the seven (7) men, no firearms were recovered from where the men were found lying dead. …… I can only conclude that the story about the alleged superior fire power, coupled with the continuous approach by the taxi drivers is nothing more than a figment in the imagination of the accused persons. It was a story calculated to try and justify the use of the firearms which the accused had.

I find the indiscriminate shooting by the accused persons to constitute a reckless use of firearms."

The learned Judge convicted the appellants and sentenced each one of them to death. That is the finding that gave rise to this appeal.

The 1st appellant advanced 26 grounds of appeal while the other appellants jointly raised 12 grounds of appeal. Ms Nyamosi, opposed the appeal. She urged the Court to reject the argument that

the appellants acted in self-defence. She added that the deceased were not armed yet the appellants fired at them with intention of killing them. However, some of the grounds advanced by all the appellants do not fall for determination. That is so because they were either abandoned or rendered moot in view of the line of defence taken by the appellants. As already stated, none of the appellants challenged that: (i) they had been issued with firearms and ammunition, (ii) that they returned fewer rounds of ammunition than they had been issued with, (iii) that they shot at the deceased persons (iv) that the deceased persons died as a result of gun shot injuries.

In our view, the remaining grounds of appeal may be summarized as hereunder:

a. ***The learned Judge erred in law and in fact in failing to appreciate that the appellants acted in self defence and protection of property and members of the public.***

b. ***The learned Judge erred in law and in fact in holding that the appellants used excessive force in the circumstances.***

c. ***The learned Judge erred in law and in fact in holding that the appellants had a common intention to murder the deceased persons.***

Regarding the above grounds, the appellants' advocates submitted that all the appellants, were responding to an alarm raised by the motor cycle operators after some of them were attacked by taxi operators. The 1st appellant and some of his colleagues who were with him at the material time saw a crowd of people approaching them. When the police identified themselves and shot in the air twice to disperse the crowd and save the man who was then pleading for his life, (being at the mercy of some taxi operators), the crowd kept advancing and firing at the police officers.

Counsel referred the Court to the evidence of **Timothy Ndeke Nebert, PW20**, who was a motor cycle operator. That witness stated that on the material night at about 11.00 p.m., **"the taxi drivers started beating them using slaps, blows and kicks. I did not see them with any weapons. The taxi drivers poured out all the food, including mine. Those who were beaten ran away leaving their bikes ….. We then saw a group approaching us from the direction of the B.P. I did not manage to identify them. I took off after noticing that they were hitting the tarmac using metal rods."**

PW14 said that the first two shots that he heard were fired into the air. The shots were intended to scare the crowd that was advancing towards the appellants but the intention was not realized. It is at that point that the 1st appellant called for reinforcement. That was confirmed by **Chief Inspector Anthony Nderitu, PW11** and **Sergeant Saleh Mulama, PW12.** It had been reported that some officers had been attacked by armed men. However, PW11 and PW12 could not verify that there had been any exchange of fire between the appellants and the deceased. The two witnesses did not find any gun at the scene, except a toy pistol.

Did the appellants shoot at innocent and peaceful members of the public or did they act in self-defence in fear for their lives after the deceased fired at them as alleged" That is not clear. None of the prosecution witnesses was able to tell the trial court what had exactly happened.

However, all the appellants said that the crowd that was approaching them, having defied

orders to surrender, was the one that fired first. Although it is only a toy pistol that was recovered at the scene, is it possible that apart from taxi drivers there were some other people who were armed with other guns and who escaped after the police returned fire, as suggested by Dr. Khaminwa" There was evidence that in the area of Kawangware there are many illegal guns in the hands of unauthorised people.

In the circumstances, is the appellants' contention that they acted in self-defence plausible" **Section 17** of the **Penal Code** states that:

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

What are the common law principles relating to self defence" The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in **PALMER v R [1971] A.C. 814**. The decision was approved and followed by the Court of Appeal in **R v McINNES, 55 Cr. App. R. 551**. Lord Morris, delivering the judgment of the Board, said:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ……Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. …... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

According to **ARCHBOLD – Criminal Pleading, Evidence and Practice 2002**, paragraph 19-42, the test of whether force used in self defence was reasonable is not purely objective.

***"There is no rule of law that a man must wait until he is struck before striking in self defence."* R v DEANA, 2 Cr. APP. R. 75, CCA.**

The above Common Law principles have been applied locally in several decisions.

In **ROBERT KINUTHIA MUNGAI v REPUBLIC (1982 – 88) 1 KAR 611**, the appellant visited a lady friend at her house and at 4.30 a.m., they were awakened by the deceased, who was also a boyfriend of the lady. He uttered threats to kill them both and attempted to strangle the lady. He also threw a hurricane lamp at the appellant and a piece of glass cut him above the eye. The appellant took his gun, which he was licenced to carry, and fired into the air. The deceased was not deterred, he continued with his threats. The appellant, fearing for the life of the lady, shot the deceased and killed him. The appellant was charged with murder but the High Court convicted him for manslaughter. On

appeal, this Court held that the appellant had acted in the course of defence of the person and also for the purpose of preventing a felony and quashed the conviction.

In the appeal before us, the learned trial Judge rejected the defence of self-defence that was advanced by the appellants. He held that the appellants were not in imminent danger at the time when they shot and killed the deceased persons. He also found that the degree of force used was not reasonable in the circumstances; it was excessive.

However, in **ROBERT MUNGAI v REPUBLIC (Supra)** the Court, having reviewed several English and local authorities, delivered itself thus:

"…. we think, in view of the earlier East African cases we have considered, and the more recent English decision in R v SHANNON Crim. LR 438 1980, that, the true interpretation of the judgment of the privy Council in PALMER v R is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered."

In this appeal, there was no evidence from any of the prosecution witnesses that the deceased persons were armed with any guns, it is the appellants who asserted that the deceased persons shot at them. Perhaps the only weapons that the deceased had were pangas, swords and a toy gun. That is why the learned trial Judge held that the appellants used excessive force in the circumstances. However, there was evidence that the deceased defied a police order to stop and confronted the appellants.

In **ROBERT KINUTHIA MUNGAI v REPUBLIC (Supra),** the Court held that it is a doctrine recognized in East Africa that excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the Court to regard the offence not as murder but as manslaughter. But if the defence of self-defence is upheld, a conviction for murder cannot be sustained.

We have already stated that the shoot out occurred at night when there was no good visibility. The appellants identified themselves as police officers and fired at least twice into the air to disperse the deceased but the deceased kept advancing. In these recent days when so many police officers are being killed in the line of duty by armed criminals, the appellants, not knowing that there had been physical confrontation between the taxi operators and motor cycle operators, could have reasonably believed that their lives were in danger and decided to open fire. As held in **DEANE v R (Supra),** in such circumstances, a police officer cannot wait until he is struck before striking in self-defence. The learned trial Judge rightly observed that police officers "perform their duties in circumstances that are often fraught with danger to their lives, it is not an easy job." That notwithstanding, the trial court blamed the police for shooting live bullets towards the taxi drivers.

We pause here to state that the appellants had not been dispatched to Kawangware to quell a reported commotion between two feuding groups of people. They had therefore not been issued with plastic bullets which are ordinarily used against rioters. They had been issued with guns and live bullets. The 1st, 2nd, 3rd and 6th appellants were on patrol duties at night, in an area that is famous for criminal notoriety at night. They heard someone screaming – "don't kill me, don't kill me". It was about 12.30 a.m. They fired twice into the air. Undeterred by the warning shots, the deceased, who were armed with pangas, swords and what looked like a gun, confronted the appellants. We think, in the circumstances, the appellants reasonably believed that their lives were in danger or were in danger of

serious bodily injury. A number of police stations have even been raided by criminals, police officers killed and arms stolen. There are also reported cases of armed police officers being attacked by criminal gangs and robbed of their loaded guns.

In **BECKFORD v FORD [1987] 3 ALL ER 425,** the appellant, a police officer, was a member of an armed posse investigating an armed man who was terrorizing and menacing his family at their house. When the police arrived at the house the appellant ran out of the back of the house, pursued by police officers, including the appellant. The Crown alleged that the man was unarmed and was shot by the appellant and another police officer after he had been discovered in hiding and had surrendered. The appellant claimed that the man had a firearm, had fired at the police and had been killed when they returned the fire.

The appellant was convicted for murder. His appeal to the Court of Appeal of Jamaica, contending that he was entitled to rely on the defence of self-defence if he had an honest belief that he had been in danger was rejected. The Court of Appeal held that the appellant's belief that the circumstances required self-defence had to be reasonably and not merely honestly held. The appellant appealed to the Privy Council. The Privy Council, in allowing the appeal, held that if a plea of self-defence was raised when the appellant had acted under a mistake as to the facts, he was to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake was reasonable. Accordingly, the test for self-defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed them to be. In other words, their Lordships established that self-defence depends on a subjective test, rather than an objective one.

The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in **DPP v MORGAN [1975] 2 ALL ER 347**, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in **DPP v MORGAN (Supra)** it was held that:

"……if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."

In **BECKFORD v R (Supra)** it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

In **R v WILLIAMS [1987] 3 ALL ER 411**, Lord Lane, C.J. held:

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

unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."

It is acknowledged that the case of **DPP v MORGAN (Supra)** was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also **SMITH AND HOGAN'S CRIMINAL LAW, 13th Edition, Page 331**.

Section 17 of the **Penal Code** subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.

The learned Judge's attention was not drawn to the current position of the English Common Law as regards the defence of self-defence. We believe that had the Judge's attention been drawn to the case of **DPP v MORGAN (Supra),** his decision would have been different.

Just as the Privy Council did in **BECKFORD v R (Supra),** we must also dispel the fear that **"the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence."** Each case will have to be determined on its own merit and peculiar circumstances. **Section 28** of the **Police Act** as well as the **Kenya Police Manual of 1980** set out explicitly the circumstances under which a police officer may use a firearm. One of them is when the officer has reasonable grounds to believe that he or she or any other person is in danger of grievous bodily harm. See this Court's decision in **ANTHONY NJUE NJERU v REPUBLIC [2006] eKLR.**

Taking into account the provisions of **Section 17** of our **Penal Code** that import application of the English Common Law into cases of this nature, we are satisfied that the appellants' defences of self-defence were improperly rejected because the learned trial Judge did not apply the right test. For this reason, we allow this appeal, quash the convictions for murder and set aside the death sentence passed by the trial court as against each of the appellants. The appellants are set at liberty unless otherwise lawfully held.

Dated and Delivered at Nairobi this 27th day of June, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

……..

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

REGISTRAR