



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 7 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

MOHAMED EDIN HASSANOW alias CHOKE.....1ST ACCUSED

IBRAHIM ADAN MOHAMED alias DOMAL.....2ND ACCUSED

MOHAMED IBRAHIM MAALIM ALI alias GERILE.....3RD ACCUSED

JUDGEMENT

1. The accused persons are charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars being that on the 27th day of March, 2018 at Domal area within Banisa Sub-County in Mandera County jointly with others not before court murdered MALAIKA YUSUF.
2. The accused persons denied the charge and matter went into full trial.
3. After close of the prosecution case the accused persons were put in their defence where they gave sworn evidence and called witnesses.
4. The court has been called upon to render a judgement on the evidence adduced.
5. The prosecution called 12 witnesses to prove its case.
6. **PW1 AM** 16 years testified without swearing as the court found she did not understand what oath is.
7. She testified that she resided in Chiroko and the deceased Malika Yusuf was her mother. She said on 17th though no month and year stated, her mother, Mohamed Abdi brother to her father, Fatuma Mohamed sister to her father Mohamed Mohamed son to her aunt Fatuma, Ibrahim Jimale son of brother to her father all died.
8. She said she knew Gerile, Ibrahim Domal, for 2 years, Choke for 4 years and Gerile for 3 years. She testified that on 27/3/2018 at 6.30 am while preparing tea with her sister Mumina she heard gunshots and she ran away into their house.
9. The gunshots were from a nearby forest but she did not know where they were arising from.
10. Then she saw 3 people standing. They had killed people and they moved from place where she was preparing tea to the house then she came out and saw people had been killed. When she saw them, she ran away and left them there at the scene. She said she saw Ibrahim Domal, Hassan and Gerile.
11. Hassan carried gun, so is Ibrahim and also Gerile had guns. She ran away after observing the type of guns they carried. They were black guns – small ones. She was afraid and thus ran away. The 3 never talked to her. She ran with her sister Mumina. They touched her on the hands and left her. They did not tell her anything. She came back and saw her people who were killed.
12. She stated that it was Ibrahim, Hassan and Gerile who killed her people. She saw them already killed and killers were preparing to leave. The killed people were five namely; Malika, Hassan, Ibrahim Ali, Mohamed Hassan and Mohamed Mohamed.

13. After seeing her people dead she went to the chief who came to the scene with car and picked bodies. She went with her sister to the chief. She did not see the killers again.
14. Prior to the shooting, her late mother was in the house as the witness was preparing tea. The late Fatuma Mohamed, and late Mohamed Mohamed were also outside the house. IMA was a child breast feeding in the house being fed by Abdia.
15. On the attackers, she said Choke lived in Domal which is 6 hrs journey on motorcycle. The other accused persons also lived with him.
16. She said she did not know what brought them to their place and she had not seen them in their place before. She identified them in court.
17. The court notes that though witness gave unsworn testimony she was not cross examined.
18. **PW2** was sworn and she stated that her name is KM 16 years old and not in school. She resides in Chiroko area and looks after goats. She was a daughter of Fatuma Mohamed Mohamed and her father was Mohamed Osman. She said her mother died during the attack. Along with her mother, victims who died were Malika Yusuf her aunt, Mohamed Mohamed her young brother, Mohamed Abdi her brother and Ibrahim Jimale son of her brother. They all died on 27th morning though month and year not stated.
19. In that morning, she saw Mohamed Edin Hassanow alias Choke, whom she used to know as she used to take water from his borehole. Also saw Ibrahim Aden Mohamed alias Domal whom she knew they were neighbours when they lived at Domal. She also knew Mohamed Ibrahim Ali as they lived with them. She saw there were no family problems with accused persons.
20. She testified that on the material day she was in the house at Chiroko. Domal is a near place. She was in house with her brother Mohamed Mohamed when she heard gunshots. The attackers came as people were moving from the houses and they shot and burn houses.
21. Among the 3 attackers who came, two went into the house and one remained outside. She named them as Ibrahim Domal, Hassan and Gerile. They carried bullets and guns. They carried small guns each and the sizes were arm length (demonstrated by PW2).
22. She ran away to a nearest village Chiroko and left her mother and all other who died. 5 people who died were shot i.e. Malika, Fatuma, Mohamed Abdi, Ibrahim and Mohamed. Malika was shot by Ibrahim Domal. Mohamed Abdi was shot by Hassan Gerile and so is Fatuma Mohamed.
23. Muhamud was killed by all accused and Ibrahim Jimale was killed by Ibrahim Domal. They ran out of the house and left it burnt. They came back with chief and bodies were collected and buried. Chief is known as Ibrahim.
24. She identified the victims on the photographs. She identified also the attackers in court.
25. In cross examination, she said she went to the parade to identify the attackers though she knew them. She had reported to the chief that her people were killed by Garre people. The witness tribe is Degodia.
26. She said there was enmity between 2 ethnic groups. She said it had rained previously. The area is near Ethiopia border. Previously on 26/3/2018 Degodia came to Kenya and killed Dorocho.
27. The problem occurred at Chiroko. She said Choke was their neighbour and they fetched water and bought milk in his place. He owns and rides a motorcycle. His house was 1 hr walk. There was no enmity between them. She saw him killing for the first time that material day.
28. She was sited in their oval shaped house with other. She was hit by bullet but never went to hospital. At police she said she saw 3 people DEXH-1 her statement. She said she saw gun AK47. It was short.
29. At the police she said she gave appearances and clothes of attackers each wore long sleeved shirt and trousers. The witness said she mentioned attackers' names but she did not know whether they were recorded in the O.B.
30. On 3rd accused, she saw him when she ran outside. The chief's home is 1hr and they took 2 hrs to come with chief.
31. **PW3 KORAN AHMED BILAL** just gave her introductory evidence via Somali language and interpreted however was stood down for Garre interpreter to be availed.
32. Later in another day, she testified that she was from Jeroko in Mandera County where she had been for 7 yrs. She knew Domal which is 1hr ride in a motorcycle and she walked now and then.
33. On 27/3/2018 at 7.30 am she was at Domal. She was about to prepare tea in the house when she heard gunshot. She saw person who shot. She ran into the bush. They were many in the homestead. In her house she had her children namely Abdulahi, Ismail and Kaltuma. They also ran away on their own.
34. She ran with Ismail as Abdulahi and Kaltuma ran on their own. Abdulahi got bullet injuries. The witness ran for about 70m as she had child. She went back to take injured who was bleeding. She saw people wielding guns walking in homestead checking the people who were shot. They picked one child Ibrahim who was shot and they threw him down.

35. These people were 3 and carried guns and wore black jackets. The witness said she knew the same people. The were Ibrahim Domal, Ibrahim who she didn't know the father and Hassanow Ibrahim Domal is the one who picked and dropped the child.
36. The witness said she hid and observed them until they left before coming out. They took goats from homestead. The goats followed them but they did not take the goats.
37. After coming from the hiding she saw 5 dead persons bodies and stayed there until police came to the scene. The dead were; Malika, Hassan Yusuf, Mohamed Abdi Bilal, Fatuma Mohamed, MMMO (child 5 yrs) and IJ (3 yrs old child). Other people were injured and others were not.
38. She was in homestead with Abdia and Jimale Ali. His injured son had escaped into the bush. People of Jeroko came with police. A chief Ibrahim Daib came. The bodies were taken to Chiroko where they were buried. The people she saw shot people including deceased Malika.
39. They came at 7 am and left at 8 am. She told the police she knew the attackers. At Mandera she identified the 3 accused persons. She knew them. She identified Ibrahim Domal and, in the call, there were over 100 people. She pointed at him.
40. The second to identify was Ibrahim and pointed him. The 3rd was Hassanow. She identified them in court as people she saw shoot people. She said previous 3 yrs there were conflicts between Garre and Degodia but at the time of incident animosity had been settled. In court she identified the 3 accused persons.
41. On cross-examination she described their homes as manyattas with over 100 houses, fenced and had over 100 people including adults and children. The time of attack was 7 am with bright day and the attackers who came were 7 in numbers. She knew only 3 of them. They came from different points. It had rained. The houses had roof 7ft inches up. She identified attackers as they left. She heard 5 gunshots. She ran away to hide for safety. She saw 3 people.
42. In the statement to police she said she saw Sheikh whom she referred as the 1st accused in court. Ibrahim alias she didn't mention him to the police. She said she mentioned Ibrahim Domal and another Ibrahim. She said she knew 1st accused before as their neighbour. She said she knew 2nd accused for 1 yr by face and name. He worked at waterpoint and is called Ibrahim Domal.
43. When police arrived, she gave them description of the 3 people and the clothes they wore. At the parade she participated in ID parade though she told police she knew attackers 3 of them. She identified them in the cells amongst 100 other people inside the cells.
44. She pointed the 3 of them. They were not in a line of 8 people. The 3 are Garre and witness is Degodia claim. The homes of 2 accused is in Domal and she knew them. As for 3rd accused, she did not know him.
45. **PW4 IBRAHIM EMYMON ENOI** Chief Lulis Location was sworn and he testified that on 27/3/2018 in the morning he was at Lulis. At 5pm the DDC called him to the office. He is the County Commissioner Deputy Barissa.
46. He stated that there was incident at Jeroko and he gave 3 names of the suspects namely; Ibrahim Garile, Ibrahim Domal and Hassanow. They were called 3 chiefs including Chief Bashir and Chief Mohamed Aburo.
47. They were ordered to look for suspects. They sent messages via public and on 1/4/2018 2 of suspects Ibrahim Gerile and Domal went to the witness who informed DCC and they were handed over for investigations.
48. On cross-examination he stated; his location borders Ethiopia and a game reserve. He was not given name of Hassanow though he comes from his location. Lulis to Jeriko is about 45km. Lulis is occupied by Garre. It borders Domal, Jeroko and Karim. Jeroko is occupied by Degodia. There was conflict 3 to 4yrs between Garre and Degodia but had been solved.
49. **PW5** Ass. Chief in Lulis Location Awale Yatani Sub-Location testified that on 30/3/2018 at 11 am he received sms from ACC (D.O) Banisa; Abduraham sending 4 names asking whether he knew them. There are Issack Riba, Issack Umas Hassan, Mohamed Eiden Hassanow, Yakub Haji Issack. The witness knew them. He was instructed to trace them and inform police. They were suspect in Jeroko incident sub-location.
50. On 1/4/2018 he summoned a gathering and Mohamed Edin Hassanow attended, and police were informed, and came and arrested him.
- On cross examination he stated; the others in sms were not arrested.
51. **PW6** Chief Banisa Location Bishar Hussein Haji: His location is about 15km to Jeroko Location on 27/3/2018 in the morning. He heard that people in Jeroko and Domal had ran away due to gunshots. He first heard via his wife. The D.O Abdurahman informed him that he was proceeding to the scene.
52. Then D.O convened public meeting and confirmed 5 people had been killed. 3 names of suspects were given to them: then him, chief of Lulis and Kaimole were given instructions to look for the suspects namely – Ibrahim Domal, Gerile and Hassanow. Thus, were told to look 10 ones they knew.
53. On 1/4/2018 they (2 suspects) brought themselves and they took them to Banisa Police Station. There were Domal and Gerile. They said they were from Mankamale Location not witness location.

54. On cross-examination he stated; he said he knew Domal who was watchman of Domal. The 2 told the witness where they were at the material day. He didn't visit their home.
55. **PW7 ADAN ALI MOHAMED** a herdsman in Jeroko who had lived there long on oath stated that he knew all the victims who died in attack. He said he knew Ibrahim Domal by face; he knew Ibrahim Karire personally. Ibrahim Adan Mohamed was from Domal. He didn't know Hassanow.
56. On 27/3/2018 at 7 am while at home seated near fire place outside the house, he heard gunshots and they all ran into the bush. He was shot on the ankle and he rolled crawled into the bush. He knew the attackers that same year. He had beards and he is Mohamed Gerile (beards). He says he used to move from place to place. Domal was place – trading centre. They had to sell milk. He was taken by relatives to Mandera hospital his bullet had gone through his ankle and exited. While in hiding he could hear crying of victims of the attack.
57. As he ran his mother Malika and Mohamed Mohamud already shot lying outside. He pointed at 3rd accused as the person who shot him. He didn't see other attackers.
58. On cross-examination he said he had no dispute with accused 3. He said he participated in identification parade where he identified 3rd accused. He said he saw accused 3 as he ran away for safety.
59. **PW8** was Mohamed Muktar Shuka clinical officer of Mandera Sub-County Hospital. 2018 he was at Banisa. His duties are to attend patients and P3 forms. He has Diploma in Clinical Medicine.
60. On 27/3/2018 he instructed another officer to document fatalities who did so and postmortem were filled. Thus, the witness produced postmortem of 5 victims who died after the attack subject herein. His colleague had signed same.
61. **PW9 BOAZ KEMOSI OKEMWA** a nurse in Banisa Sub-County; he examined bodies who had died of gunshots. He took notes at scene of attack and transferred same to the postmortem forms. He signed them on 28/3/2018. Bodies were identified by relatives. The postmortems were produced as exhibits. Cause of deaths were gunshot wounds.
62. **PW10 CIP JAMES ONYANGO** of DCI a firearm examiner on 19/4/2018 he received exhibits; 17 cartridges, 1 fired bullet, examined them and made report which was produced as exhibits.
63. **PW11 KENNEDY OJWANG** DCI Banisa on 27/3/2018 was instructed by his senior to proceed to the scene of attack. He went with other officers. They found 5 bodies lying down. The autopsy was conducted on the bodies by the doctor and postmortem was filled. The bodies were buried later.
64. **PW12 KOKARA SAMSON** of DCI Banisa stated that on 27/3/2018 he got instruction from senior to visit scene of shooting and did visit and commenced investigations. He went along with other officers. They took photos of the bodies at the scene which were procured later. This was done by scene of crime officer. Relatives identified bodies; autopsy was done.
65. At the scene the names of the attackers were given namely; Gerile, Choke and another. Suspects were arrested later.
66. PW11 was recalled to produce exhibits of 8 photos.
67. The prosecution closed case and the court found the 3 accused persons had case to answer. They gave sworn statements and called witnesses. Their defence are alibis. **DW1** accused No. 3 said he is from Domal. He said on 27/3/2018 at 6 am he went to mosque and left same at 7 am and went home. He said he is a Garre clan. He said they live near Kenya – Ethiopia border.
68. While back at home after attending prayers at mosque he stayed there with wife and 8 children. After learning of attack of Chiroko they ran away towards Banisa.
69. On the 3rd day Chief Bishar with other 2 chiefs called them. They were to explain what happened on the attack in issue. They were handed over to the police for further action. He says on interrogation by police he denied the charges/allegations against him. He recorded statement produced as Dexh-8. He denied ever being involved in attack at Chiroko. He also produced statutory declaration by the Chief Bishar. He denied being at scene of the attack as alleged by PW1, 2 and 3. He also produced PW5's statement. He said PW1-5 allegations that they identified him in a parade is not true as there was no identification parade conducted to identify him. He said he had no grudges with victims of attack. He comes from same place with 2nd accused and he knew him but didn't know accused 1.
70. On cross-examination he said before running away he heard there was gunshots in neighbouring area. He didn't know PW1 and PW2.
71. **DW2** accused 2 testified on oath and stated that he was Domal Bula. He said on 27/3/2018, he left watchman job at Domal Primary School at 6 am and went home. Then he learned of attack at Chiroko thus he fled towards Banisa. He fled with his 4 wives and 10 children.
72. Chief Aburo called them later and police came and arrested him. He denied allegation against him and he recorded statement. He produced his statement Dexh-2. He was arrested by chiefs Aburo and Bishar. No identification parade was ever conducted nor forms produced.
73. On cross-examination he said he had a dam/well or watering place where over 100 people go for water. He said that he was referred to as Domal.

74. DW3 accused 1 Mohamed Edin Hassanow from Lulis Sub-Location Barissa married to 2 wives and had 7 children.

75. On the material day he had gone to mosque for prayers at 6 am and at 7 am returned home. Later one Mohamed asked him to take him to Banisa. The witness operates a boda boda. He bought grass for animals and went home then went to Banisa and bought miraa and stayed at Banisa upto 12 noon and went home.

76. On 1/4/2018 chief called Barasa at Lulis centre. He attended and found chief and police. He was arrested and taken to Banisa. They waited to know when he was on 27/3/2018 and he said at home and accounted for his movement on same date. He produced his statement.

77. DW3 denied PW1, 2 and 3 identified him on the material date attack her in any identification parade. He denied alias Choke as his name. He didn't know victims of attack. He denied the charges. He said he has been to Chiroko.

78. On cross-examination he said he knew all accused before the material. He didn't know PW2 and 3 who said they identified him nor did he know PW7.

79. DW4 witness for accused 2. He stated that on 27/3/2018 at 6 am he was at Domal. At 7 am accused 2 came to the centre Domal and they met. He said accused 2 is a watchman. He learned there was an attack at Chiroko. People started fleeing Domal as there was tensions between Garre and Degodia clans. The tensions were caused by politics.

80. On cross-examination he said in the morning accused 2 came at 7 am and told him he heard there was attack at Chiroko. Also, police gave him the same information. They all ran to Banisa side.

81. DW5 witness for accused 1. He said on 27/3/2018 he was in the mosque together with accused 1. He didn't hear of Chiroko incident but heard same on the 3rd day.

82. On cross examination he said; he has never been to Domal.

83. The defence was closed and submissions was tendered.

DEFENCE SUBMISSIONS

84. Defence counsel relied on submissions dated 4/11/2019. He stated that the defence is unchallenged by prosecution. The circumstances surrounding incident was tension.

85. PW1-3 evidence on identification is on issue as to whether it is safe to convict. How long did they see the assailants? They gave alias names same were not established that the same alias names refer to the same people.

86. The issue of motive for attack – what was it? The accused are Garre. The investigation officer did not do investigation which connected accused with murder and/or weapons. Other than alleged recognition no other piece of evidence connects the 3 accused to the incident.

87. The other issue is *locus in quo* of the incident. The charge talks of incident at Domal not Chiroko 25 or 50km away. No evidence from village elder or area sub-chief of area clarified that. The alibi by defence was raised from time of arrest vide their produced statements which demonstrate same. No visit of accused homes was done nor investigation on same.

88. The prosecution has not asked to bring rebutting evidence. PW11 and 12 investigation officers have not indicated they investigated accused persons.

89. The counsel urged court to dismiss charges and acquit accused persons forthwith.

PROSECUTION'S SUBMISSIONS

90. Mr. Mulati for the prosecution submitted that on alibi PW1, 2, 3 and 7 are very clear. They were not at same place. They met assailant whom they knew. They gave the assailants names. They met and they identified them. In the identification parade they picked the assailants.

91. On motive, counsel for the prosecution stated that it can be inferred from nature of injuries inflicted to the victims. The information shows the locus doma which is conceded error but not fatal. He prayed for conviction.

DEFENCE REPLY

92. Mr. Nzili for defence submitted that the denial of charges makes everything becomes an issue. No inference can apply. It has to be pleaded properly. No basis laid for inference. If there is a missing link or contradictions in prosecution's case the doubt goes to the benefit of the accused.

93. On motive same cannot be inferred. It is either there or not. In absence of that they sought acquittal.

ANALYSIS AND FINDINGS

94. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngarivs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

95. In our case the prove of death of the deceased has been established by PW1, PW2, PW3, PW7, PW9, PW11 and PW12 who all saw the dead body of the deceased named in charge sheet along with other victims whose bodies were at the scene.

96. A postmortem report of the deceased Pex.5 produced by consent of both parties' consent, showed that she had a big wound from the back to the chest which caused her death. Though the postmortem was conducted and filed by a nurse on instruction of clinical officer the same lacks details, thus attracted an issue of its competence raised in passing.

97. However, the incident as witnessed by PW1, PW2, PW3 and PW7 confirms that the deceased was in good shape at the morning of the attack by the persons wielding guns (some mentioned) AK 47. The victim died instantly at the scene of attack with big back wound going to the chest.

98. Even in absence of a postmortem report, circumstantial evidence would warrant court to infer the occurrence of the death of the deceased as a result of the wound(s) emanating from the gunshots along with other victims as shown by photographs taken at the scene produced by consent.

99. PW10 examined cartridges collected at the scene of attack and confirmed via report produced by consent that they were fired from an AK 47 inter alia.

100. *As for the motive, it was in evidence that, Degodia and Garre ethnic groups conflicts was cited as the cause. See PW3's evidence. The ethnic conflict did not come out with details to demonstrate the real motive. However, that notwithstanding, the nature of injuries being grievous harm which caused death suffices to infer malice aforethought.*

101. In the case of **Nzuki v Republic [1993] KLR 191** where the court stated as follows:

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

102. See also the provisions of the Penal Code which by dint of **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought as follows:

“206. 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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused 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”

103. The core issue therefore revolves on the identification of the attackers. **PW1 AM16** yrs old gave unsworn evidence and told court that she saw during attack Ibrahim Domal, Hassan Garrile. This was on 27/3/2018 at 6.30 am at Chiroko. She said Choke lived in Domal 6hrs journey from Chiroko via motorbike ride. Other accused person according to her lived with him.

104. The record shows that she was not cross examined nor did she give detail how she came to know the persons she saw and mentioned as the attackers. **PW2 Kheira Mohamed** on oath testified that on the material date in the morning at Chiroko she saw the attackers namely; Ibrahim Domal, Hassan and Gerille. They carried guns and bullets. The guns were arm length in size.

105. On cross examination she said she went to a parade to identify the attackers though she knew them. To the police she had reported that her people were killed by Garre people. Her tribe is Degodia. She said there was animosity between the 2 ethnic groups. Previously on 26/3/2018 Degodia had come to Kenya and killed Dorocho.

106. She said Choke was their neighbour and fetched water and bought milk in his place. He owned and used to ride motorcycle. His house was 1hr walk. At police station she said she gave appearance and cloths of the attackers as each wore long-sleeved shirt and trouser.

107. She said she mentioned attackers' names but was not sure whether they were recorded in the O.B. **PW3 Koran Ahmed Bilal** testified that the attackers came at 7 am and left at 8am. She identified Ibrahim Domal, then identified Ibrahim and then Hassanow. She pointed at them in court as the attackers.

108. She said there was animosity between Garre and the Degodia though at the time of attack it had been settled. She said at the time of attack at 7Am the day was bright and could see attackers who came from different directions.

109. In statement to police shown to her she said she saw Sheikh whom she pointed as accused 1. She said she mentioned Domal and another Ibrahim. She said she knew accused 1 before as neighbour and accused 2 by face and name.

110. She said she gave 3 persons' description and the clothes to police who came to the scene. She said she participated in identification parade though she knew the attackers. She identified the 3 in cells amongst 100 others in cells. They were not in a line of 8 people. She said accused 1 and 2 were residing at Domal but she didn't know of accused 3's home area.

111. Other than the said PW1, PW2 and PW3's identification evidence, **PW7** also testified that the attack on 27/3/2018 took place at 7am. He heard gunshots and ran away into the bush. He said he saw accused 3 as he ran away for safety. He also said he participated in identification parade and identified accused 3. He named him as Mohamed Gerile (beards).

112. **PW12 Kakara Samson**, police officer went to the scene with other officers and saw bodies of the victims and said names of attackers were given at the scene namely; Gerile, Choke and another.

113. In **Wamunga vs Republic [1989] KLR 424** the Court of Appeal held:

“It is trite law that where evidence against a defendant is evidence on identification, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

Also in **Ogeto vs Republic [2004] KLR 19** court held that:“.....the court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

In **Cr. Appeal No. 117 of 2005 – David Mwita & Others vs Republic [2007] eKLR** Court of Appeal held:“.....the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders.”

114. The instant case first witness PW1 said she identified named people. She did not state how and when she came to know them. Her evidence was unsworn and she was not cross examined. She did not identify the same people other than in court which is a dock identification.

115. PW2, PW3 and PW7 also never gave any detailed evidence on how and when they came to know the persons they were pointing out in court as the attackers on 27/3/2018. They claimed to have gone to identify the suspects but PW3 stated that the people were in cells and amongst 100 of them pointed the accused persons.

116. No Parade Officer testified on the conduct of parade and the identification of the suspects nor were parade forms produced to confirm there were parade conducted in respect of identification of the suspects and whether any was identified. No explanation has been given for that omission.

117. The only evidence on identification of suspects remains dock identification. This is so because PW12 police officer who went to the scene mentioned that they got names of suspects namely; Gerile, Choke and another. He never stated who gave the same names nor did he investigate as to who the 2 names referred to.

118. The 3 accused persons raised defence of alibi in their statements and even at the police station they even called witnesses. The police never investigated the same.

119. In **Gabriel Kamau Njoroge vs Republic [1982-1988] 1KLR 1134** court observed:

“A dock identification is generally worthless and should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give description of accused and the police should then arrange a fair identification parade.”

120. Thus, in absence of a credible identification evidence on the person who attacked and murdered the victim herein and others, the court finds that there was no watertight identification evidence to meet the threshold to warrant conviction on the basis of the identification evidence only.

121. Thus, the prosecution’s case falls short of prove to the required standard as prescribed by the law.

122. Thus, the court makes the following orders;

i) The accused persons are acquitted and thus set at liberty forthwith.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

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C. KARIUKI

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3. After close of the prosecution case the accused persons were put in their defence where they gave sworn evidence and called witnesses.

4. The court has been called upon to render a judgement on the evidence adduced.

5. The prosecution called 12 witnesses to prove its case.

6. **PW1 AM** 16 years testified without swearing as the court found she did not understand what oath is.

7. She testified that she resided in Chiroko and the deceased Malika Yusuf was her mother. She said on 17th though no month and year stated, her mother, Mohamed Abdi brother to her father, Fatuma Mohamed sister to her father Mohamed Mohamed son to her aunt Fatuma, Ibrahim Jimale son of brother to her father all died.

8. She said she knew Gerile, Ibrahim Domal, for 2 years, Choke for 4 years and Gerile for 3 years. She testified that on 27/3/2018 at 6.30 am while preparing tea with her sister Mumina she heard gunshots and she ran away into their house.

9. The gunshots were from a nearby forest but she did not known where they were arising from.

10. Then she saw 3 people standing. They had killed people and they moved from place where she was preparing tea to the house then she

came out and saw people had been killed. When she saw them, she ran away and left them there at the scene. She said she saw Ibrahim Domal, Hassan and Gerile.

11. Hassan carried gun, so is Ibrahim and also Gerile had guns. She ran away after observing the type of guns they carried. They were black guns – small ones. She was afraid and thus ran away. The 3 never talked to her. She ran with her sister Mumina. They touched her on the hands and left her. They did not tell her anything. She came back and saw her people who were killed.

12. She stated that it was Ibrahim, Hassan and Gerile who killed her people. She saw them already killed and killers were preparing to leave. The killed people were five namely; Malika, Hassan, Ibrahim Ali, Mohamed Hassan and Mohamed Mohamed.

13. After seeing her people dead she went to the chief who came to the scene with car and picked bodies. She went with her sister to the chief. She did not see the killers again.

14. Prior to the shooting, her late mother was in the house as the witness was preparing tea. The late Fatuma Mohamed, and late Mohamed Mohamed were also outside the house. IMA was a child breast feeding in the house being fed by Abdia.

15. On the attackers, she said Choke lived in Domal which is 6 hrs journey on motorcycle. The other accused persons also lived with him.

16. She said she did not know what brought them to their place and she had not seen them in their place before. She identified them in court.

17. The court notes that though witness gave unsworn testimony she was not cross examined.

18. PW2 was sworn and she stated that her name is KM 16 years old and not in school. She resides in Chiroko area and looks after goats. She was a daughter of Fatuma Mohamed Mohamed and her father was Mohamed Osman. She said her mother died during the attack. Along with her mother, victims who died were Malika Yusuf her aunt, Mohamed Mohamed her young brother, Mohamed Abdi her brother and Ibrahim Jimale son of her brother. They all died on 27th morning though month and year not stated.

19. In that morning, she saw Mohamed Edin Hassanow alias Choke, whom she used to know as she used to take water from his borehole. Also saw Ibrahim Aden Mohamed alias Domal whom she knew they were neighbours when they lived at Domal. She also knew Mohamed Ibrahim Ali as they lived with them. She saw there were no family problems with accused persons.

20. She testified that on the material day she was in the house at Chiroko. Domal is a near place. She was in house with her brother Mohamed Mohamed when she heard gunshots. The attackers came as people were moving from the houses and they shot and burn houses.

21. Among the 3 attackers who came, two went into the house and one remained outside. She named them as Ibrahim Domal, Hassan and Gerile. They carried bullets and guns. They carried small guns each and the sizes were arm length (demonstrated by PW2).

22. She ran away to a nearest village Chiroko and left her mother and all other who died. 5 people who died were shot i.e. Malika, Fatuma, Mohamed Abdi, Ibrahim and Mohamed. Malika was shot by Ibrahim Domal. Mohamed Abdi was shot by Hassan Gerile and so is Fatuma Mohamed.

23. Muhamud was killed by all accused and Ibrahim Jimale was killed by Ibrahim Domal. They ran out of the house and left it burnt. They came back with chief and bodies were collected and buried. Chief is known as Ibrahim.

24. She identified the victims on the photographs. She identified also the attackers in court.

25. In cross examination, she said she went to the parade to identify the attackers though she knew them. She had reported to the chief that her people were killed by Garre people. The witness tribe is Degodia.

26. She said there was enmity between 2 ethnic groups. She said it had rained previously. The area is near Ethiopia border. Previously on 26/3/2018 Degodia came to Kenya and killed Dorocho.

27. The problem occurred at Chiroko. She said Choke was their neighbour and they fetched water and bought milk in his place. He owns and rides a motorcycle. His house was 1 hr walk. There was no enmity between them. She saw him killing for the first time that material day.

28. She was sited in their oval shaped house with other. She was hit by bullet but never went to hospital. At police she said she saw 3 people Dexh-1 her statement. She said she saw gun AK47. It was short.

29. At the police she said she gave appearances and clothes of attackers each wore long sleeved shirt and trousers. The witness said she mentioned attackers' names but she did not know whether they were recorded in the O.B.

30. On 3rd accused, she saw him when she ran outside. The chief's home is 1hr and they took 2 hrs to come with chief.

31. PW3 KORAN AHMED BILAL just gave her introductory evidence via Somali language and interpreted however was stood down for Garre interpreter to be availed.

32. Later in another day, she testified that she was from Jeroko in Mandera County where she had been for 7 yrs. She knew Domal which is

1hr ride in a motorcycle and she walked now and then.

33. On 27/3/2018 at 7.30 am she was at Domal. She was about to prepare tea in the house when she heard gunshot. She saw person who shot. She ran into the bush. They were many in the homestead. In her house she had her children namely Abdulahi, Ismail and Kaltuma. They also ran away on their own.

34. She ran with Ismail as Abdulahi and Kaltuma ran on their own. Abdulahi got bullet injuries. The witness ran for about 70m as she had child. She went back to take injured who was bleeding. She saw people wielding guns walking in homestead checking the people who were shot. They picked one child Ibrahim who was shot and they threw him down.

35. These people were 3 and carried guns and wore black jackets. The witness said she knew the same people. They were Ibrahim Domal, Ibrahim who she didn't know the father and Hassanow Ibrahim Domal is the one who picked and dropped the child.

36. The witness said she hid and observed them until they left before coming out. They took goats from homestead. The goats followed them but they did not take the goats.

37. After coming from the hiding she saw 5 dead persons bodies and stayed there until police came to the scene. The dead were; Malika, Hassan Yusuf, Mohamed Abdi Bilal, Fatuma Mohamed, MMMO (child 5 yrs) and IJ (3 yrs old child). Other people were injured and others were not.

38. She was in homestead with Abdia and Jimale Ali. His injured son had escaped into the bush. People of Jeroko came with police. A chief Ibrahim Daib came. The bodies were taken to Chiroko where they were buried. The people she saw shot people including deceased Malika.

39. They came at 7 am and left at 8 am. She told the police she knew the attackers. At Mandera she identified the 3 accused persons. She knew them. She identified Ibrahim Domal and, in the call, there were over 100 people. She pointed at him.

40. The second to identify was Ibrahim and pointed him. The 3rd was Hassanow. She identified them in court as people she saw shoot people. She said previous 3 yrs there were conflicts between Garre and Degodia but at the time of incident animosity had been settled. In court she identified the 3 accused persons.

41. On cross-examination she described their homes as manyattas with over 100 houses, fenced and had over 100 people including adults and children. The time of attack was 7 am with bright day and the attackers who came were 7 in numbers. She knew only 3 of them. They came from different points. It had rained. The houses had roof 7ft inches up. She identified attackers as they left. She heard 5 gunshots. She ran away to hide for safety. She saw 3 people.

42. In the statement to police she said she saw Sheikh whom she referred as the 1st accused in court. Ibrahim alias she didn't mention him to the police. She said she mentioned Ibrahim Domal and another Ibrahim. She said she knew 1st accused before as their neighbour. She said she knew 2nd accused for 1 yr by face and name. He worked at waterpoint and is called Ibrahim Domal.

43. When police arrived, she gave them description of the 3 people and the clothes they wore. At the parade she participated in ID parade though she told police she knew attackers 3 of them. She identified them in the cells amongst 100 other people inside the cells.

44. She pointed the 3 of them. They were not in a line of 8 people. The 3 are Garre and witness is Degodia claim. The homes of 2 accused is in Domal and she knew them. As for 3rd accused, she did not know him.

45. PW4 IBRAHIM EMYMON ENOI Chief Lulis Location was sworn and he testified that on 27/3/2018 in the morning he was at Lulis. At 5pm the DDC called him to the office. He is the County Commissioner Deputy Barissa.

46. He stated that there was incident at Jeroko and he gave 3 names of the suspects namely; Ibrahim Garile, Ibrahim Domal and Hassanow. They were called 3 chiefs including Chief Bashir and Chief Mohamed Aburo.

47. They were ordered to look for suspects. They sent messages via public and on 1/4/2018 2 of suspects Ibrahim Gerile and Domal went to the witness who informed DCC and they were handed over for investigations.

48. On cross-examination he stated; his location borders Ethiopia and a game reserve. He was not given name of Hassanow though he comes from his location. Lulis to Jeriko is about 45km. Lulis is occupied by Garre. It borders Domal, Jeroko and Karim. Jeroko is occupied by Degodia. There was conflict 3 to 4yrs between Garre and Degodia but had been solved.

49. PW5 Ass. Chief in Lulis Location Awale Yatani Sub-Location testified that on 30/3/2018 at 11 am he received sms from ACC (D.O) Banisa; Abduraham sending 4 names asking whether he knew them. There are Issack Riba, Issack Umas Hassan, Mohamed Eiden Hassanow, Yakub Haji Issack. The witness knew them. He was instructed to trace them and inform police. They were suspect in Jeroko incident sub-location.

50. On 1/4/2018 he summoned a gathering and Mohamed Edin Hassanow attended, and police were informed, and came and arrested him.

On cross examination he stated; the others in sms were not arrested.

51. **PW6** Chief Banisa Location Bishar Hussein Haji: His location is about 15km to Jeroko Location on 27/3/2018 in the morning. He heard that people in Jeroko and Domal had ran away due to gunshots. He first heard via his wife. The D.O Abdurahman informed him that he was proceeding to the scene.
52. Then D.O convened public meeting and confirmed 5 people had been killed. 3 names of suspects were given to them: then him, chief of Lulis and Kaimole were given instructions to look for the suspects namely – Ibrahim Domal, Gerile and Hassanow. Thus, were told to look 10 ones they knew.
53. On 1/4/2018 they (2 suspects) brought themselves and they took them to Banisa Police Station. There were Domal and Gerile. They said they were from Mankamale Location not witness location.
54. On cross-examination he stated; he said he knew Domal who was watchman of Domal. The 2 told the witness where they were at the material day. He didn't visit their home.
55. **PW7 ADAN ALI MOHAMED** a herdsman in Jeroko who had lived there long on oath stated that he knew all the victims who died in attack. He said he knew Ibrahim Domal by face; he knew Ibrahim Karire personally. Ibrahim Adan Mohamed was from Domal. He didn't know Hassanow.
56. On 27/3/2018 at 7 am while at home seated near fire place outside the house, he heard gunshots and they all ran into the bush. He was shot on the ankle and he rolled crawled into the bush. He knew the attackers that same year. He had beards and he is Mohamed Gerile (beards). He says he used to move from place to place. Domal was place – trading centre. They had to sell milk. He was taken by relatives to Mandera hospital has bullet had gone through his ankle and exited. While in hiding he could hear crying of victims of the attack.
57. As he ran his mother Malika and Mohamed Mohamud already shot lying outside. He pointed at 3rd accused as the person who shot him. He didn't see other attackers.
58. On cross-examination he said he had no dispute with accused 3. He said he participated in identification parade where he identified 3rd accused. He said he saw accused 3 as he ran away for safety.
59. **PW8** was Mohamed Muktar Shuka clinical officer of Mandera Sub-County Hospital. 2018 he was at Banisa. His duties are to attend patients and P3 forms. He has Diploma in Clinical Medicine.
60. On 27/3/2018 he instructed another officer to document fatalities who did so and postmortem were filled. Thus, the witness produced postmortem of 5 victims who died after the attack subject herein. His colleague had signed same.
61. **PW9 BOAZ KEMOSI OKEMWA** a nurse in Banisa Sub-County; he examined bodies who had died of gunshots. He took notes at scene of attack and transferred same to the postmortem forms. He signed them on 28/3/2018. Bodies were identified by relatives. The postmortems were produced as exhibits. Cause of deaths were gunshot wounds.
62. **PW10 CIP JAMES ONYANGO** of DCI a firearm examiner on 19/4/2018 he received exhibits; 17 cartridges, 1 fired bullet, examined them and made report which was produced as exhibits.
63. **PW11 KENNEDY OJWANG** DCI Banisa on 27/3/2018 was instructed by his senior to proceed to the scene of attack. He went with other officers. They found 5 bodies lying down. The autopsy was conducted on the bodies by the doctor and postmortem was filled. The bodies were buried later.
64. **PW12 KOKARA SAMSON** of DCI Banisa stated that on 27/3/2018 he got instruction from senior to visit scene of shooting and did visit and commenced investigations. He went along with other officers. They took photos of the bodies at the scene which were procured later. This was done by scene of crime officer. Relatives identified bodies; autopsy was done.
65. At the scene the names of the attackers were given namely; Gerile, Choke and another. Suspects were arrested later.
66. PW11 was recalled to produce exhibits of 8 photos.
67. The prosecution closed case and the court found the 3 accused persons had case to answer. They gave sworn statements and called witnesses. Their defence are alibis. **DW1** accused No. 3 said he is from Domal. He said on 27/3/2018 at 6 am he went to mosque and left same at 7 am and went home. He said he is a Garre clan. He said they live near Kenya – Ethiopia border.
68. While back at home after attending prayers at mosque he stayed there with wife and 8 children. After learning of attack of Chiroko they ran away towards Banisa.
69. On the 3rd day Chief Bishar with other 2 chiefs called them. They were to explain what happened on the attack in issue. They were handed over to the police for further action. He says on interrogation by police he denied the charges/allegations against him. He recorded statement produced as Dexh-8. He denied ever being involved in attack at Chiroko. He also produced statutory declaration by the Chief Bishar. He denied being at scene of the attack as alleged by PW1, 2 and 3. He also produced PW5's statement. He said PW1-5 allegations that they identified him in a parade is not true as there was no identification parade conducted to identify him. He said he had no grudges with victims of attack. He comes from same place with 2nd accused and he knew him but didn't know accused 1.

70. On cross-examination he said before running away he heard there was gunshots in neighbouring area. He didn't know PW1 and PW2.

71. **DW2** accused 2 testified on oath and stated that he was Domal Bula. He said on 27/3/2018, he left watchman job at Domal Primary School at 6 am and went home. Then he learned of attack at Chiroko thus he fled towards Banisa. He fled with his 4 wives and 10 children.

72. Chief Aburo called them later and police came and arrested him. He denied allegation against him and he recorded statement. He produced his statement Dexh-2. He was arrested by chiefs Aburo and Bishar. No identification parade was ever conducted nor forms produced.

73. On cross-examination he said he had a dam/well or watering place where over 100 people go for water. He said that he was referred to as Domal.

74. **DW3** accused 1 Mohamed Edin Hassanow from Lulis Sub-Location Barissa married to 2 wives and had 7 children.

75. On the material day he had gone to mosque for prayers at 6 am and at 7 am returned home. Later one Mohamed asked him to take him to Banisa. The witness operates a boda boda. He bought grass for animals and went home then went to Banisa and bought miraa and stayed at Banisa upto 12 noon and went home.

76. On 1/4/2018 chief called Barasa at Lulis centre. He attended and found chief and police. He was arrested and taken to Banisa. They waited to know when he was on 27/3/2018 and he said at home and accounted for his movement on same date. He produced his statement.

77. **DW3** denied PW1, 2 and 3 identified him on the material date attack her in any identification parade. He denied alias Choke as his name. He didn't know victims of attack. He denied the charges. He said he has been to Chiroko.

78. On cross-examination he said he knew all accused before the material. He didn't know PW2 and 3 who said they identified him nor did he know PW7.

79. **DW4** witness for accused 2. He stated that on 27/3/2018 at 6 am he was at Domal. At 7 am accused 2 came to the centre Domal and they met. He said accused 2 is a watchman. He learned there was an attack at Chiroko. People started fleeing Domal as there was tensions between Garre and Degodia clans. The tensions were caused by politics.

80. On cross-examination he said in the morning accused 2 came at 7 am and told him he heard there was attack at Chiroko. Also, police gave him the same information. They all ran to Banisa side.

81. **DW5** witness for accused 1. He said on 27/3/2018 he was in the mosque together with accused 1. He didn't hear of Chiroko incident but heard same on the 3rd day.

82. On cross examination he said; he has never been to Domal.

83. The defence was closed and submissions was tendered.

DEFENCE SUBMISSIONS

84. Defence counsel relied on submissions dated 4/11/2019. He stated that the defence is unchallenged by prosecution. The circumstances surrounding incident was tension.

85. PW1-3 evidence on identification is on issue as to whether it is safe to convict. How long did they see the assailants? They gave alias names same were not established that the same alias names refer to the same people.

86. The issue of motive for attack – what was it? The accused are Garre. The investigation officer did not do investigation which connected accused with murder and/or weapons. Other than alleged recognition no other piece of evidence connects the 3 accused to the incident.

87. The other issue is *locus in quo* of the incident. The charge talks of incident at Domal not Chiroko 25 or 50km away. No evidence from village elder or area sub-chief of area clarified that. The alibi by defence was raised from time of arrest vide their produced statements which demonstrate same. No visit of accused homes was done nor investigation on same.

88. The prosecution has not asked to bring rebutting evidence. PW11 and 12 investigation officers have not indicated they investigated accused persons.

89. The counsel urged court to dismiss charges and acquit accused persons forthwith.

PROSECUTION'S SUBMISSIONS

90. Mr. Mulati for the prosecution submitted that on alibi PW1, 2, 3 and 7 are very clear. They were not at same place. They met assailant whom they knew. They gave the assailants names. They met and they identified them. In the identification parade they picked the assailants.

91. On motive, counsel for the prosecution stated that it can be inferred from nature of injuries inflicted to the victims. The information

shows the locus domi which is conceded error but not fatal. He prayed for conviction.

DEFENCE REPLY

92. Mr. Nzili for defence submitted that the denial of charges makes everything become an issue. No inference can apply. It has to be pleaded properly. No basis laid for inference. If there is a missing link or contradictions in prosecution's case the doubt goes to the benefit of the accused.

93. On motive same cannot be inferred. It is either there or not. In absence of that they sought acquittal.

ANALYSIS AND FINDINGS

94. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngariv Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

95. In our case the prove of death of the deceased has been established by PW1, PW2, PW3, PW7, PW9, PW11 and PW12 who all saw the dead body of the deceased named in charge sheet along with other victims whose bodies were at the scene.

96. A postmortem report of the deceased Pex.5 produced by consent of both parties' consent, showed that she had a big wound from the back to the chest which caused her death. Though the postmortem was conducted and filed by a nurse on instruction of clinical officer the same lacks details, thus attracted an issue of its competence raised in passing.

97. However, the incident as witnessed by PW1, PW2, PW3 and PW7 confirms that the deceased was in good shape at the morning of the attack by the persons wielding guns (some mentioned) AK 47. The victim died instantly at the scene of attack with big back wound going to the chest.

98. Even in absence of a postmortem report, circumstantial evidence would warrant court to infer the occurrence of the death of the deceased as a result of the wound(s) emanating from the gunshots along with other victims as shown by photographs taken at the scene produced by consent.

99. PW10 examined cartridges collected at the scene of attack and confirmed via report produced by consent that they were fired from an AK 47 inter alia.

100. As for the motive, it was in evidence that, Degodia and Garre ethnic groups conflicts was cited as the cause. See PW3's evidence. The ethnic conflict did not come out with details to demonstrate the real motive. However, that notwithstanding, the nature of injuries being grievous harm which caused death suffices to infer malice aforethought.

101. In the case of **Nzuki v Republic [1993] KLR 191** where the court stated as follows:

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

102. See also the provisions of the Penal Code which by dint of **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought as follows:

“206. 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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused 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”

103. The core issue therefore revolves on the identification of the attackers. **PW1 AM16** yrs old gave unsworn evidence and told court that she saw during attack Ibrahim Domal, Hassan Garrile. This was on 27/3/2018 at 6.30 am at Chiroko. She said Choke lived in Domal 6hrs journey from Chiroko via motorbike ride. Other accused person according to her lived with him.

104. The record shows that she was not cross examined nor did she give detail how she came to know the persons she saw and mentioned as the attackers. **PW2 Kheira Mohamed** on oath testified that on the material date in the morning at Chiroko she saw the attackers namely; Ibrahim Domal, Hassan and Gerille. They carried guns and bullets. The guns were arm length in size.

105. On cross examination she said she went to a parade to identify the attackers though she knew them. To the police she had reported that her people were killed by Garre people. Her tribe is Degodia. She said there was animosity between the 2 ethnic groups. Previously on 26/3/2018 Degodia had come to Kenya and killed Dorocho.

106. She said Choke was their neighbour and fetched water and bought milk in his place. He owned and used to ride motorcycle. His house was 1hr walk. At police station she said she gave appearance and cloths of the attackers as each wore long-sleeved shirt and trouser.

107. She said she mentioned attackers' names but was not sure whether they were recorded in the O.B. **PW3 Koran Ahmed Bilal** testified that the attackers came at 7 am and left at 8am. She identified Ibrahim Domal, then identified Ibrahim and then Hassanow. She pointed at them in court as the attackers.

108. She said there was animosity between Garre and the Degodia though at the time of attack it had been settled. She said at the time of attack at 7Am the day was bright and could see attackers who came from different directions.

109. In statement to police shown to her she said she saw Sheikh whom she pointed as accused 1. She said she mentioned Domal and another Ibrahim. She said she knew accused 1 before as neighbour and accused 2 by face and name.

110. She said she gave 3 persons' description and the clothes to police who came to the scene. She said she participated in identification parade though she knew the attackers. She identified the 3 in cells amongst 100 others in cells. They were not in a line of 8 people. She said accused 1 and 2 were residing at Domal but she didn't know of accused 3's home area.

111. Other than the said PW1, PW2 and PW3's identification evidence, **PW7** also testified that the attack on 27/3/2018 took place at 7am. He heard gunshots and ran away into the bush. He said he saw accused 3 as he ran away for safety. He also said he participated in identification parade and identified accused 3. He named him as Mohamed Gerile (beards).

112. PW12 Kakara Samson, police officer went to the scene with other officers and saw bodies of the victims and said names of attackers were given at the scene namely; Gerile, Choke and another.

113. In **Wamunga vs Republic [1989] KLR 424** the Court of Appeal held:

“It is trite law that where evidence against a defendant is evidence on identification, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

Also in **Ogeto vs Republic [2004] KLR 19** court held that:“.....the court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

In **Cr. Appeal No. 117 of 2005 – David Mwita & Others vs Republic [2007] eKLR** Court of Appeal held:“.....the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders.”

114. The instant case first witness PW1 said she identified named people. She did not state how and when she came to know them. Her evidence was unsworn and she was not cross examined. She did not identify the same people other than in court which is a dock identification.

115. PW2, PW3 and PW7 also never gave any detailed evidence on how and when they came to know the persons they were pointing out in court as the attackers on 27/3/2018. They claimed to have gone to identify the suspects but PW3 stated that the people were in cells and amongst 100 of them pointed the accused persons.

116. No Parade Officer testified on the conduct of parade and the identification of the suspects nor were parade forms produced to confirm there were parade conducted in respect of identification of the suspects and whether any was identified. No explanation has been given for that omission.

117. The only evidence on identification of suspects remains dock identification. This is so because PW12 police officer who went to the scene mentioned that they got names of suspects namely; Gerile, Choke and another. He never stated who gave the same names nor did he investigate as to who the 2 names referred to.

118. The 3 accused persons raised defence of alibi in their statements and even at the police station they even called witnesses. The police never investigated the same.

119. In **Gabriel Kamau Njoroge vs Republic [1982-1988] 1KLR 1134** court observed:

“A dock identification is generally worthless and should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give description of accused and the police should then arrange a fair identification parade.”

120. Thus, in absence of a credible identification evidence on the person who attacked and murdered the victim herein and others, the court finds that there was no watertight identification evidence to meet the threshold to warrant conviction on the basis of the identification evidence only.

121. Thus, the prosecution’s case falls short of prove to the required standard as prescribed by the law.

122. Thus, the court makes the following orders;

i. The accused persons are acquitted and thus set at liberty forthwith.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

.....

C. KARIUKI

JUDGE