



**Republic v Nyapara (Criminal Case 20 of 2019)
[2023] KEHC 131 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 20 OF 2019
WM MUSYOKA, J
JANUARY 20, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PATRICK OITA NYAPARA ACCUSED

JUDGMENT

1. Patrick Oita Nyapara is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, cap 63, Laws of Kenya. Particulars of the offence allege that on the March 14, 2019, at around 20.00 hours, at Duka Moja area in Nambacha sub-location, Navakholo sub-county, within Kakamega county, he murdered Christine Maonga, hereinafter referred to as the deceased. He pleaded not guilty to the charge on April 2, 2019. The hearing of the case for the prosecution commenced on May 26, 2020. 21 witnesses testified.
2. The first on the stand was Evans Sylvester Sewe, who testified as PW1. He stated that on March 14, 2019, he was on duty at 6.30 pm, at the Independent Electoral Boundaries Commission offices at Navakholo, with a colleague. They heard composition at the market, people were screaming, and both of them went out to investigate. They met members of the public informed them that someone had been killed. He left his colleague at the guard post, and he went to the Navakholo police station. He joined other officers, who were leaving for the scene. The scene was 500 metres from the Navakholo shopping centre, at a place called Duka Moja. They found a huge crowd at the scene. He saw the body of a woman lying outside a residential house. He left the scene, leaving other police officers there, and went back to the police station. While at the police station the accused telephoned him on his mobile phone, and instructed him to go to his house to retrieve a Ceska pistol and a key to the armoury. He gave him directions on where he was to get the key to his house, to enable him access it. He did so, in the company of one senior sergeant Alex Keitany, PW15. They accessed the house, and retrieved a ceska pistol, number G1411, which they took to the police station. It had a bullet in the chamber and another in the magazine. He handed the pistol over to corporal Sarah Arusei, and the keys to the armoury to



- PW15. He later learnt that the woman had been shot dead. There were many people at the scene, who were rowdy. He identified the accused as his colleague at work, who he had met in September 2012, and with whom they were transferred from north eastern. He stated that he knew the woman killed as the wife of the accused, with whom they related well, and with whom the accused had one child. He stated that she had telephoned him, sometime in 2017, to say that she had an issue with the accused, which he helped them resolve, in his capacity as chaplain and pastor. During cross-examination, he stated that the crowd at the residential house was very rowdy, and an attempt was even made to torch the police station. They did not wish to see any police officer at the scene.
3. Shaban Oduki Wanyama testified as PW2. He was a resident of Duka Moja, and knew both the accused and the deceased, as a police officer at the Navakholo police station and a teacher at a local secondary school, respectively. He also knew them as lovers. On the material day, he saw the accused, at about 18.50 hours, as he went into the market to sell milk, while the accused was walking towards the residence of the deceased. He waved at the accused, who did not notice him. After his business at the market, he went home. When he got home a gunshot rang out, from the direction of the residence of the deceased. He ran in that direction. At the gate to the compound of the plot, he met a doctor, called Philip, PW10, who was screaming that the accused was killing the deceased. When the witness spoke to him, he told him to go there and see for himself. A second gunshot rang at that point. He entered the compound, and stood near a water tank, and a third gunshot rang out. He said that from that point he could see the accused holding a pistol and firing at the deceased at the head, who fell down, with blood flowing from her head. A crowd formed, and the accused got out, walked slowly away, and left the compound. He said he could see spent cartridges on the ground of the compound. He and others began to trace the Officer Commanding Station, OCS, Navakholo police station. He came to the compound at about 9.00 pm, in the company of 2 other officers. The crowd was hostile to them. They wanted to remove the body, while the crowd wanted them to arrest the accused. The crowd kept them away, they did not want to see the police, as one of them was involved in the killing. The OCS attempted to get to the scene twice, and told them that he was still trying to trace the accused. They managed to access at about midnight, they threw teargas at the crowd, and removed the body. During cross-examination, he stated that the accused did not live with the deceased, but had his own house at the trading centre. He said that the third gunshot was when he was at the compound, and he saw it being fired, hitting the deceased, and the deceased falling. He said that the accused pushed the deceased first, before firing that third gunshot.
 4. Fredrick Mbesi Okumu testified as PW3. He was the father of the deceased. He testified that he was at home on the material day, when someone telephoned him, to inform him that the deceased had died at her house at Duka Moja, after she was shot by a police officer. He drove to the scene. He found a huge crowd there, and the deceased lying dead in a pool of blood, with 3 gunshot wounds on her head and hand. He left the scene and went to make a report at the Navakholo police station. The police retrieved the body from the scene, and moved it to the mortuary. He was present at post-mortem. A bullet was retrieved from the body. He said that he knew the accused, as he had been a tenant in one of his houses. He said that he did not know that the accused had a relationship with the deceased, asserting that she was not married.
 5. Jane Lamonya Mahiva followed as PW4. She was a police commissioner, service number 19877301189. She was the Navakholo district AP commandant at the time of the incident. The accused was one of the officers serving under her. She had assigned to him duties at the armoury, where he worked with sergeant Nyangweso, PW7. She testified that pistol number G1411 was one of the firearms in that armoury. She explained that a register was kept at the armoury, and whenever a firearm was issued to an officer, an entry was made in the register. She said that the keys to the armoury were kept by an armourer, and the accused was one such armourer. She said that she knew the deceased as a spouse



- of the accused. She produced a report, which showed that the firearm number G1411 was one of the firearms that she handed over when she left the station, and the accused as one of the officers at the station.
6. Jacob Kipkoech Chelimo, service number 87622357 testified as PW5. He was the Navakholo sub-county AP Commander. He stated that he was contacted by the OCS Navakholo, chief inspector of police Abdalla Abdo Kiptoo, PW14, who informed him that the accused, an AP officer, had shot and killed his wife, in a domestic quarrel. He was implored to arrest the accused, and to recover the firearm, so that he could not do more damage. He was also informed that members of the public had jammed the scene, and were preventing the police from accessing the body. He telephoned his superiors, to inform them of the incident. He asked for reinforcements, to enable the police access the scene, and he also began investigations. He testified that they struggled to get to the police station, as members of the public had lit fires on the road, making them impassable. They disembarked from their vehicle, removed their uniforms, hid the same in a bush, and walked to the station. At the police station he found the police and members of the public engaged in running battles. He held meetings at the station with local politicians and the father of the deceased, and assured them that he would get to the bottom of the matter. He and the politicians went to the scene at midnight, and were allowed access. He found the body of the deceased lying outside her house, wrapped in a blanket. He uncovered it, and saw a fresh wound on the left side of the head above the left ear. He noted that the wound did not have an exit. He caused the body to be moved into a police vehicle, and was driven to the police station, and from there to the mortuary at Kakamega. He testified that the environment at Navakholo was very hostile, public property was damaged, and he had to hold crisis meetings with local leaders to bring calm to the area. He stated that the signal of the phone of the accused was traced in Busia, and he sent a team to Busia, to arrest him. He was apprehended, and detained at the Kakamega police station. He confirmed that the accused had been assigned to do armoury duties at the station, and that it was probable that he was able to access the firearm. He said that he got information from the OCS that the firearm had been recovered, after the accused had directed one of his trusted friends, PW1, on where to get it, and it had been handed over to the in charge of the armoury, PW15. He was also informed that at post-mortem a bullet had been recovered from the chest of the deceased, where it lodged after it hit the head and ricocheted. It was handed over to the investigating officer. During cross-examination, he stated that the accused was arrested at the home of his sister at Busia. He said that there were challenges with investigations, as some of the witnesses were not willing to record statements. He mentioned Sergeant Marion Njujo, PW9, as one of them, who he had to call to his office to counsel her on the need to record a statement. She recorded one, which he described as shallow, as it omitted some ingredients. He stated that PW9 was a neighbour of the deceased, and was present when the accused shot the deceased.
 7. Inspector of police John Humphrey Shichele, service number 94021917, testified as PW6. He was the Navakholo sub-county AP deputy commander at the time. He testified that the accused was in charge of the armoury, after he took over from a police officer who had fallen ill. He worked together with an officer from the Kenya police side, PW7. When the incident happened, PW7 was off duty, and it was the accused who had keys to the armoury. During cross-examination, he stated that he knew the deceased as a wife of the accused. They had a child that the accused used to drop at school. He explained that one could only take a firearm from the armoury after signing for it in the firearms movement register, indicating the purpose for which the gun was being removed. In re-examination, he said that one had to have a good reason to take a firearm. He said that he did not know that the accused had a gun that night, and he did not know whether he had signed for it. He said that the gun should have been at the armoury.
 8. PW7 was Sergeant Josephat Obunia Nyangweso, service number 218451. He testified that at the material time, he was on leave at his home in Trans Nzoia. He was called by PW15, who informed him



- that the accused had killed his wife. PW6 then summoned him back to duty. He reported the following day, and found members of the public demonstrating. He found that the guns issued the previous day had been returned to the armoury. He was given the keys to the armoury. He stated that it was the accused who was supposed to be on duty then.
9. Ntoinya Fredrick Benjamin, service number 258136, was PW8. He was on duty at the material time with PW1. They heard noises outside, and PW1 went to investigate, leaving him behind. He said that they both had guns, which had been issued to them by the accused, from the armoury at 6.00 pm. They were to return the guns to the armoury at 6.00 am the following morning. When he went to return his gun, the accused was not at the armoury, and the place was closed. He said that he later heard that the accused had killed his wife. He testified that he had never met the deceased, and did not know her. He said that on the material day, only 3 firearms had been issued, to him, PW1 and Dismas Kibet. During cross-examination, he stated that the accused had issued the firearms to him and PW1 on the material day, and they had left him at the armoury alone. They returned the guns at 10. 00 am the following day, as the armoury was not open at 6.00 am.
 10. Marion Naziloli Buchunju, service number 256878, was PW9. She was a neighbour of the deceased. She was at home on the material day, listening to music. She got out of the house, and heard deceased and the accused quarrelling. She did not intervene, but she heard the deceased say, “wachana na mimi.” She then heard a gunshot, which made her drop her water, and rush to hide. A second gunshot rang out, but she remained hiding. When she came back to the compound, she found that the deceased dead, lying on her blood, on the door outside her house. She left and went to the police station. During cross-examination, she stated that she never saw the deceased bring another man to the house, apart from the accused, and when she said “wachana na mimi,” she thought that she was talking to the accused. She said that she did not know how the deceased died. She said that the words she heard suggested a domestic dispute between a husband and his wife. She said she heard 2 gunshots.
 11. PW10 was Philip Emojong Okapesi. He was a neighbour of the deceased. On the material day he saw the accused enter the house of the deceased, and there was commotion in that house. The child of the deceased left the house, and ran towards his. He heard gunshots, and he grabbed the child and they ran into the next plot, where he handed the child to a woman in that plot. He got out and alerted the police at Navakholo police station. He later went to the scene. As a medical officer, being a clinician, he was expecting to give first aid, but he found the deceased had died, lying in a pool of her own blood. A crowd gathered. During cross-examination, he stated that he was outside with 2 neighbours, Ndiacha and Katami, who testified as PW11 and PW18, respectively, and he saw the accused get into the house of the deceased. He said that he knew the accused, and there was no mistaken identity. He said there was commotion from the house of the deceased, and he heard her say “Patrick achana na mimi,” followed by 3 gunshot sounds. He said that he told the police that he saw the accused shoot the deceased. He said that he saw the accused shoot at the deceased at close range. He said that she was shot as she was lying down. He said that he used to see the accused come and pick the child and take her to school.
 12. Martin Juma Katami testified as PW11. He stated that the deceased was his colleague teacher at Navakholo secondary school and stayed within the same residential compound with her, with her house being just next to his. On the material day and time, he was within the compound, but outside his house, with 3 of his friends, PW10, PW18 and a Godwin. As they were talking, the deceased came out of her house, and was speaking on phone. She then went back to her house, and a gunshot rang out. He said that they peeped into the compound, and saw the deceased lying on the ground. He said that he saw sparks coming out of a gun held by the accused. He and his colleagues ran away and hid for about 10 to 20 minutes. He thereafter went back to the compound, and found that the deceased had died. He said that he saw the accused walk out of the compound, towards the road. During cross-



examination, he said that he saw the accused shoot into the air, 4 gunshots. He thereafter saw him leaving the plot. He also saw the body of the deceased lying in a pool of blood. He said he knew that the accused and the deceased were friends. He said that he saw the accused at the scene, 2 steps from where the body was lying. During re-examination, he stated that he saw only one person with a gun at the scene, and that was the accused.

13. PW12 was Dr Dickson Mwaludindi, a consultant pathologist, who conducted an autopsy on the body of the deceased, on March 18, 2019. He saw a single bullet wound, above the left ear. There were also minor abrasions on the left chin. Internally, he established that the bullet went below the left jaw, in front of the spine, into the chest, where it was harvested from the right upper lobe of the lung. He noted minimal bleeding into the right chest and windpipe/trachea. Under the head, he found bleeding under the skin. On the scalp, there was a puncture hole, where the bullet went into the brain, through hind brain into the brain, downwards. He formed the opinion that the cause of death was a penetrating head injury, secondary to gunshot wound. He retrieved the bullet, and handed it over to the investigating officer for ballistics examination. He opined that the firearm used to shoot the bullet was of low calibre, and fired from distant range.
14. Vincent Wanyonyi Chelongo testified as PW13. He was a forensic document examiner, holding the position of inspector of police, service number 235252. He testified on behalf of his colleague, senior superintendent of police John Muinde, who had done the forensic examination on the document the subject of the testimony, being daily arms movement register. He compared the signatures on that register with known signatures of the accused, in his statement and certain leave applications forms, and concluded that some of the signatures in the daily arms movement register belonged to the accused.
15. PW14 was Abdoo Kiptoo Abdallah, service number 10540014, an inspector of police and the officer commanding the Navakholo police station at the material time. He got a call from a clinical officer known as Raphael Andera, informing him that a police officer attached to his station had killed his wife. He immediately convened a meeting of his officers, and they proceeded to the scene, which was some 400 metres from the station. A crowd had gathered at the scene. He found the accused lying dead, facing upwards. He noted a gunshot wound on the left side of her head. Members of the public were riotous, but he calmed them down. He got a blanket and spread it over the body of the deceased. The tension shot up, and members of the public in the environs came to the scene on motorcycles, and became violent. He got some officers to secure the scene. Shortly thereafter, he got information from PW15, that they had recovered the pistol, allegedly used by the accused person. He informed the Navakholo sub-county police commander, PW5, and the district criminal investigations officer, chief inspector of police Kiplangat, of the developments. He proceeded to the station, where he met PW1 and PW15 and APC Sewe, who handed the pistol, a ceska KEAP G1411, loaded with 2 rounds of ammunition of 9 mm bullets, over to him. He instructed the in-charge armoury, corporal Arusei, PW16, to keep it in safe custody, at the armoury. After that he went back to the scene. He explained that getting there was very hard, as members of the public had blocked the roads, and lit fires. PW5 and CIP Kiplangat joined him, together with local Members of the County Assembly (MCA). Members of the public were preventing the removal of the body from the scene. They talked to them and they relented, and at around midnight they were able to remove the body, to Kakamega mortuary. He established that the person implicated with the murder was Patrick Oita Nyapara, the accused. He stated that angry members of the public damaged 2 vehicles at the police station, and a section of the local government hospital. He testified that the accused was arrested in Busia, he stated that he was away without leave, and he had no reasonable excuse for being away from duty.
16. PW15 was Alex Kibiwott Keitany, service number 66490, a senior sergeant of police. He was in charge of the armoury and discipline. He said that he was informed of the incident by PW14. They went



together to the station, and mobilised the other officers. PW16 issued firearms, to facilitate the exercise of tracing the killer, who had escaped, and was believed to be within the vicinity. After he was issued with a firearm, he left the station. He found PW1 on phone, telling the person on the other side not to kill himself or do any other terrible thing. He informed him that he was talking to the accused, then a suspect, who had instructed him to proceed to his house to recover a firearm. PW15 then told PW1 that they would proceed there together, which they did. They recovered a ceska from under the pillow of the bed. The gun had 2 bullets. He instructed PW1 to handover the pistol to PW16, which he did. He and PW1 inspected the armoury, and established that all was well, after which PW1 handed the keys over to him. PW15 then handed over the keys to PW6, the in charge of the AP Navakholo. The pistol was handed over to the OCS for documentation, after which PW15 took the armoury keys from PW16. He explained that the local MCAs had incited members of the public, who then attacked the police station, and he had to lead in securing it, as the OCS went to the scene to retrieve the body. Some damage was done to the station, but the situation normalised the next day.

17. PW16 was Sarah Jebiwot Arusei, service number 89274, a police corporal. She testified that on the material day, PW15 summoned her to the station. She, PW14 and PW15 held a meeting. She was briefed of what had transpired, and was directed, as the in charge of the armoury, to issue firearms to the other officer, which she did. She was handed a ceska pistol, KEAP G1411, with 2 rounds of 9 mm in a magazine, by PW1. She was informed that that was the firearm used to kill the deceased. She kept it in safe custody in the armoury. She later handed it over to PW14, for documentation, before she handed the armoury keys to PW15.
18. PW17 was Psinen Kibet Edwin, service number 101587, a constable of police, with the directorate of criminal investigations. He testified that on the material day he encountered members of the public running helter skelter, screaming and shouting that accused had killed his wife. He followed them, and they headed to Duka Moja, where he found a very angry crowd. He found the OCS there. He and his team were chased away. As he was in civilian clothes, he was able to access where the body was, lying in a pool of blood. When members of the public realised that he was also a police officer, he was chased away. He ran away, as he was not armed, and he went to the police station. He asked for a rifle, as the public was planning to raid the residence where the suspect stayed, where he, PW16, also resided, and there was a threat to life and property. He was issued with a rifle. The local public hospital and the police station were attacked by members of the public who were claiming that they wanted to burn them down, but they were repulsed. However, they damaged 2 police vehicles. The riots continued throughout the night. Reinforcements were called in from Kakamega, and the body was retrieved, and moved to the county referral hospital mortuary. He was party of the party that went to Busia to apprehend the accused. He was arrested at the home of his sister. He was booked at Kakamega police station as Navakholo was still restive. He attended the post-mortem exercise, and the bullet head retrieved from the body was handed over to him. He took the bullet head to ballistic experts in Nairobi for examination. He also took the signatures of the accused to the handwriting experts for examination, for verification of his signatures on the arms movement register as he was in charge of the armoury. He also took the spent cartridges recovered from the scene to the ballistics experts. During cross-examination, he stated that he was handed over the ceska pistol and the ammunition by PW15, after the district criminal investigations officer had instructed him to take over the matter.
19. Henry Magorombo Ndiacho testified as PW18. He was working at the Navakholo hospital at the material time. He was with PW10 and PW11 at the residence, seated outside, when the accused came in and greeted them, and went straight to the house of the deceased. After 3 or so minutes, the deceased came out of her house, talking on the phone. She went back, and he heard her say: "Pattie wachana na mimi." It appeared as if she and the accused were quarrelling. He saw her try to escape from her house, she fell, and the accused then shot her on the head. He said that he saw the accused point his gun at



her head as she lay on the ground, and he heard gunshots. He and his friends fled. After sometime, he and his colleagues went back to the scene. They found the deceased lying in a pool of her own blood, with her eyes wide open. He stated that he saw an injury on her head. He stated that she had been their neighbour for 3 months before the incident, and the accused used to visit her, to take her child to school. He had heard that they were married, but were not staying together. During cross-examination, he said that the accused person was the only regular visitor to the deceased, and that he did not see any other visitors to her house. He stated he did not see the accused and the deceased rush out of the house as if escaping from something inside the house. He said that he “saw” 2 gunshots, and heard the third one as he was fleeing from the scene. During cross-examination, he stated that there was no possibility of there being a third person in the house, and that he only saw the accused, and that he saw the accused shoot at the deceased.

20. PW19 was Audrine Wanjala Khayiya. On that fateful day, she had gone to the market, with Chanice, the daughter of the deceased. When they got back to the house, at 7.30 pm, they found the child’s father. The child called him, but he did not respond to her. PW20 found him seated inside the house of the deceased. The deceased then came from the house of another neighbour, and she gave her the vegetables that she had sent her to buy for her. She left her, and went to her house. When she got to her house, she heard gunshots, and she got out. She saw the deceased getting out of her house, with blood on her blouse and abdomen. She went to assist her. 3 gunshots rang out, and she and PW10 grabbed the child, and took her to the house of a neighbour at the next plot. She said that she heard the deceased saying “niwache, niwache.” She said the deceased was at her door, kneeling; while the accused was standing at the door. She said that PW9 and PW10 came, and pleaded with the accused, to leave her alone. She also mentioned that PW11 and PW18 were within. She and PW10 ran out after the deceased fell. When she went back, she found blood spurting out of her abdomen, and was already dead. She said that she knew both the accused and the deceased as lovers, who had the child known as Chanice. She stated that after the incident, she saw the accused get onto a motorcycle and leave. She said that when she went into their house to hand over the vegetable or stores that the deceased had sent her to buy, she only saw the accused in that house, and she did not see anyone else, adding that she could not tell whether there was anyone else. During cross-examination, she stated that there were times the accused would come to the house, and talk only to the child, but not the deceased, and it appeared that they were not on good terms. She described PW10 as her husband. She said that although she did not know who fired the gun, it was the accused who was in that house, and it must have been him who fired the gun. He said that PW11 and PW18 were within the compound, but PW10 was just at the door, and after he heard the first gunshot he ran to the house. She said that PW9 was near the deceased. She said that she saw the accused fire the second shot, in the air. She said that the third shot was aimed at the deceased, and it caught her on the head. She said that she saw the accused leave the compound.
21. Reuben Kiptum Bett, service number 235253, an inspector of police and a ballistics examiner, testified as PW20. He stated that the firearm produced earlier by the other witnesses, alleged to have been used by the accused, was capable of firing the bullets, whose spent cartridges were recovered from the scene, and that the bullet retrieved from the body of the deceased during post-mortem was in fact fired from that firearm.
22. PW21, Rashid Ngolo Wekesa, was the last witness. He was the lead investigator from the independent police oversight authority. He said that he got information of March 15, 2019. He went to the scene. It had already been processed by the police, but had been tampered with. He saw blood splattered outside door No 4, a house belonging to PW9, some 3 metres from the house of the deceased, which was door No 1. He interviewed witnesses, being neighbours, and took statements from them. He also requested for documentary evidence from the police, being the OB abstracts, armoury register and other records, statements from the superiors of the accused, attended the post-mortem exercise,



where a bullet was extracted and handed over to the police investigator for forwarding to ballistics, statements were recorded from the accused. During cross-examination, he testified that he conducted investigations independent of the directorate of criminal investigations, and that both the independent police oversight authority and the directorate of criminal investigations had mandate to conduct investigations. He said where the independent police oversight authority comes into the picture after the directorate of criminal investigations had completed investigations, the independent police oversight authority goes by the investigations by the directorate of criminal investigations. He stated that the independent police oversight authority had mandate to oversee the directorate of criminal investigations, and that he did not find anything manifestly wrong with the directorate of criminal investigations conduct of the investigations. He said that the independent police oversight authority managed to reach witnesses that the directorate of criminal investigations had not managed to reach. He asserted that the prosecution was mounted by the independent police oversight authority and not the directorate of criminal investigations. During re-examination, he said that the incident involved a shooting by a police officer, which was within the independent police oversight authority mandate. He stated that the independent police oversight authority and the directorate of criminal investigations could work together.

23. I ruled, on September 17, 2021, that the accused person had a case to answer, and I put him on his defence. The defence hearing happened on December 9, 2021. The accused gave an unsworn statement. He said that he was an administration police constable, service number 200903-4894. He said that he met the deceased while he was residing in her father's house as a tenant, while she was as student at Masinde Muliro University of Science and Technology. When he sought her hand in marriage, her father told him to wait for her to complete her studies. At some point, in 2013, 2014, 2015 and 2016, she was staying in his house. She got pregnant and they had a daughter together in 2015. After graduation, she got a job at a school within Navakholo. She wanted to stay at a place near her parents, in 2017, and he allowed it, after which they began to differ. She would sometimes stay with him, and other times with her parents. In 2019, she got a teaching job at Bututa, where she said she would like to stay there alone, and said that they ought to lead separate lives. He allowed it, and he would pass by her house every morning to pick the child, and drop her in school. He said that on the material day, he went to her house at about 7.00 pm, and found her neighbours, PW10 and PW18 outside, he greeted them and went to her house. He met their child outside, and she was happy. He sat. The deceased emerged from the bedroom. She began to shout, asking why he had come to her house. She told him to leave, and not come back, saying that she had told him not to come to her house without her consent. He said that as he was leaving a man emerged from the bedroom inside the house, and charged at him with a stool. He cocked his firearm to defend himself, whereupon the man jumped at him, and they struggled. He said that he thought some bullets were fired inside the house in the process. When he got a chance, he jumped out of the house. He found the deceased outside lying at the door. There was blood. At the market, people began to shout that he was the one who had killed her. He got confused. He asserted that he had been attacked at his house. He decided to escape. He went to his house, kept the armoury keys, locked the house and left. He then called PW1 and informed him what had happened, and the former urged him not to harm himself. He instructed him to go to his house, and take the armoury keys and the pistol. He then left for Teso, from where he was later arrested, at the home of his aunt. He said that he did not know whether her death was planned or whether she had her own plans.
24. At the close of the oral hearings, the accused, through his advocate, Mr William Ikapel, filed written submissions, dated February 28, 2022, complete with case law. I have read through the said submissions and noted the arguments made.



25. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of the death, the role of the accused person in the cause of the death, and the fact that the death is caused by the accused with malice aforethought.
26. From the material before me there is *prima facie* proof that the deceased in fact died. All the prosecution witnesses testified to the fact of her death. The pathologist, PW12, conducted a post-mortem on her body, after it was identified by relatives. The cause of the death is also not in dispute, it was said to be due to a penetrating head injury, secondary to a gunshot wound. The contestation is on whether the accused caused the death, and, if he did, whether it was with malice aforethought.
27. So, who was responsible for the death of the deceased? The case presented by the state is fairly straightforward. The accused went to the house of the deceased, there was a verbal exchange between them, followed by a physical altercation, from which the deceased rushed outside, gunshots rang out, the deceased fell to the ground bleeding, and the accused fled the scene. That set of facts was given by civilian witnesses, who were next door neighbours of the deceased. They were at the scene. They saw the accused come to the house, they heard the two quarrel or disagree, they saw the deceased rush outside, they heard the gunshots or saw the accused fire the gun at the deceased, they saw the deceased fall, and saw the accused flee the scene. The next set of facts was by the police. Their case was that the accused was on duty at the armoury, he issued firearms to his colleagues, he took a gun from the armoury, went with it to the house of the deceased, the police officers at the scene said they either saw him or heard that he was at the scene and he had shot and killed someone, then he called his friend and colleague to inform him of what transpired and instructed him where to get keys and the gun from his house, how the records from the armoury connected the said gun to him, and how the forensics done on the gun and the spent cartridges collected from the scene and the bullet recovered from the body of the deceased connected the same to him. In his own unsworn statement, the accused placed himself at the scene of the shooting, and confirmed, in material particulars, what the prosecution witnesses had stated, the only difference being that he alleged that there was a third person in the house of the deceased, who attacked him, and that it was in the course of the struggle between him and that third person that his gun, which he, the accused, had cocked, in alleged self-defence, went off and the deceased got fatally injured in that process.
28. The case by the accused is that the gun fired by mistake, in that scuffle with the alleged third party. Either way, if he is to be believed, that there was a third person in the picture, he, the accused, had the gun. He did not deny that fact. Secondly, it was him who cocked it. He did not say whether he was the one who pulled the trigger, but he said it was in the struggle that the gun fired. However, it was he who was holding the gun, and it must be him who had his finger on the trigger. It can only mean that it was he who fired the gun, and fatally injured the deceased. He caused the death.
29. The next consideration is whether he caused the death with malice aforethought. Did he have malice aforethought? malice aforethought is defined in section 206 of the *Penal Code*. Section 206(b) states:
- “ malice aforethought
- malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (a) 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;
- (b) 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

30. Under section 206, malice aforethought is to be inferred where an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from custody of a person and in the process a death is caused.
31. One of the issues to consider is why the accused was armed in the first place. He was the armourer on duty on the material day. His duty was to issue firearms to his colleagues, and to receive the firearms back from them at the end of their duty. He was not on sentry duty or on the beat on the material day. He was not supposed to be issued with or to bear a firearm. The fact that he took a firearm, when he was not required to by his duty on that material day, and went with it, to the house of the deceased, meant that he had an intention to use it on someone. That someone turned out to be the deceased. He did not, in his unsworn statement, talk about why he had the firearm in the first place. He merely talked about the alleged other man in the house, who allegedly attacked him, forcing him to draw and cock the firearm. He did not explain why he had the firearm.
32. Of course, the issue of the alleged other man in the house of the deceased has to be considered. Was there such a man? None of the witnesses who were within the compound, at the material time, and witnessed the drama unfold first-hand, placed any other man in that house at the material time. Am talking about PW2, PW9, PW10, PW11, PW18 and PW19. They went as far as saying that they had never seen any other man visit the deceased. Some of them appeared to be sympathetic to the accused, such as PW9 and PW10, and if there was another man, they, no doubt, would have mentioned it. The story that there was another man inside the house of the deceased at the material time is, therefore, not supported by the evidence on record. In any case, the accused gave an unsworn statement, and it is trite that such evidence is worthless. The effect of it all then would be that the accused person fired the shot that killed the deceased, and witnesses saw him point the gun at the deceased. The fact of pointing the gun at the deceased indicates an intention to kill. Indeed, pointing a gun, at such a vital body organ, such as the head, and shooting at it, clearly implies malice aforethought.
33. The accused had possession of the gun. He confirmed it himself. In criminal matters, whenever the issue of possession arises, the burden of proof always shifts from the prosecution to the defence, with respect to giving an account for the possession. The accused did not allege to be a gun holder, and that he had been licensed to hold the gun in question. It was government property, that came to his possession on account of his employment. As said elsewhere, he was not on the beat or in an operation, so as to be issued with the firearm at that time. He was not supposed to be in possession of a gun then. Having been established that he had the said government gun in his possession, the burden shifted to him to give an account for how it came to his possession, for the manner in which he used it. In his defence, he gave no account whatsoever of how he came to be in possession of that gun, at a time when he should not have had it. He merely said that he was armed, and that he removed the pistol and cocked it. That then presupposes that he had acquired possession of it for some unlawful purpose, and that he had an intention to do some unlawful thing with it. He gave some account of how he used it, that some third party attacked him, and he cocked the gun in an effort to defend himself from that danger, a struggle ensued, in the process of which the gun went off, and the deceased was unintentionally the



casualty. As stated elsewhere, there were numerous other persons at the scene at the material time. None of them saw any third person in the house of the deceased, nor witnessed any scuffle between the accused and any such person, suggesting that that allegation was a figment of the imagination of the accused. Furthermore, that allegation was made in an unsworn statement, and carried little weight in the circumstances.

34. Did the firearm go off by accident, on account of the struggle with the alleged other man? If the gun went off accidentally, that would afford the accused a defence, whose effect would be to reduce the offence to a manslaughter, founded on the mens rea of either negligence or recklessness. I believe that what I have stated above answers the question. The mystery man only existed in the mind of the accused, none of the other people in the scene saw him. Secondly, the story of the alleged man should be taken with a pinch of salt, as it was rendered in an unsworn statement, which is virtually worthless, in terms of evidential value.
35. In view of everything stated above, I do find the accused herein guilty of the offence of murder, of Christine Maonga, contrary to section 203 of the *Penal Code*, as read with section 204 thereof, and I convict him accordingly, under section 322 of the *Criminal Procedure Code*, cap 75, Laws of Kenya. For the purpose of sentencing, I hereby direct the Kakamega county director of probation and aftercare services to assess the antecedents of the accused person, and to get the views of the family of the deceased and the community, and file a report thereon within 30 days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF JANUARY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. William Ikapel, Advocate for the accused person.

Dr. Malala, Advocate for the family of the deceased person.

Ms. Mbogua, Advocate for the Independent Police Oversight Authority.

