



**Republic v Lenangetei (Criminal Case 8 of 2020)  
[2023] KEHC 22641 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL CASE 8 OF 2020  
CM KARIUKI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETER LENANGETEI ..... ACCUSED**

**JUDGMENT**

1. Peter Lenangetei, the Accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 Laws of Kenya. Particulars are that on 23rd day of August 2020 within Loruko-Baragoi Highway in Samburu North Sub-County within Samburu County jointly with others not before the court, the Accused murdered one Livingstone Nyota, the deceased herein.
2. The Accused pleaded not guilty and the prosecution called 5 witnesses after which the Accused was placed on his defence. The Accused called one witness and claimed that he was not at the scene on the material day. It was alleged that on the material date, the deceased was travelling with his lorry at night together with other people when they were ambushed by highway robbers and shot dead.

**Prosecution's Submissions**

**On the fact of the death of the deceased there cannot be any doubt**

3. The prosecution stated that the information stated that the deceased had been murdered and the post-mortem done on the deceased's body was proof he was dead. The deceased was also photographed and identified by his relatives and the doctor who testified and produced the post-mortem form as exhibit clearly indicated that the deceased was indeed dead.



### **On the cause of the death of the deceased**

4. It was asserted that the doctor who testified and produced the post-mortem report in court as prosecution exhibit concluded that the deceased died due to cardiopulmonary arrest secondary to severe bleed injury and hypovolemic shock due to bullet wound.

### **On whether the said death was caused by unlawful act or omission on the part of the Accused person**

5. The prosecution submitted that PW2 and PW3 testified that while being loaders of motor vehicle registration number KCH236B Mitsubishi Fuso driven by the deceased, they were supplying shop goods to customers and as they were driving past Loruko Police Post on 23rd March 2020 at night, they had gunshots from the driver's side and suddenly the vehicle stopped on the left side of the road. PW3 jumped and while squatting there he saw one of the thugs armed with a rifle who came in front of the motor vehicle where the headlights were fully on and ordered him to come forward and put off the lights.
6. That during that time he got an opportunity to look at that thug properly using the headlights and identified him as the one who had been following them with a motorcycle KMER 951N from a place called Loruko, South Horr and then to Lonjorin without talking to them or buying anything.
7. That when the thugs left into the bush, he ran into the bush to hide and joined the other loaders. They found the deceased lying dead in the bush with gunshot wounds on the chest. The gunshot he received from the thugs who shot at the motor vehicle and the deceased run out of the motor vehicle into the bush, PW3 further indicated that he saw more than three men around with rifles.
8. Further, it was averred that an identification parade was conducted where the Accused was positively identified. That the Accused did not give reasons as to why he was unsatisfied with the conduct of the parade only to come to state during defence that he may have been framed since he was a Samburu and was kept together with Turkana. But a look at the forms on page 4, he did not object to the arrangement of the members of the parade.
9. It was submitted that all the testimony above directly proves that the fact in issue as to the cause of the deceased's death and the fact that the Accused was responsible proves the same beyond doubt.

### **On proof that said unlawful act or omission was committed with malice aforethought**

10. The prosecution submitted that the Accused person had the necessary mens rea to murder the deceased because PW2 and PW3 confirmed that the deceased died because the Accused shot him using a rifle. That the act of shooting the deceased and stealing Kshs. 300,000 from him proved that he was aware when he shot the deceased on the head, he would most likely sustain severe or grievous harm or would be dead.
11. It was argued that the Accused's defence of alibi was essentially an afterthought and he had not issued any notice of his intention to raise the same for the prosecution to sufficiently counter the same. He even claimed he did not know how to handle a firearm.
12. The prosecution pointed out that DW2 when put on the dock indicated that he knew the Accused for they come from the same area and he was not with him on 23.3.2023 as alleged by the Accused. Hence his own witness displaced the alibi. Further, that the Accused's evidence was full of falsehoods.
13. Lastly, the prosecution submitted that it has proved its case beyond reasonable doubt as all major elements of the offence of murder have been proved and if there were any minor contradictions, the



same do not affect the case and that the Accused person ought to face the full force of law to serve as a lesson to all and sundry of such conduct.

### **Accused's Submissions**

#### **Burden of Proof**

14. It was submitted that the prosecution left so many questions unanswered hence leaving some doubts in the court's mind. The prosecution failed to produce the murder weapon in this case and further failed to produce a ballistic/forensic report. To add salt to injury, the investigation officer confirmed that the murder weapon was similar to a weapon owned by the deceased and the had collected the weapon at the scene. Reliance was placed on Article 50 (2)(a) of the *Constitution*, *Bakare v State* [1985] 2 NWLR
15. The Accused averred that the prosecution only produced witnesses who were at the back of the lorry and failed to produce the witness who was seated next to the deceased. That the eyewitnesses who testified against the Accused were from the Turkana community which had clashed with the Accused's community and there is no way they could have given an independent testimony considering their relationship at the time.

#### **Identification Parade**

16. It was the Accused's submission that the identification parade was not properly conducted, the Accused was placed among people from the Turkana community who were of different general appearance and height. Further, the persons were well known by the eyewitnesses considering they were from the same place. The investigations team bungled a crucial part of the trial process hence a conviction cannot stand on that.
17. Reliance was placed on Chapter 42 Paragraph 7 & Paragraph 7 (5) (d) of the *National Police Service Standing Orders*, Article 50 of the *Constitution*, *Wamunga Vs Republic* [1989] eKLR

#### **Forensic Evidence vis a vis Circumstantial Evidence**

18. The prosecution contended that there was no forensic evidence connecting the Accused to the murder weapon and failure by the prosecution to link the Accused to the murder weapon in a case of this nature cannot sustain a murder conviction.
19. Reliance was placed on *Abanga alias Onyango Abanga versus Republic*, Criminal Appeal no. 32 of 1990 (V.R) & *Republic v SNM* [2022] eKLR

#### **Defence of Alibi**

20. The prosecution stated that an alibi defence is a defence based on information that the Accused was not at the scene of the crime when the crime occurred, that he was somewhere else and could not be the person who committed the crime. That in this instance despite the Accused raising the defence the prosecution never brought any evidence, direct or circumstantial to establish that he Accused was at the scene. Reliance was placed on *Kiarie v Republic* [1984] KLR, *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR
21. In conclusion, the Accused submitted that the prosecution has not proved all the ingredients of murder against the deceased beyond reasonable doubt and hence he was not guilty.



## Analysis and Determination

22. The Accused herein is charged with the offence of murder. Section 203 of the Penal Code defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
23. There is no doubt as to the death of the deceased herein and the cause of death. PW2, PW3, PW4 and PW5 testified to the same. They asserted that the deceased was shot by thugs who attacked them wielding guns on the highway on the material date. PW5, 92823 PC John Ngunyi, the investigating officer testified that he found the deceased's body at the scene of crime on the material date. He stated that he photographed scene of body and the lorry then they collected the body and took it to the mortuary. He went on to state that the post mortem was conducted on 25/3/2020 at Maralal County Hospital by Dr. Kuria whose opinion is that the cause of death was due to bullet wounds. The post mortem report was produced as p exhibit no. 3. It confirmed that the deceased died due to cardiopulmonary arrest secondary to severe bleed injury and hypovolemic shock due to bullet wound. Accordingly, the prosecution proved beyond reasonable doubt that indeed the deceased passed on and the cause thereof proved beyond reasonable doubt.
24. The next element for consideration is whether the deceased's death was caused by an unlawful act or omission. Article 26 (1) of the *Constitution* guarantees every person the right to life. The post-mortem report showed that the cause of the deceased's death was cardiopulmonary arrest secondary to severe bleed injury and hypovolemic shock due to bullet wound. PW2 and PW3 testified that they were attacked at night on passing Loruko and they were sprayed with bullets. They asserted that after the attack the deceased body was found having being shot next to the lorry the were using to travel.
25. Although the deceased was said to also possess a gun, it is my considered opinion that he did not shoot himself and was rather shot by the thugs in the course of the highway attack. It is my opinion that there is no lawful basis for the aforementioned cause of death. In the circumstances, I am persuaded beyond reasonable doubt that the deceased died out of an unlawful act.
26. The next question that remains unanswered is whether it was the Accused herein who unlawfully caused the death of the deceased.
27. PW2, Pascal Kerio, a tout testified that on 23/3/2020 at 4:30pm, he was with the deceased and others proceeding to South Horr when they stopped at Loruko to supply food to customers. They were aboard motor vehicle KCH 236B Mitsubishi Fuso. While there 2 motor cycles came, one red and the other black one. They both had a passenger each. The motor cycles left them parked at Loruko.
28. He stated that when they finished their business, they headed to Sumumai and he saw the black motorcycle with one passenger. It went towards South Horr town side. They then proceeded to South Horr and saw the black motor cycle with the rider parked. Afterwards, they proceeded to Kuringu Centre where they arrived at 1p.m. They then went to Anderi Centre then Ntalenirani Village/ Manyatta.
29. It was PW2's testimony that he saw the black motor cycle parked there. That he saw the riders but did not know them although he saw them very well. He stated that they went to Loonjorin Centre where they sold the remaining goods before going back. The black motor cycle was also parked nearby but it left before them.



30. They then proceeded back to South Horr side. On passing Loruko they were attacked and sprayed with bullets. He was at rear side of lorry and in front there were 2 people including the deceased. The bullets were hitting the motor vehicle on both sides. That the motor vehicle stopped and moved backward and hit an embankment. He pointed out that the head lights were on. It was about 9pm and that the deceased used to possess a gun.
31. PW2 testified that the firing stopped and he could hear people talk in Samburu language. He stated that he is a Turkana but he could understand the language. He jumped out of the motor vehicle and ran away headed to the back side of the lorry. He then went to the police at Losuko and reported the incident. While there Adan came with the deceased's gun. He was the one with deceased at front side of motor vehicle.
32. He stated that police officers from Baragoi were called and they went to scene with them. That the motor vehicle was still at the scene. The deceased was found dead besides the lorry. He saw the deceased's body but did not see injuries. He also did not see the motor cycle at the scene. He also saw the deceased's body at Baragoi Police Station before it was taken to mortuary. It was bloodstained on the chest side.
33. He also testified that he heard attackers had taken money from deceased but he did not see. That he was injured at the hip and he did not know whether deceased had any grudge with anybody.
34. He asserted that when the police later arrested the suspect and he went at Baragoi Police Station to identify the attackers. He identified one person by touching. He pointed at the Accused as the person he had identified. He stated that he had seen him well when he was riding the black motor cycle. That he did not have a helmet and he saw his face. That while the motor cycle was parked, he was the rider. He confirmed that he was not shown Accused before identified him on a parade.
35. PW2 averred that they were selling goods in various centres and that the area was very insecure. That there were frequent attacks and various motor bikes use the same route. That he was suspicious of the motor cycles which were passing as frequently and following them.
36. In cross examination, the witness testified that when he saw the motor cycle, he noted the black one. That it was frequent on the areas that they stopped and he noted the number. He stated that he saw the red motor cycle once. That he never talked to the suspect when he picked his number plate.
37. PW2 submitted that when they were attacked, they were in the lorry but he did not see the attackers. He only heard bullets and gun firing. That they had a gun in the motor vehicle in the front side. He stated he did not know the people in the parade save for the 2 and that he knew before that he could not identify by tribe during the ID parade.
38. PW3, Joseph Loyapal Loteng, a turn boy of the deceased's Lorry KCH 236B gave sworn testimony corroborating PW2's account of their movements on the material day.
39. He stated that upon reaching Loruko and passing it, they were sprayed with bullets guns firing. That PW2 jumped out of the lorry and he remained in the lorry. He then jumped but was held by leg by the attackers. They told him to board the front side of motor vehicle and he switched off the motor vehicle. That the others who were with them including Adan fled. That the deceased Nyota died there at the scene.
40. He asserted that he switched off the lights but he saw one of the attackers who was ordering him around. That he knew him before as he was a boda boda rider in Baragoi and he had seen him for 8 years or so. That he used to see him in town and knew him as Lenangetei. He stated that he talked in Samburu language, which he could understand although he is a Turkana.



41. PW3 testified that he saw the Accused riding the black motor cycle along the way. That the attackers then entered the front cabin and but he did not know what they took before they fled. That they were walking and they never covered their faces. He went to the top of the mountain and ran away into the forest.
42. He asserted that he went back to scene when he saw police and joined them. The deceased's body was found next to the lorry. The body had an injury at the chest and had blood on his body.
43. That it was not the first time he had worked with same motor vehicle. That the deceased used to have the gun. Later, the Accused was arrested and he saw him that night and he picked Accused in parade at Baragoi Police Station.
44. In cross examination, PW3 stated that when going to South Horror, they saw the motor cycle and that he knew it for long. That he never asked the rider why he was following as he could have been on his business but they got interested in him as he was following them.
45. He stated that the motor cycle had one person and had no passenger. That they were attacked at around 8.30p.m. he heard gun shots and the firing was from front side. That he did not see the attackers and did not see anybody being shot.
46. It was his assertion that he only saw the attackers when he was being ordered to do things by them. That he is a Turkana but he understands Samburu. The person who talked to me had an AK 47. They were about 5 of them all armed with gun AK 47. That the police who came first were from Baragoi and not the nearby police camp. That he had been called via phone by police. He wrote the number plate of motor cycle.
47. Upon re-exam the witness testified that all the attackers had guns. That normally people carry guns. That he did not give motor cycle number plates.
48. PW5, No.92823 P C John Ngunyi, the investigating officer, attached to DCI Samburu Police Station, Baragoi stated that on 23/3/2020 at 10p.m, he received a call from the DCIO informing him that there was an incident at Baragoi Social Hall Highway where the deceased had been attacked by robbers. Accompanied by other security agencies, they went to Laruko near Laruko Police Post and met a lorry besides the road. They found 4 people who were loaders of the lorry motor vehicle KCH 236 B.
49. He testified that there the manager of lorry who narrated what happened. He told them that they supplied goods at Laruko area and while returning they were attacked by about 8 robbers and the Accused was shot dead. They searched for deceased's body and found it in bushy area with 2 bullet wounds at the chest.
50. He photographed scene of body and the lorry then collected the body and took it to the mortuary. He stated that loader Adan and others told them that when they were supplying goods, they spotted a motor cycle which was following them and they were able to identify rider by motor cycle and face. The following day, they commenced investigation and recorded statements in course of investigation, motor cycles which were following the lorry was identified one black and another red in color.
51. On 25/3/2020 , he received information that the suspects had been spotted in Illaut Market and they headed there with a colleague. On their way they saw the motor cycle KMEZ 916X blue in color. They arrested the rider and took him to Baragoi Police Station. He asserted that they arrested them on account of the informer's information.



52. The investigating officer stated that descriptions were given that one was brown and another medium size. The informer said that they were using motor cycle which was blue in color and that they were coming from Illaut market.
53. On 7/15/2020, the 2 suspects were taken before Maralal Law Courts on Misc. Application for them to help in investigations. They were detained for 21 days vide Misc. 2/2020. This was to enable ID Parade to be conducted, recording of statements and post mortem to be done. On 13/5/2020, he witnessed the DCIO conducting the ID parade. The Accused had a relative as a witness. The suspect participated in the identification parade and the witnesses positively identified the Accused him. He stated that PW1, PW2 and PW3 identified the Accused. Thus, he preferred charges against the suspect. He produced the ID parade forms as P exhibit 1. The bundle of photos taken that is 15 photos of scene sharing deceased body, lorry and scene. 2 lorry motor cycle KMER 951 N 1 photo on KCH 236B Lorry as P exhibit 2 and the post mortem report as P exhibit No. 3.
54. On cross examination, the investigating officer stated that they collected spent cartridges from the scene from the deceased's AK 47. That they did not retrieve any gun at the scene save for the deceased's gun. He stated that the lorry KCH was sprayed with bullets. That the window was scattered by bullets and the witnesses said that the bullets came from outside. That he did not arrest Accused with any gun. And he did not know whether knew how to use gun.
55. He reiterated that he arrested 2 suspects based on informers' information but he only charged the Accused as he was the only one identified at the parade. That there were similar attacks in the area from time to time and also cattle rusting. He stated that from it took 2 months from the date of incident to arrest of the Accused. That they were not forced to charge somebody in the parade. They had 8 people from Baragoi town. That the witnesses were also from Baragoi town and they knew members of parade before the parade. That the members of the parade were from different tribes and young men of different body psyches. That the Accused was not satisfied and the witness of Accused did not sign.
56. In re-examination, PW5 clarified that the members of parade were members of the public and that he cannot tell whether witnesses and parade members knew each other and that the Accused did not state the reason of not being satisfied with parade.
57. Accordingly, the prosecution's case was based largely on direct evidence. The prosecution stated that the Accused was identified as one of the attackers who was wielding a gun on the fateful night during the attack that led to the deceased's death. According to the ID parade report dated 13/5/2020, the witnesses were listed as: -Pascal Epetonon KerioJoseph Loyapal Lotong and;Morris Merinyang Eregae.
58. The first two are PW2 and PW3 respectively.
59. Further, on results of the parade section, it was remarked that: -
- “The witness no. 1 & 2 identified the suspect without difficulties by touching him and the suspect became very scared and confused while witness no. 3 was confused and defeated to identify anybody.”
60. The report also noted that the Accused was asked whether he was satisfied with the conduct of the parade and he replied that he was not satisfied but no reasons were indicated for the same.
61. From the foregoing, it is clear that the parade witness known as Morris Merinyang Eregae was not called as a witness in court and therefore this court cannot rely on his identification of the Accused. Further, it was reported that PW3 was unable to identify the Accused and therefore the only identification that this court will interrogate is that of Joseph Loyapal Lotong, PW2.



62. The Accused in his submissions contended that the identification parade was not properly conducted. He stated that the Accused was placed among people from the Turkana community who were of different general appearance and height. Further, the persons were well known by the eyewitnesses considering they were from the same place. That the investigations team bungled a crucial part of the trial process hence a conviction cannot stand on that.
63. On the other hand, the prosecution stated that PW3 jumped and while squatting he saw one of the thugs armed with a rifle who came in front of the motor vehicle where the headlights were fully on and ordered him to come forward and put off the lights. That during that time he got an opportunity to look at that thug properly using the headlights and identified him as the one who had been following them with a motorcycle KMER 951N from a place called Loruko, South Horr and then to Lonjorin without talking to them or buying anything.
64. Further, it was averred that an identification parade was conducted where the Accused was positively identified. That the Accused did not give reasons as to why he was unsatisfied with the conduct of the parade only to come to state during defence that he may have been framed since he was a Samburu and was kept together with Turkana. But a look at the forms on page 4, he did not object to the arrangement of the members of the parade.
65. From his testimony, PW3, Joseph Loyapal Loteng stated that they had been transporting and delivering goods with deceased on the fateful day aboard his lorry KCH 236B. He stated that while they were returning from their deliveries and upon reaching Loruko and passing it, they were sprayed with bullets guns firing.
66. PW2 jumped out of the lorry and he remained in the lorry. He then jumped and but was held by his leg by the attackers. They told him to board the front side of motor vehicle and he switched off the motor vehicle. He asserted that he switched off the lights but he saw one of the attackers who was ordering him around. That he knew him before as he was a boda boda rider in Baragoi and he had seen him for 8 years or so. That he used to see him in town and knew him as Lenangetei. He stated that he talked in Samburu Language, which he could understand although he is a Turkana.
67. PW3 testified that he saw the Accused riding the black motor cycle that trailing them along the way. That when the Accused was arrested and he saw him that night and he picked Accused in parade at Baragoi Police Station.
68. In cross examination, PW3 stated that when going to South Horr, they saw the motor cycle and that he knew it for long. That he never asked him why he was following as he could have been on his business but they got interested with him as he was following them. He stated that the motor cycle had one person and had no passenger. That he did not see the attackers and did not see anybody being shot.
69. It was his assertion that he only saw the attackers when he was being ordered to do things by them. That he is a Turkana but he understands Samburu. The person who talked to me had an AK 47. They were about 5 of them all armed with gun AK 47. That the police who came first were from Baragoi and not the near police camp. That he had been called via phone by police. He wrote the number plate of motor cycle.
70. From PW3's testimony, I gather that he provided evidence on both recognition and identification. His account was that while they were delivering goods together with the deceased in the Loruko, South Horr and then to Lonjorin area on the fateful night, the noticed that they were being trailed by a black and red motorcycle; an assertion that was corroborated by PW2. He stated that they noticed the motor cycle follow them to several locations that they had been to and that is what captured their attention



and they become suspicious of the same. PW2 went on to state that he even went further and noted the black motorcycle's registration number.

71. It was his testimony, that they could see the people riding the motor cycles well. He even stated that when going to South Horr, they saw the motor cycle and that he knew it for long during cross examination.
72. PW3 asserted that when they were attacked, he did not see the attackers initially although their vehicle was sprayed with bullets but he was able to see one of attackers when he started ordering him around. That before he switched off the lorry's headlights, he saw the Accused. He also stated that he knew the attacker as he had seen him before as he was a boda boda rider in Baragoi and he had seen him for 8 years or so. That he used to see him in town and knew him as Lenangetei. He stated that he talked in Samburu Language, which he could understand although he is a Turkana. He then stated that he was later able to identify the Accused during the ID parade that was conducted. Notably, both PW2 and PW3 stated that they heard the attackers converse in Samburu language.
73. The court is mandated to proceed with caution or circumspection before convicting an Accused person solely or mainly on the evidence of a single or multiple identification, the same has been the subject of numerous court decisions. The caution proceeds from a realization that the spectre and possibility of mistaken identity with its potential for great injustice always looms large. {See *Roria -vs- Republic* [1967] EA 583.]
74. In *Maitanyi Vs Republic* [1986] KLR 198 it was held: -
- “ 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
  2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.
  3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
  4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”
75. Moreover, it is widely held that reliance should be placed on identification evidence only when such evidence, viewed as a whole, is free from the possibility of errors. See *Abdala bin Wendo & Another versus Republic* (1953), 20 EACA 166
76. I am tasked with establishing whether the identification of the Accused by the witnesses particularly PW3 can be relied on in convicting the Accused, given the fact that the prosecution's case is centrally based on his alleged identification of the Accused.
77. I find that based on the fact that PW3 stated that he recognized the Accused firstly, as a boda boda rider in Baragoi town who he had seen for about 8 years or so and secondly, as one of the people who was trailing them on the material date using the black motor cycle (as was further corroborated by PW2); his evidence that he was able to properly see and identify the Accused as one of the attackers using the



lorry's headlight was credible and consistent. I find that although it was at night, the conditions for identification i.e. the light from the lorry's headlights provided sufficient light which was favourable for positive identification especially as the Accused was ordering him. Furthermore, PW3 had special reasons to remember the Accused because he knew him and could easily recognize him thus, he could identify him. In *R vs Turnbull & Others* (1976) 3 ALL ER 549 the court held that: -

Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

78. I find that PW3 was a credible witness and I am confident in his evidence on positive identification of the Accused as one of the attackers.
79. Although very late in the game in this judgement, I would like to explicitly assert that this court will not be relying on the testimony of PW1 who was stood down and never recalled as the same would be prejudicial to the Accused.
80. Further, I concur with the prosecution that although the Accused stated that he was unsatisfied with conduct of the parade, he did not give reasons why and it only during his defence that he stated that he may have been framed since he was a Samburu and was kept together with people from the Turkana community. However, as per the ID parade report he did not object to the arrangement of the members of the parade. Moreover, PW5 testified that the members of the parade were from different tribes and young men of different body physiques and he could not tell whether the witnesses and the members of the parade knew each other and I find the same to be credible.
81. It is my opinion that the identification parade appears to have been conducted in compliance with the law.
82. It is also my considered opinion that having weighed the nature and strength of any contradictions and inconsistencies in the evidence presented in this case against the entire evidence tendered as a whole, I find that the magnitude and strength of the same is insignificant.
83. On the defence of alibi by the Accused, I find the same to be inconsistent and the Accused's evidence did not rise to the level where it could in any way raise doubt in the prosecution's case or shake the credibility of the prosecution witnesses. My finding is based on the fact that DW2 who was supposed to corroborate the Accused's alibi defence testified that he cannot recall where he was on the fateful day but that he was not with the Accused although the Accused had stated that he was with him on that day. Further, it was my opinion that even if he was with him during the day, the attack happened at night and the Accused did not provide any details as to his whereabouts. I find that his defence was full of mere denials and his alibi evidence cannot stand.
84. In light of the above, I find that the prosecution proved beyond reasonable doubt that the Accused is responsible for the unlawful act that led to the deceased's death.
85. On the issue of whether the Accused had malice aforethought, I have carefully considered the circumstances of this case and find that the Accused had the necessary malice aforethought when he unlawfully murdered the deceased as stipulated in Section 206 of the *Penal Code*.
86. In the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the Accused before, during and after the attack.



87. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased's attacker(s) was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased and the weapons used during the attack i.e. guns. An attack on one's chest and vital body parts is an attack on the life of that person. I infer that attackers had the intention to eliminate the deceased with the motive probably being to rob him of the money he had made from the days sales given the witnesses account that the Accused had been trailing him. Nonetheless, motive is immaterial in proving one's criminal responsibility.
88. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the Accused person beyond reasonable doubt.
- I. Accordingly, I find the Accused person Peter Lenangetei is guilty of the offence of murder as charged contrary to Section 203 as read with Section 204 of the Penal Code. I convict him accordingly.

**DATED AND DELIVERED AT OLKALOU THIS 28<sup>th</sup> DAY OF SEPTEMBER 2023**

**CHARLES KARIUKI**

**JUDGE**

