



**Republic v Bore (Criminal Case 67 of 2012)
[2023] KEHC 26649 (KLR) (20 December 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 67 OF 2012
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

JAMES KIPROTICH BORE ACCUSED

JUDGMENT

1. The accused person was charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused person on the 12th day of August 2012 at Chebiemit Forest Murdered Patrick Kibet Kiprono (hereinafter referred to as the deceased). The accused person pleaded not guilty and the matter proceeded to full hearing with the prosecution calling 11 witnesses whereas the accused person called one witness in his defence.
2. PW1, Monica Nafula Kibet testified that she knew the deceased as he was her husband. On 12th August 2012 at around 6 am, the deceased left the house with their son Evans Kimutai Kibet and went to the forest to cut wood. After a while, she heard the sound of gunshots from the nearby forest and she rushed there. It was her testimony that she found the deceased lying under a log, dead. There were seven spent cartridges near his body which they collected. She produced the same as MFI-1 a-g. There were also seven bullets at the scene which they collected, she produced the same as MFI2 a-g. She saw that some branches from the trees around had been burnt. Her son was not at the scene and came later after she screamed. The police then came and took the body to the mortuary. At the station she found the two suspects being the accused and a man named Shadrack. She had known the accused for one year.
3. In cross examination, she testified that the deceased left the house with a cross cutter and a panga. Further, that one required a permit to enter the forest and the deceased did not have one. She said that they had gone to the forest to get her firewood. During re-examination, she testified that when one is found in the forest without a permit they are supposed to be arrested.



4. PW2 was Wilson Sirma, a resident in the area. He recalled that on the material date he was woken up by his niece called Doris asking whether he had correctly heard the sound of a gunshot, which was answered in the negative. Walking towards the forest, he met a man called James who informed him that their brother Patrick had been killed in the forest. He found Patrick dead with blood oozing out of his shoulder. He saw an unused bullet near the body. The police then came and took away the body. That evening he went to the police station where he found the accused and Shadrack under arrest. They were forest guards. He knew the accused for about a year but did not know the nature of his relationship with the deceased.
5. In cross examination he testified that the material day was on a Sunday. Further, that the deceased used to trade in charcoal and there was a time he was arrested for felling trees in the forest without a license. He confirmed that near the body there was one bullet and there were logs of trees which had been cut.
6. PW3, Kenneth Kipserem Kigen, a farmer residing at Chebiemit testified that on 17th August 2012 he identified the body of the deceased at Moi Teaching and referral hospital. He witnessed the post mortem and saw an injury on his right shoulder.
7. PW4, Evans Kimitei Kibet, testified that on 12th August 2012 at around 6am he was asleep. His father, the deceased, woke him up and asked him to accompany him to Chebiemit forest to cut trees and split for firewood. On arrival they began cutting the logs and the trees using the cross cutter and the panga. They were also using the panga. He identified the cross cutter and panga as MFI-1 and MFI-2 respectively. He stated that the trees were felled already and they were just splitting them. As they were splitting them he saw two forest guards approaching them and they were dressed in forest guard uniforms. He ran away but they were close to them and he was able to see the accused. Immediately he ran away, he heard one of the askaris say in Swahili ‘tumempata leo, tumekuwa tunawatafuta. On hearing the gun shot he lay flat on his stomach and started crawling. After all went quiet, he went back to the scene and found his mother wailing. He found his father had fallen on the log and there was a gunshot wound on his back. He started screaming heading home and met his uncle on the way and told him what had happened. In the evening, he went to the police station and recorded his statement. He confirmed that he saw the face of the accused and that the incident occurred between 7.50am and 8.00am. He was holding a black firearm and he identified the same as MFi-3 which had been presented in court. he knew him previously and used to see him at Chebiemit trading centre.
8. During cross examination, he confirmed that there was no permit allowing people to go into the forest on a Sunday and agreed that it was illegal to cut forest produce without a permit. He confirmed that they were cutting trees and that both askaris were armed with rifles. He stated that many shots were fired and when he went back to the scene and found the panga and cross cutter missing. He disagreed that his father cut one of the askaris and stated that this was untrue because the way he found his father, it was clear that he was shot before he found the opportunity to turn or do anything. He stated that he remained in hiding for 20 minutes and that their home was 3kms from the scene. They took about 30 minutes to get there and that he was so frightened after the gunshots that he fainted and came to after 20 minutes. He stated that he could not remember a time his father was arrested for illegal charcoal burning.
9. PW5, Joseph Kipkoech Kigen, a resident at Kuinet testified that on 17th August 2012 he went to Moi teaching and Referral Hospital where he identified the body and saw the gunshot wound to his back. In cross examination he disagreed that the entry point of the bullet was at the front.
10. PW6, James Kemboi Kigen, a resident at Chebiemit and a brother to the deceased testified that on 12th August 2012 at about 8 am he was asleep when he was awoken by a gunshot sounds from inside the forest. He then went to ask the deceased’s wife whether there was anyone in her home that had gone



to the forest as their homes were in the same compound. She told him that his brother had gone to the forest together with his nephew. He decided to go to the forest and met Evans screaming. Evans told him that his father had been shot dead by a forest guard and PW6 proceeded to the forest where he found PW1 beside the body of the deceased wailing. He examined the body and saw a gunshot wound on the back near his shoulder. He also saw three live bullets which he identified as MFI4 a-c. he went to communicate the incident to their relatives and later on headed back to the forest. Some police officers and forest guards found them at the scene and the police instructed them to load the body onto the police vehicle. He did not know the nature of the relationship between the deceased and the accused person.

11. PW7, Shadrack Tokii testified that as a forest guard his duty was to guard forests. He recalled that on 12th August 2012 he was attached to Elgeyo Forest station. on that date he was on duty with his colleague, the accused person. While patrolling the forest they came across two people splitting logs into firewood using a panga and cross cutter and surrounded them. The young man ran away but the older man stood up and held a panga. He stated that he went to the other side then saw the deceased approach the accused person with a panga. He then heard the sound of a gunshot and the man fell down. He looked at the accused person's hand and saw he was bleeding. He confirmed that the accused person is the one who shot the deceased. He could not tell if the deceased was shot from the front or the back. When they realized the deceased was dead they took the panga and cross cutter and went back to their camp. While at the camp, members of the public came and wanted to attack them, which they reported to their bosses seeking reinforcement. Police came and they were directed to go to the police station and record statements and they were released afterwards. He identified the G3 rifle that the accused had as MFI-3. The rifle he was armed with was marked as MFI-5 and had twenty rounds of ammunition. When the accused was found a bullet hit the magazine and the ammunition must have fallen out without them realizing. He identified the rounds in court, stating that three were spent and there were only 17 live bullets, identifying them as the ones marked as MFI-6(a) and the three spent cartridges as MFI6(b). it was his testimony that the two people had no permits and that ordinarily they would arrest such persons and take them to the police station to be charged. He knew the deceased and he used to live peacefully with the accused.
12. During cross examination he confirmed that the incident occurred on the Sunday and that they had no prior information that the deceased was in the forest. He was not aware of the relationship between the accused and the deceased. Further, that they patrol while armed for self defence and previously, there had been no hostility from the people who came into the forest illegally. Whenever they would command anyone to stop they are supposed to surrender and if they ran away they would let them go. He testified that they had no intention to kill anybody and they wanted to arrest the two. The scene had a clearance but there was a small thicket. He heard the accused tell the deceased to stop and the deceased asked him 'mnanitakia nini'. He stated that he did not hear the accused say 'tumekupata leo, nimekutafuta siku nyingi'. He confirmed seeing the deceased pick the panga and approach the accused but he did not see how the accused was cut. However, after the gunshot he saw blood on the accused person's hand. The bullet that hit his magazine missed the deceased and passed him. Further, the deceased was between him and the accused. He maintained that the deceased was not shot while running away and that the accused fired to protect himself.
13. PW8 CPL Joseph Lagat, testified that he works at Elgeyo police station and that he had been there for four years. On 5th July 2012 he issued two firearms; G-31-BOF-07-J40745 and G-31-BOF-07-J40708 to Jonathan Tandui KFS No. 2123 and James Bore, KFS No. 2130 respectively. The officers were living at Chebiemit outpost and were in the rank of forest guards protecting the forest. Officer John Tandui requested permission to go home which was granted. He then handed his weapon to officer Shadrack Tokii which was recorded on the firearm exercise book. On 12th August 2012 he was called



d by Shadrack Tokii asking him to make an entry that they were commencing the guarding of the forest. While on normal patrol they said they found two people felling trees and they tried to arrest the two but it turned violent and one of them cut James Bore on his hand. He was told that the accused opened fire on the suspect and did not know whether he was dead. He was told that they were heading back to the outpost. He mobilized officers at the station and they headed to the outpost where they found many people surrounding the police post with police officers trying to calm the public. They accompanied the police to the forest and found a dead man at the scene but he saw no injury on him. There were live bullets at the scene and spent cartridges all for a G3, 7.6mm calibre which the police too. He identified the rifles he had issued as MFI-3 and MFI-4 which had an empty magazine and one which had a magazine and 20 bullets marked as MFI3A and MFI4A. MFI3A, which was perforated was from the gun issued to Jonathan Tandui. He produced the firearm movement book as exhibition 8. He stated that both of the officers were not at the scene.

14. In cross examination, he testified that he managed the firearm movement register and whenever a firearm was returned to him he would make comment as to its condition. When it is not signed at the end it means that the firearm has not been returned. He stated that the two firearms were not returned to him. He confirmed the firearms he had issued to Jonathan Tandui and James Bore were as indicated in the movement book. Further, that on 24th February 2012 two guns were given to Joseph Sirwa and Shadrack Tokii being J40708 and J40745 respectively which were the ones in court. It was his testimony that the guns were never returned and that the Chebiemit post had 4 officers. Further, that the officers would not interchangeably use the guns. On 12th August 2012 Joseph Sirwa was not at the outpost and therefore the gun could be used by another officer after properly handing over which would be recorded in PMFI-7 which showed that Joseph Sirwa had never handled a gun since July. Further, that if he had a gun he did not officially hand it over to anyone and that record of 24th February 2012 shows his gun was not returned.
15. PW9, Alex Mdimdi Mwandawiro, an assistant superintendent of police attached to the Forensic Ballistic Laboratory as a firearm examiner at DCI Headquarters testified that he has done the work of examination and identification of firearms for 16 years on a full-time basis. He received the exhibits on 15th August 2012 from PC Hassan Ahmed Aden which were two G3 rifles bearing seal nos. J40708 and J40745. The expended cartridges were marked as C1 to C7. There were 24 rounds of ammunition marked from D1 to D3 and E1 to E11. There were two rifle magazines marked E and F and finally, there was a magazine marked G. He stated that he examined the exhibits and determined that the G3 rifle seal no. J40708 fired C1, C2, C4 and C6 as the markings he found in their chambers were repeated on the test cartridge of exhibit A which he fired during testing. He examined C3, C5 and C7 and determined that they were ruptured which could have been due to excessive heat of propellant powder. He examined exhibit E and F and determined that exhibit F had all the components and was capable of being used in exhibit A and B. At full capacity it carries 20 rounds of ammunition and it was extensively damaged which could be occasioned by high velocity like bullets. He observed the entry of a bullet on the side of the magazine. He examined exhibit G which was a G3 magazine release catch which could have been detached from exhibit B after being hit by a high velocity projectile like a bullet. He testified that he prepared a report of his findings dated 15th August 2012 which as the laboratory reference CID/Firearms lab/441/2012. He produced it together with a copy of the exhibit memo.
16. In cross examination, he testified that the damage on exhibit F was consistent with a bullet caused damage by a bullet of the calibre fired from a G3 rifle. He confirmed that exhibits C3, C5 and C7 were ruptured which rupture could have been caused by a bullet hitting the magazine which held them. The magazine could not work after it was ruptured but the gun could.



17. PW10, Sergeant Robert Ndambuki, working under DCIO Keiyo North, testified that on 12th August 2012 he was called by the DCIO Keiyo North to accompany the scene of crime personnel who had come from Eldoret. He went to the scene of crime and found the deceased lying next to a log of wood and there was a panga and cross cutter beside his body. The OCS had arrested two forest guards and was in possession of their G3 rifles. There were 13 live ammunitions spread near the body and 7 spent cartridges. There was also a damaged magazine at the scene. The accused had a fresh cut on his palm and was treated at hospital and discharged. He collected the exhibits and in total, the live ammunitions were 24 and the ballistic experts tested 6 live bullets. He produced the photos taken at the scene showing the deceased, the injury and the damaged magazine, 7 spent cartridges and 9 live ammunitions. The photographs were produced as MFI 11 a-g, he also took blood samples from the panga and the accused which he sent for testing. He stated that he received a report from the government analyst which showed there were no blood stains on the surface of the panga.
18. In cross examination he testified that the body was 3 paces from where the cartridges and the rifles were, confirming that there was combat at close range. The accused had a cut on his hand that day which he stated was caused by the deceased. The damage to the magazine of the damaged gun was caused by a bullet and that the deceased had one physical wound, one entry and one exit. Further, that on the day of the incident he did not note any blood stains on the panga at the scene. He stated that he kept all the exhibits separate and did not know whether the injury on the deceased was caused by a sharp object.
19. PW 11, Dr. Wekesa Nalianya, a pathologist at Moi Teaching and Referral Hospital, testified that he did a post mortem on the deceased on 17th August 2012. He produced the report in court as PMI 10. He testified that there was a gunshot wound on the right side of the chest between the 7th and 8th ribs. The wound was on the posterior side of the shoulder and had irregular margins. The cause of death was severe chest injury due to gunshot wounds. In cross examination, he testified that the entry of the bullet was in front and the exit wound was on the back left of the shoulder. The wound was from the lower part going up at an angle of about 60 degrees upward. He stated that the deceased could not have been running away from the shooter. Further, that the shooting was at long range.
20. The court made a finding that the prosecution had established a prima facie case against the accused person and he was placed on his defence.
21. DW1 was the accused person. He testified that he works with Kenya Forest Services as a ranger as a constable ranger. On 12th August 2012 they were assigned to patrol an area where they had a logging problem. He stated that he was with PW7 and they had rifles they had been given by the firearms officer in charge. They left for the forest at 6am and arrived at 6.30 am. They heard the sound of a saw and when they went near the sound they could not see who was using the saw due to the bush. Before they got there, one of the two, who was facing their direction, escaped. The one who remained faced them and held a panga in the right hand, the same panga availed in court. He ordered him to drop the panga and surrender and sit down but he did not comply. He charged towards him armed with the panga and he moved behind and cocked the gun. He shot in the air to scare him and fired a second time but he still charged at him. He then cut him with a panga on the right rear palm and he fell down. He shot a 3rd and 4th time which hit his colleague and the deceased respectively. The deceased was hit in the right ribs and the bullet exited through his back. They took the panga and the saw and went back to the camp. He maintained that he never shot at the deceased when he was escaping and that Shadrack Toki was unable to shoot. He had no issues with the deceased and if the deceased had escaped he would not have shot at him. He had no intention to kill the deceased.
22. In cross examination, he testified that he did not find it appropriate to shoot the deceased. He shot to scare him and he had never arrested the deceased before. He stated that he had a scar which had healed



from the cut and showed the same to the court. The treatment note was marked upon application by counsel for the accused.

23. The defence closed its case and parties filed submissions on the case.

Prosecution's Submissions

24. Learned counsel for the state, Senior Prosecution Counsel Mark Mugun, filed submissions on 22nd September 2023. He urged that the State has proved its case beyond reasonable doubt. Counsel submitted that according to the Court of Appeal of *Anthony Ndeawa Naari v Republic* [2014] eKLR, for cases of Murder, the Republic is supposed to prove each of the following ingredients beyond reasonable doubt:

- i. The fact of death;
- ii. The fact that deceased's death was caused by an unlawful act or omission;
- iii. That the accused committed the unlawful act which caused the death of deceased; and
- iv. That the accused had malice aforethought

25. In this case, the defence admits to the fact and cause of death. It is also not disputed that it was the accused who fired the fatal shot. He admits to it but maintains that the prevailing circumstances left him with no other obligation but to shoot at the deceased. What is up for determination is whether he killed the deceased with malice aforethought or whether he did so in self-defence. Should the court find that there was malice aforethought or excessive use of force, which in reality is what happened, then the accused should be convicted of Murder or manslaughter at the very least. However, should the court find that the level of force used was commensurate to the circumstances, then the accused should be acquitted.

26. It is the prosecution's case that the submissions will only be limited to addressing the court on whether the accused acted with malice aforethought at the time of the fatal shooting. Further, that the evidence is enough to sustain a conviction on the charge of Murder and in the alternative, convict him for the offence of manslaughter.

27. Counsel submitted that under section 206 of the Penal Code, malice aforethought is deemed to have been established by proving any one of the following circumstances:

- a. An intention to cause the death of or to do grievous harm to any person;
- b. Knowledge that the act or omission causing death will probably cause death or grievous harm to someone; or
- c. An intent to commit a felony.

28. Furthermore, in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR, the court stated that;

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v. Uganda*, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of Murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”



29. It is the prosecution's case that at the time of the incident, the accused was a KFS officer and he was on duty. According to section 63(2) of the Forest Conservation & Management Act, it is permissible for a KFS officer to use deadly force in certain situations.

On self-defence, counsel urged that Section 17 of the Penal Code provides as follows:

“ 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.”

30. Learned counsel cited the case of *IP Veronica Githahi & Ano v Republic* [2017] eKLR where the Court of Appeal stated when the self-defence contained in section 17 of the Penal Code may be considered. Further, that the provisions of section 63(2) and (3) of the Forest Conservation & Management Act are relevant to the case. It would be improper to invoke the provisions of section 17 of the Penal Code and applying any of the provisions of common law on self-defence. Section 63(3) is categorical that non-lethal force should always be employed in the first instance and where it is necessary to use force, it must be proportional to the objective to be achieved i.e. effect an arrest and/or defending oneself from grievous bodily harm. Therefore, the accused was only allowed to use his firearm to prevent the deceased from escaping or to subdue him in order to effect an arrest. According to the deceased's son who was harvesting firewood with him at the time of the incident, the two were using a cross-cutter when he noticed two KFS officers approaching them from behind the deceased. He immediately took off leaving the deceased holding the cross-cutter on the other end. The deceased was caught by surprise, completely unaware that the officers were behind him. So, at what point did he then drop the cross-cutter, pick up panga then turn to the attack the officers and at the same time maintain composure while gunshots are fired as warning shots? Considering that the accused sustained a small cut wound on the arm, it is unbelievable that the deceased posed such a serious threat to the life of the accused. The exit wound suggests that the deceased was shot from a distance and not from a close range as suggested by the accused. A panga is a close-range weapon and there is no suggestion from the defence it was thrown at him. It therefore cannot be that the deceased cut the accused using the panga from a distance. The accused cannot therefore have been acting in self-defence when he was not at risk of grievous harm.
31. Learned counsel urged that there is sufficient evidence to show that the accused persons caught the deceased by surprise. In his hands, was a cross-cutter that he and his son were using to split a log that was on the ground. He therefore posed no imminent harm to the accused and his colleague. Further, that where a KFS officer is to effect an arrest, the Act states that the first measure was for the accused to use accused was required to use non-lethal force. He did not. He cannot seek the protection under the Forest Management and Conservation Act when he did not abide by the provisions thereof. He submitted that the Republic prays that this Honourable Court finds him guilty of Murder as charged. In the alternative and in a worse-case scenario, the evidence shows that the accused used excessive force to subdue the deceased. In those circumstances the accused should be convicted on the charge of manslaughter.

Accused Person's Submissions

32. Learned counsel for the accused person submitted that the prosecution have failed to establish a prima facie case. He urged that there was no bad blood between the accused and the deceased to warrant intent to kill on the part of the accused. That PW1 who was the wife of the deceased testified that in her opinion, the accused and the deceased did not know each other. PW7 who testified as the accused's workmate corroborated PW2's testimony that indeed there was no bad blood between the accused



and the deceased. PW4 testified that the accused and the deceased were friends. PW6 was not aware of the relations between the accused and the deceased. He stated that that the accused and PW7 were on normal work routine as forest guards when the incident happened and therefore, he did not set out to kill the deceased. It was PW8's testimony as a forest officer attached to Elgeyo Forest Station and having worked there for 4 years that no logging was allowed during the weekends most especially on Sunday. If any logging was happening on Sunday, the same would be illegal and in this case, it was PW4 who corroborated this testifying that no one was not allowed to enter the forest on Sunday and yet he and his deceased father went any way. PW7 also testified that it was an offence to be in the forest on Sunday. Furthermore, when PW7 and the accused were on patrol, they had no idea that the deceased was in the forest together with PW4.

33. Learned counsel urged that the defendant in his defence pleaded self-defence, testifying that on the fateful morning, together with PW7, they were on routine patrol at the forest which like many forest in Kenya was facing acute problem of illegal logging. Both PW7 and the accused were armed with G3 rifles. On entering the forest, with the accused in front and PW7 following, they stumbled upon the deceased and his son, PW4, in the process of cutting timber. On seeing the two rangers the deceased's son who was facing the directing of the rangers took off and the deceased had his back to the rangers and on seeing his son taking off, also stood up, but in so doing, also picked his panga and instead of surrendering, confronted the two rangers with a panga. The deceased was close to him, as a result the deceased attacked him inflicting injury on his on his right hand. Faced with imminent danger on his life, the accused fired and the first bullet shot the magazine of the rifle PW 7 was using, destroying the magazine, and the next shot hit the deceased who had continued his charge on him. The accused accounted for the four bullets fired as follows;
1. He fired two bullets in the air when the deceased raised the panga. The aim was to warn the deceased from moving further towards him.
 2. The third bullet was discharged when the deceased inflicted the panga cut. It is the bullet that tore the magazine for the gun PW7 was holding.
 3. The fourth bullet is the one that hit the deceased.
34. The accused was thereafter treated at Iten District hospital where he was treated and the cut wound dressed. The P3 form as well as the treatment notes were admitted as exhibits.
35. Counsel urged that the prosecution had called a total of 11 witnesses and sought to draw the attention of the court to the following witnesses. PW 1, the wife of the deceased testified that the deceased and her son ventured into the forest on the fateful weekend. It is a common ground that logging over the weekend is prohibited, and no permits are issued to sanction logging over the weekend. It is therefore uncontested that the deceased and his son were committing a criminal activity to which the accused and PW 7 are by law enjoined to effect an arrest. PW 7 was a colleague of the accused and were together with the accused on patrol on the fateful morning. The witness testified that they were on routine patrol at Chebiemit forest to address the problem of illegal logging in the forest. Both PW7 and the accused were armed with G3 rifles (G3 Rifle No. G3-A3-POF-07-J40708 issued to the accused and G3 Rifle No. G3-A3-POF-07— J40745 issued to PW7) with each of the two guns loaded with one magazine with 20 bullets each. It was the testimony of the PW7 that on reaching the scene in issue, they stumbled upon the deceased and his son in process of cutting timber from a tree they had felled. That on seeing the two rangers the deceased's son took off but the deceased did not. Instead, he confronted the two rangers while armed with a panga. PW7 confirmed that the accused fired twice in the air and ordered the deceased to surrender but the deceased instead attacked the accused, who was the ranger nearest to him (the deceased), and in the process inflicted serious injuries on the defendant. As a consequence,



- the accused sustained a cut on his right hand. Faced with imminent danger on his life, the accused fired and the first bullet shot the magazine of the rifle PW 7 was using, destroying the magazine, and the next shot hit the deceased who had continued his charge on the accused. The evidence of PW7 is in tandem with the evidence presented during the trial by the prosecution. The Investigating officer, Robert Ndambuki PW10, confirmed that the accused had a fresh wound on his right hand. That he recovered two firearms. One had its magazine torn (broken) and no ammunition. He also confirmed that 7 spent cartridges were recovered at the scene plus 13 live bullets.
36. PW 10 also, confirmed that the magazine in respect of G3 Rifle G3 Rifle No. G3-A3-POF-07-J40708 had its magazine destroyed by a high velocity projectile consistent with a bullet. It was therefore incapable of firing. He also confirmed that of 7 spent cartridges recovered at the scene four were fired from rifle G3 Rifle No. G3-A3-POF-07-J40745 and 3 were destroyed by the high velocity projectile. The bullets recovered from the scene were consistent with those discharged by the magazine after the magazine was hit by the bullet. PW 11, was Dr. Wekesa Nalinya, a pathologist, who conducted a post-mortem. The bullet's point of entry was right chest between 7th and 8th rib and exit was the left shoulder blade, evidencing that the rifle was facing upwards at an angle of 60 degrees at the time it was fired. His evidence corroborates the evidence of PW7 and the accused that by the time the fatal shot was fired, the accused was falling from the impact of the panga cut. He also confirmed that the deceased was about 90 cm away evidencing close combat. The medical records indeed confirm that the deceased suffered fatal shot while he was attacking the two rangers namely PW7 and the accused. The medical report also confirmed that there was only one gun wound. It cannot be suggested that the deceased was shot at severally. The evidence of PW4 that the deceased was shot at while running away is evidently a lie.
37. Counsel urged that the actions of the accused were lawful and reasonable to warrant use of force. It was PWS's testimony that forest officers were normally equipped with guns for their safety. He produced a Firearms Movement Book as PExh7 demonstrating that PW7 and the accused were duly armed as is the practice of forest officers. PW7 corroborated this by testifying that they usually patrol with guns to defend themselves in case they encounter an attack.
38. It is the accused person's case that under section 63 of the Forest and Conservation and Management Act, a forest officer may use a lawfully issued firearm during enforcement of the provisions of the Act in the event that a person intends to commit an offence. It is not disputed that the deceased together with PW4 had no permit fell trees as they did and thus were in violation of section 64 of the Forest and Conservation and Management Act. PW7 as an eye witness attested to the fact that it was upon confrontation with the deceased person that the accused fired at the deceased. Otherwise, their aim upon encountering the deceased and PW4 was their desire to arrest them for their illegal activity. Counsel urged the court to note that PW7 as an eye witness testified that the deceased confronted the accused and attacked him by cutting the palm of his hand with the panga. There's medical evidence that the accused was injured and treated at a government hospital. It is, according to counsel, notable that the accused had reasonable cause under the provisions of section 63 of the Forest and Conservation and Management Act to use the firearm as the deceased intended to cause grievous harm when he was about to be arrested for his illegal act.
39. The accused was in the course of his duty and honestly believed that he was in danger by the act of the deceased cutting his hand and accosting him with a panga. His intuition was to react as fast as possible to dispel the danger. The only tool available to him was the firearm, and he used it to warn the deceased by firing in the air in vain prompting the shooting as a last resort. Unfortunately, the deceased succumbed to the injury.



40. Learned counsel for the accused person urged this court find that 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, find that the accused's defence of self-defence has been established and constitutes an absolute defence to the charge(s) against him and acquit him accordingly.

Analysis & Determination

41. The accused faces a charge of Murder which is defined under section 203 of the Penal Code as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of Murder.”

42. In order to prove the charge of Murder the prosecution has to adduce evidence to prove:

- a) That the deceased died as a result of an unlawful act or omission.
- b) That the accused was the one who committed the act or omission that led to deceased death.
- c) That at the time the accused did the act or omission which caused the deceased death, he had formed the necessary malice aforethought

Section 206 of the Penal Code describes the various circumstances which constitute malice aforethought, an important ingredient for the offence of Murder, as follows:

“206. 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.”

43. Upon considering the charge against the accused person, the evidence adduced in court, the testimonies of the witnesses and the submissions on record, the following issues emerge for determination;

1. The fact of death
2. Whether the deceased died as a result of an unlawful act or omission by the accused
3. Whether there was malice aforethought

The fact of death

44. It is not in dispute that the deceased died as a result of a bullet wound to his chest. The evidence of PW 11, Dr. Wekesa Nalianya who conducted the post mortem on the deceased 17th August 2012 was that



the cause of death was a severe chest injury due to a gunshot wound. It was therefore proved that the deceased died. The fact of death is undisputed.

Whether the deceased died as a result of an unlawful act or omission by the accused

45. The accused person confirmed that he indeed shot the deceased on the material day. This was corroborated by the forensic evidence adduced by PW 9. The witness was an expert witness and his evidence was not shaken in any way by the defence. He conducted tests on the exhibits and established that the spent cartridges which were marked as C1 to C7 to establish whether the said cartridges were fired from exhibits A and B. Exhibit A was the G-3 rifle serial no. J40708 AND Exhibit B was a G-3 rifles serial no. J40745. From the evidence of the PW 8, who issued firearms to the accused and John Tandui, exhibit A was the gun issued to the accused. The ballistic expert testified that upon comparing the test cartridges to the exhibits, his examination revealed that G3 rifle seal no. J40708 fired C1, C2, C4 and C6. This therefore confirmed that it is the accused person who fired bullets on the material date.
46. The evidence of PW11 confirmed that the deceased died of a bullet wound and the evidence of PW 9 confirmed that the accused person's gun was the one that fired the bullets at the scene. Therefore, it follows that the accused person's act of firing his rifle is what caused the death of the deceased.

Whether there was malice aforethought

47. Malice aforethought draws the line between Murder and manslaughter. It describes the mens rea or the mental element required for a conviction for the offence of Murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be Murder but manslaughter. Section 206 of the Penal Code provides for circumstances which if manifested in any particular case malice aforethought is deemed to be established:
- (a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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 fight or escape from custody of any person who has committed or attempted to commit a felony”.
47. The provisions on the issue of malice aforethought leave a lot to be desired as there may arise challenges in applying the same, specifically the provision that knowledge that the act or omission will cause death to a person. Any person who fires a gun in the direction or presence of another person is well aware that the same may result in death or grievous harm. Does this impute malice on any firing of a weapon? In my view, it does not. However, the elements as phrased in legislation, gives the court a wide berth within which to qualify an act as malicious, a freedom courts should exercise with caution.



48. There are numerous authorities covering manifestation of malice aforethought in cases on the charge under Section 203 of the Penal Code. For the offence of Murder and proof of malice aforethought in *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, the Eastern Court of Appeal observed:
- “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
49. In the case of *Hyam v DPP* {1974} A.C. the Court held inter alia that:
- “Malice aforethought in the crime of Murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”
50. The pertinent question herein is whether the prosecution has proved malice aforethought. It is upon the answer to this question that in my view under Section 107 (1) as read with Section 108 and 109 of the *Evidence act* can the case be proved against the accused.
51. It is not in dispute that on 12th August 2012 the accused person found the deceased and his son in Chebiemit forest and upon a confrontation, the accused person shot the deceased. From the evidence of the witnesses, there was clearly no bad blood between the deceased and the accused. The allegation by PW5 that the accused person told the deceased ‘tunekupata leo’ was not corroborated by any other witness.
52. The accused person’s position is that the use of force was reasonable in the circumstances. In this regard, I acknowledge the provisions of section 63(3) of the *Forest Conservation and Management Act* which provides as follows;
- (2) Any uniformed and disciplined officer of the Service, after acquiring the requisite paramilitary and skill at arms training, and when authorised by the Chief Conservator of Forests, may use a lawfully issued firearm
 - (a) in the course of the enforcement of the provisions of this Act against
 - (i) any person charged with an offence punishable under this Act, when that person is escaping or attempting to escape from lawful custody;
 - (ii) any person who, by force, removes or attempts to remove any other person from lawful custody;
 - (iii) any person who, by force, attempts to prevent the lawful arrest of himself or any other person: or
 - (iv) any person unlawfully hunting any animal within a forest area or nature reserve.
 - (b) for the protection of people and property against any animal causing destruction to human life or property or crops; and
 - (c) in the course of animal population control.
 - (3) Notwithstanding the foregoing, an officer of the Service shall not use a firearm—
 - (a) under sub-section (2) (a)(i), unless the officer has reasonable grounds to believe that he or she cannot otherwise prevent the escape, and unless he or she has given ample warning to such person that he or she is about to use a firearm against that person, and the warning is unheeded;



- (b) under sub-section (2)(a)(ii) or (Hi) of unless the officer concerned believes on reasonable grounds that the officer or any other person is in danger of grievous bodily harm, or that the officer cannot otherwise prevent the removal. or, as the case maybe, effect the arrest.
53. Looking at the facts presented, the court must examine whether the accused had any reason to perceive any danger. Bearing in mind all the circumstances that existed and the prevailing conditions that the accused found himself, the question that needs to be answered is whether he was justified to use a firearm. The Court of Appeal laid down a test on the case of Republic V. Joseph Chege Njora 2007 eKLR as follows:
- “A killing of a person and excusable where the accused action which causes the death was in the source of overtaking a felonious attack and no more force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger parcel arising from a sudden and serious attack by his victim it must also be shown that reasonable force was used to avert or forestall the attack”
54. The reasons underlying this approach as can be assessed from the following elements of self-defence in our law:
- (a) That the accused must have had reasonable ground to believe that there was apparent imminent or immediate danger of death or immediate danger of death or serious bodily harm from his attacker,
- (b) The accused must have in fact a reasonable belief that his life is in danger or a third person or his property or other person’s property,
- (c) He must not be the person who triggered the conflict or the assault,
- (d) The use of force must have been reasonable and not excessive
55. The key elements of firearm use are laid out in the provisions of section 63(3) of the [Forest Conservation and Management Act](#) and therefore, the accused person was bound by said provisions in his use of his firearm. There was no evidence that he warned the deceased or that he was in danger of grievous bodily harm. He claimed that the deceased attacked him with the panga, which attack was the cause of the cut on his arm. However, the panga which was found at the scene, and claimed to be the weapon used to cause his cut did not have any blood stains on it. This was confirmed by the evidence of PW 10, Sgt Robert Ndambuki who was part of the scene of crime personnel. He sent the panga to the government chemist and the report dated 10th December 2012 proved that there were no blood samples on the panga. Further, the evidence of PW 11 who conducted the post mortem, revealed that the deceased was not shot at close range as there was no soot on the wound. This piece of evidence was crucial in establishing whether the accused person shot the deceased in self-defence. From the evidence, I deduce that the deceased did not attack the accused person with the panga and further, the accused person used unreasonable force to subdue the deceased. All facts and evidence considered, I am of the view that the prosecution did not show that the accused person had intended, planned and conspired to kill the deceased and therefore, there was no mens rea. In the same breath, the accused person did not have to kill the deceased as there were other measures he would have taken in the circumstances.
56. As the element of malice aforethought has not been established, the charge of Murder cannot be sustained in the circumstances. Section 202 of the Penal Code provides as follows;



- (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.
57. That the death of the deceased was caused by an unlawful act, perpetrated by the accused person, has been proved beyond reasonable doubt. I therefore substituted the charge of Murder with that of manslaughter contrary to section 202 of the Penal Code. The accused person is hereby convicted of the offence of manslaughter contrary to section 202 of the Penal Code. The matter shall now proceed for sentencing.

Sentence

The legal framework

58. Section 205 of the Penal Code provides that on conviction of an offender for the offence of manslaughter he or she shall be liable to life imprisonment. In this regard certain key principles upon which the facts of this case shall be underpinned are worthy consideration. The sentencing objectives in Kenya have been captured in the judiciary sentencing Policy Guidelines, to be the following:
1. Retribution: to punish the offender to his/her criminal conduct in a just manner.
 2. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences
 3. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person
 4. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages
 5. Community Protection: to protect the community by incapacitating the offender
 6. Denunciation: to communicate the community's condemnation of the criminal conduct.
59. In setting the new tone on sentencing in Kenya on homicide cases the Supreme Court in the Francis Muruatetu (2017) eKLR outlined the following guidelines for consideration by trial courts as they go about exercising discretion on sentencing.
- a. Age of the offender
 - b. Being a first offender
 - c. Whether the offender pleaded guilty
 - d. Character and record of the offender
 - e. Commission of the offence in response to gender-based violence
 - f. Remorsefulness of the offender.
60. It is a wide discretion donated by the relevant penal statutes, case law principles, sentencing policy guidelines 2023, and [the constitution](#). The key pillars that should guide the sentencing process can be construed from the general provision of [the constitution](#) 2010. Art. 10 (1) and 10(2) direct all public officers who include judicial officers, to adhere to the principles human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Judicial officers are further required to carry out their functions in a manner that promotes public confidence in the integrity of the office and to act objectively as well as with impartiality as provided by Art. 73(2)



of *the Constitution* 2010. Thus in meting out individuals sentence, judicial officers ought to be guided by these broad principles.

61. In the instant case, Mr.Tororei on behalf of the accused on mitigation submitted as follows:
1. The accused person is of ill-health and has been in and out of hospital having been diagnosed with high blood pressure and ulcer which he is being constantly being treated of even during the delivery of judgement of this honourable court.
 2. The conduct of the accused while out on bond showed evidence of having been rehabilitated, having not engaged in any bad conduct and is therefore not a danger to society.
 3. The accused person's health status and age requires him to still attend clinics for chek-up and medication, which he may not get while in prison which also make him vulnerable to contracting Covid 19 and other infectious diseases, this my lord makes the accused vulnerable person, we humbly submit this factors which favour non-custodial sentence.
 4. It is our submission that based on the age of the accused, it is our humble submission that he has the right under Art. 57of *the constitution* as an old member of society to live in dignity.
62. To this end, the court has also been supplied with the pre-sentencing report dated 20.12.23 covering the personal antecedents of the convict. In order to address this question all these factors will be used as a measure to come up with an appropriate sentence applying an hybrid system constituting mitigation, aggravating factors, Art.10 of *the Constitution*, Section 205 of the Penal code and the sentencing policy guidelines 2023. The usefulness of guideline judgements in structuring sentence discretion is that there are mechanism rather than restricting it. With regard to this case some of the key aggravating factors stand out, the use of a firearm in circumstances indicative that that was not the only option available to the convict. Applying the various legal tools as discussed above, my exercise of discretion leads me to impose a custodial sentence of seven (7) years. The measure of this period is mitigated by the age of the convict and the reparation to the victim's family.

Orders Accordingly

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF DECEMBER 2023

In the Presence of

Kimeli for Tororey for the Accused

Mugun for the State.

.....

R. NYAKUNDI

JUDGE

