



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO. 03 OF 2017

REPUBLIC.....PROSECUTOR

VS

KOSICHA KANCHORA GURA.....ACCUSED

J U D G M E N T

The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that the accused on the 12th day of April 2017 at Shur village in North Horr Sub-County within Marsabit County murdered YATTANI HAFATU.

The state summoned 12 witnesses in support of its case. **PW1 MOLU JILLO** is a Kenya Police Reserve (KPR). On the 11th of April 2017 the Area Chief called to inform him that someone was lost. He was asked to get other KPR and go out to look for the lost person. Around seven of them met at chief's place. Two of them were not KPR officers. They went to Shur area and reported at the Chief's place. They told the Chief of Shur that they were looking for a lost person. The chief gave them the green light. They went to Hawaye. This was the place where the cattle that was under the care of the lost person were. They were told that the lost person had been seen at a well. They went to Namicha area and met the lost person. The lost person had been employed by another employer and left the cattle unattended. The new employer agreed to release the lost person. They took the lost person up to where the unattended cattle were and went back to Shur. They told the chief that they had found the lost person. As they left the chief's place they were stopped by around 10 people. He was seated at the front of the car and told the driver to stop the vehicle. One person picked a stone. He asked them what was the problem. He told the driver to leave and shortly he heard gun shots. After a distance of about 150 meters they met a second road block. Stones had been placed on the road. About 8 people came out and he identified two of them. The appellant and another person he used to see at a well in Jaldesa. The accused had a jungle jacket and was armed with a gun. The people started shooting at them and they decided to drive away. He saw the accused shooting at them. The deceased was hit on the forehead. As they drove off they met a 3rd road block that had placed stones on the road but was about 80 meters from the road. They also started shooting but did not get closer to the vehicle.

It is PW1's evidence that when he saw the accused he was just about 7 meters from him. It was about 6pm. They went to Marsabit police station and reported the incident. He gave the accused's name to the police. According to him the stoppages on the three (3) road blocks took between 10 to 15 minutes. He knows the accused very well as they were brought up together since childhood. There were 3 people sitting at the front of the car including a woman. He also gave the name of the chief of Shur location to the police. The accused was carrying an AK 47 rifle. The vehicle was on high speed. The vehicle had bullet marks. It is a land cruiser with an open canvas.

PW2 BORU BARAKO works at the Jaldesa Conservancy as a Security Officer. He knew the accused as he normally goes to the watering point at Jaldesa to buy cattle. He had seen him for a period of about 1½ months. On 11th April 2017 they went to look for the lost person. They found him at Yamicha. They had reported to the area chief and police station that they were going to look for the lost person. They were about 9 people namely WAKO DIDA, KATELO GUYO, LIBAN SOBA, WAKO SHARO, BORU BARAKO, MOLU JILLO, TALI WAKO and the deceased. After seeing the lost person they went to report to the Shur chief's office. As they left the chief's place he had gun shots. They passed the 1st group of people and meet another group which also attacked them. He was able to identify the accused in the second group which had about 5 people. The deceased was shot and he held him. He made the deceased to sleep in the vehicle and the deceased rifle also fell in the vehicle. They also fired back. He had a G3 rifle. He was able to identify the accused and another person by the name Gulacho Elema who works in a conservancy. The two were in police jungle uniform. The accused was just near the road at a distance of about 10 to 12 meters armed with an AK47 rifle. They met a 3rd road block and drove off up to Marsabit police station. He was seated immediately after the deceased. The 1st group of attackers did not manage to hit the vehicle or any of the occupants. The 1st and 2nd group were about 500 meters apart. It is the second group of attackers which had about 5 people which hit the deceased. Out of those 5 people 3 of them were armed including the accused. He had known the other person he identified as he was with him at LEWA training for one (1) month. He mentioned the accused's name and that of Dulacha at the AP Post where they went to report the incident. He recorded his statement on 18th of April 2017.

PW3 DARM JATANI is the deceased's wife. The deceased went out to look for one Garbich who had gone to Hawaye area. This was on 11th April 2017. On 12th April 2017 in the evening she got information from his brother in law (PW5) that the deceased had been killed.

PW4 KATELO GUYO is a KPR Officer. He knows the accused is also a KPR Officer. On the 11th of April 2017 they boarded a vehicle belonging to Jaldesa conservancy and went to look for a person by the name Darbich who was lost. They found that person at Yamicha. They took him to Hawaye where they had seen the cattle. They went back to report to the Shur Chief that they had found the lost person. There were three (3) road blocks and stones were used to block the road. He saw the accused at the 2nd road block dressed in police uniform and armed with a Kalasher gun. He was seated on the right side of the vehicle. The deceased was shot and fell in the car together with his gun. That is the time he turned and saw the accused. The accused started running towards them. He also responded by shooting. The accused and his people thought that they had killed someone who had fallen on the ground. The distance between the 1st bump and the 2nd one was not very far. When they met the Shur chief at the 1st time there was no tension in the area. They came to Marsabit police station and reported the incident.

PW5 GEOFFREY GALGALLO GOLICHA is a cousin to the deceased. On 12th April 2017 in the evening he heard that the deceased had been killed. He informed the deceased's wife. On 13th April 2017 he went to the Marsabit hospital mortuary and identified the deceased's body for post mortem purposes.

PW6 ELEMA BORU is a business woman. She knew the deceased. On 11th April 2017 she boarded the vehicle and went to look for the lost person. They reached Shur at about 8.00pm. They went to the area chief's office and informed him that they were looking for a lost person. They went to Hawaye and slept there. The lost person was found. They went back to Shur the following day and reached there at about 5.30 pm. They found the Shur chief resting under a tree and reported to him. As they left they saw people on the road. Some were armed with rifles while others had pangas. She was seated at the front of the vehicle together with PW1 and the driver. She saw someone picking a stone. PW1 asked the people if there was a problem. Shortly, she heard gun shots from behind the vehicle. They met another group with many people. She saw the accused on the left side of the vehicle about 7 meters away. The accused shot and hit the deceased on the left side. She had her hand bag and covered herself. They meet a third road block and those who were behind the vehicle informed them that one of them had been killed at the second road block. Those behind the vehicle told them that they saw the accused running towards them trying to pick the deceased's gun. They went to make a report at the AP post and then went to Marsabit police station. The accused was dressed in police uniform and had no cap on his head. They were driving very fast. She knew the accused as he buys cattle. The deceased was also dealing in cattle. She sells miraa and normally visits the water point. She had known the accused for over 5 years. She was only able to identify the accused. The stones on the road block were not many. The 3rd group was standing about 15 meters away. The 2nd group had around 15 people.

PW7 PC AGUSTUS MOI was stationed at the Turbi police station. On 26th of May 2017 together with other officers went to Shur area. They were told they were going for a peace meeting. They went to the chief's house and met the chief Mr. Isako Karkaba. People attended the meeting including KPR officers. The OCPD who was with them told them that they were to go somewhere with the chief where a rifle had been hidden. They boarded a vehicle and left. After about 2 km the chief who was in front of the vehicle told the driver to stop. The chief directed them to a specific tree about 100 meters away and they recovered a Mac 4 rifle serial number R9693. It had two rounds of ammunition. They went back to the meeting place and found the DC and the OCPD at the venue. He did not know the accused.

PW8 LIBAN BORU was a driver with Jaldesa conservancy. He was the one driving the vehicle on 11th April 2017. He was told that someone was lost and they were to go and look for him. He was given 5 KPR officers who were armed. They passed Jaldesa and reached Shur. They went to the chief whom they knew and reported that they were going to look for a lost person. They slept at Hawaye area. They got information that the lost person was seen heading to Yamicha. They found him and went with him to Hawaye. It was about 3 pm. They decided to head back to Marsabit and reached Shur at about 5 pm. They went back to the chief and notified him that they had seen the lost person. It was a usual security procedure to notify the chief. He had with him some civilians from Hawaye and they alighted at Shur.

It is PW8 evidence that about 500 metres from the chief's place he saw 15 people standing ahead. Some had motor bikes. As he approached three (3) of them jumped on the road while armed with guns. He saw stones blocking the roads. People started shooting from both sides of the road. He could not reverse and passed the stones. He could hear the shooting from behind. After a short while he saw stones ahead and saw other people. He heard something had hit the vehicle. He checked on the side mirror and saw something like a rifle falling down. He peeped behind and asked whether one of them had been hit. He was told to speed up. After 300 meters he met a 3rd barrier which had few stones. He passed through the stones. He stopped after about one (1)km and found that the deceased had been shot on the head and was already dead. The deceased was behind the car. He went to Jaldesa AP Camp and made a report. Those who were behind the vehicle mentioned the accused as the one who had shot at them. The chief did not tell them that there was any tension in the area. It is his evidence that PW6 was also seated with him at the front of the vehicle. He did not identify the accused during the incident.

PW9 ISACK WARQUTO is the Chief of Shur location. On 11th of April 2017 at about 2pm the vehicle from Jaldesa conservancy went to his place. They told him they were heading to Hawaye within his sub location to look for a herder who was lost. He told them to go ahead. In the evening he heard over the radio that someone had been killed. The following day in the evening those who went to look for the herder went back and informed him that they had traced the lost person. He told them that he had heard news that somewhere around Jaldesa there was a problem and there was no network in the area. The driver told him that they had security and the vehicle belonged to the conservancy. After about 1 to 2 hours he heard that a vehicle had been attacked. In the evening he heard over the radio that a KPR had been killed. In the morning police vehicles went to his area and told him that a police rifle had been lost. After about 3 weeks' police went back and they held a meeting. They looked for the lost rifle and recovered it. He is not the one who showed the Police where the rifle was. There was no tension at his place but there was tension at Jaldesa. Jaldesa is under another chief. He knows the accused who is a KPR officer from Shur area.

PW10 DR. DUB HALAKE DIDO is a Medical Doctor based at the Marsabit County Referral Hospital. He produced a post mortem report on the deceased which he had conducted at the hospital. The deceased was dressed in green army uniform and was about 60 years old. He had a wound on the head measuring 2cm wide. There was another wound at the back of the head about 6cm wide. He formed the opinion that the cause of death was a single close range gunshot to the left head region leading to cardiopulmonary arrest. The body was not opened.

The deceased had no any other injuries. The gun shot entered on the front part of the head and existed through the back. The body was still fresh.

PW11 CORPORAL SAMUEL GICHUKI was based at the Marsabit police station conducting investigation duties. He produced a statement of Inspector Samuel Barongo whom he had known for 2 years. Inspector Barongo was the Investigation Officer but was transferred to Transmara. An exhibit memo for an AK 47 with 45 rounds of ammunition was prepared. There was the Mac 4 rifle belonging to the deceased which had two rounds of ammunition. He also produced two separate magazines for the AK47 rifle as well as the magazine for the mac 4 rifle. Two cartridges of 7.62mm by 3.9mm special were collected at the scene. According to the statement of Inspector Barongo the accused was present when the two weapons were recovered. The AK 47 was legally issued to the accused who is a Kenya Police Reservist. The accused was also issued with 30 rounds of ammunition. The Mac 4 rifle belonged to the deceased and was recovered at Shur area. 30 rounds of ammunition are normally contained in one AK47 Magazine. He was not present when the weapons were recovered.

PW12 INSPECTOR KENNETH CHOMBA is a ballistic expert dealing in forensic investigation. He produced a report conducted by his colleague Mr. Alex Chirchir. The report mainly involved examination of (1) one AK47 assault rifle serial number 60033886, 45 rounds of ammunition, 2 cartridges that had been fired and two magazines. The examination confirmed that the two cartridges were fired from the AK 47 rifle and the 45 rounds of ammunition were capable of being used with the rifle.

The accused tendered sworn evidence. He lives in Shur area and has been doing business there for the last 10 years. He was arrested at Shur about 2 km from his home. He had bought some goats at Hawaye and had gone to check on them. He was arrested by police officers who were with the Shur area chief called Isako Warquto. He was taken to Marsabit police station. He was having his rifle with him and it was taken away. He is a KPR. It is his evidence that on the date of the alleged incident he was at Hawaye where he bought goats and had gone to collect them. He is not aware of the shooting and did not shoot at anyone. When he was issued with the KPR rifle the area chief was not involved. He got his rifle from Turbi police station and was issued with 30 rounds of ammunition and one magazine. The Shur chief was not happy. He is not aware of the other magazine with 15 rounds. He had all the 30 rounds of ammunition when he was arrested. The police only recovered the AK47 rifle with the 30 rounds of ammunition. He never signed any inventory indicating that he had another magazine. The said cartridges that were taken for analysis are not his. He cannot tell whether they were picked from the scene of crime or not. He further testified that it could be possible that some of the witnesses knew him before the incident. He did not know the deceased. He had been a KPR for two years before he was arrested. He never used his rifle during that period.

Mr. Biwott, counsel for the accused, submitted that the prosecution did not prove its case beyond reasonable doubt. None of the witnesses saw the accused shooting and killing the accused. The witnesses testified about exchange of fire. The Investigation Officer Inspector Barongo in his statement stated that he never recovered any spent cartridges on the ground. None of the witnesses testified that cartridges were recovered which could be compared with the ammunition that was legally issued to the accused as a KPR. There was a shoot out and somebody died. All witnesses mentioned three areas where there was shooting. The prosecution did not discharge its burden of proving its case. Beyond reasonable doubt. There was no motive or intention for the accused to kill the deceased. There is no nexuses connecting between the licensed gun to the crime.

Mr. Ochieng, Prosecution Counsel, maintains that the prosecution proved its case beyond reasonable doubt. The ingredients of murder were proved. The accused was placed at the scene by direct eye witnesses namely; PW1 and PW2. PW1 and PW2 are credible witnesses. The forensic evidence brought out direct nexuses between the gun issued to the accused and the fatal shooting. The indiscriminate manner that the accused and his associate shot at the deceased and his colleague was intended to kill or cause grievous harm. The key witnesses are fellow KPR who have no reason as to why they could be malicious against the accused. The accused raised an alibi defence without any notice. No witnesses were called to collaborate the alibi.

The Court has to determine whether the prosecution has proved beyond reasonable doubt that it is the appellant who killed the deceased. The prosecution evidence does prove that the deceased was in the company of fellow KPR officers and had gone to look for a herder by the name Garbich on 11.4.2017. It is established that the team slept at Hawaye and the following day proceeded back to Shur on their way to Marsabit. The deceased was shot on the head and died instantly. PW10 conducted a postmortem on 13th April, 2017 at the Marsabit County referral hospital. There is no issue that indeed the deceased was killed as a result of the shooting on 12.04.2017 at around 6.00pm.

The prosecution evidence is that it is the accused who shot at the deceased. It is also the prosecution evidence that the accused was in the second group of people that had placed a second road block using stones. Although the Shur chief, PW9, testified that there was a killing at Jaldesa which is not within his jurisdiction, the evidence does prove that the killing took place at Shur within his location. The charge sheet states that the incident occurred at Shur. Further, the chief denied that he assisted in the recovery of the Mac 4 rifle yet **PW7 PC Augustus Moi** testified that it is the chief who pointed at a tree where they recovered the rifle. It is clear to me that PW9, the Shur chief is not honest. The shooting occurred about 500 metres from his home and yet testified that it was in Jaldesa. The deceased's rifle was recovered at Shur within his location.

The accused tendered an alibi defence. On the 12.4.2017 he went to Hawaye where he had bought some goats. He went to collect them. He was not at Shur that day. He was issued with the G47 rifle lawfully and had not used it during the two (2) years. He has been a KPR. He was arrested with only the rifle he had been lawfully issued together with the 30 rounds of ammunition. He was arrested about two (2) kilometres from his home.

The investigation officer did not testify. His statement was not produced. The statement basically states that the Police went to the accused's home on 8th of June, 2017 as the accused was a murder suspect. They found him around the manyatta and went with him to his house. They recovered an AK 47 rifle with 45 rounds of ammunition. They also recovered a HK 21 rifle serial number 20252, barrel serial number 22275 with 184 rounds of ammunition. According to the prosecution inspector Samwel Barongo had been transferred to Transmara.

Section 33 of the Evidence act states as follows:

Statement, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases;

All what I can say is that under section 33 if it can be shown that a witness may not be availed to court without an amount of delay or expenses which appears to the court unreasonable such a statement can be admitted. Inspector Barongo was on transfer to Transmara. The case took over two years to finalise which delay is attributable to both the prosecution and the accused. Counsel for the accused did not object to the production of the statement. The accused admit that he was arrested and his rifle taken away but denies that he was arrested and taken to his house. I am alive to the fact that the accused was charged before the Magistrate Court with the offence of being in possession of the HK 21 rifle and 184 rounds of ammunition and was acquitted of those charges.

The totality of all this is that although Inspector Barongo's statement was produced in court, I will not put much probative value on its content as the witness was not subjected to cross examination. However, part of the contents of the statement is in line with both the prosecution and defence case. Mr. Biwott maintains that the statement does not state that spent cartridges were recovered at the scene. The witness could have been availed to testify as Transmara is within Kenya.

The prosecution case is grounded on the evidence of the witnesses who testified that they saw the accused among those people who were in the second road block. Section 63 of the Evidence Act, Cap 80 Laws of Kenya states as follows:-

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, "direct evidence" means—

- a. With reference to a fact which could be seen, the evidence of a witness who say he saw it: (emphasis added)**
- b. With reference to a fact which could be heard, the evidence of a witness who say he heard it;**
- c. With reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who say he perceived it by that sense or in that manner.**
- d. With reference to an opinion or to the grounds of which that opinion is held, the evidence of the person who hold that opinion or, as the case maybe, who hold it on those grounds:**

provided that the opinion of an expert expressed in any treatise commonly offered for sale and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable

(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

The prosecution evidence is therefore direct and not circumstantial. The court has to determine whether the circumstances were favourable for positive identification. The first witness to testify that he saw the accused on the 12th April 2017 to be amongst those who shot at the vehicle is PW1. According to PW1 after they past the first lot of about 10 people, they were confronted by another group of, of about 8 people after a distance of about 150 metres. He saw the accused wearing a jungle jacket at a distance of about 7 metres. It was around 6pm. PW1 saw the accused shooting at them. He knew the accused very well as they were brought up together since childhood. PW1 was seated at the front of the vehicle. He gave the accused's name to the Police.

PW2, Boru Barako also testified that amongst the people in the second road block he was able to identify two people. Instead of eight people as per PW1, PW2 saw about five people in the second road block. Three of them were armed including the accused. PW2 identified the accused and one **Gulacha Elema** with whom they attended training at Lewa together. PW2 saw the accused dressed in Police jungle uniform at a distance of about 10 to 12 metres armed with an AK 47 rifle.

PW4 Katelo Guyo testified that on the material day he saw the accused at the 2nd road block armed with a Kalasher gun. PW2 and PW4 were seated at the rear side of the vehicle. PW4 turned after the deceased was shot and saw the accused who started running towards the car. PW4 is a KPR officer.

PW6 Elema Boru was seated at the front of the vehicle. She had known the accused for over five (5) years. She saw the accused at a distance of about seven (7) metres. According to PW6 it is the accused who shot at the deceased. Those behind the vehicle told them that they saw the accused running towards the vehicle trying to pick the deceased's rifle.

PW8 was the driver of the vehicle. His evidence is that from the chief's place they moved for about 500 metres and saw the first road block. When he passed the second road block he saw something like a rifle falling down. Those who were behind the vehicle mentioned the accused as one of those who had shot at them.

The above evidence has to be weighed against the accused's testimony that he was not at Shur on the material day. He had gone to Hawaye to collect his goats.

In the case of **Anjonomi & others –V- The Republic (1976-80) I KLR, 1566** the Court of Appeal observed at page 1648 as follows:

Mr. Barasa for the appellants argued as his main ground of appeal the question of identification. The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailant; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic (unreported)*.

The evidence of PW1, PW2 and PW6 is that they knew the accused before the incident. The incident occurred at around 6.00pm and the witnesses were able to see those who were attacking them. I was able to see the witnesses testifying before me and there is no indication that the witnesses had any grudge or issue with the accused. PW1 and PW4 are fellow KPR officers. They knew the accused and the accused confirmed in his defence that it was possible that the witnesses knew him. There is no evidence that the accused had disagreed with the accused.

The main question is whether the circumstances were conducive for positive identification or recognition. The vehicle was being attacked. The shooting started from the first road block. According to the evidence the first shooting did not hit at the vehicle. The second road block was about 150 metres as per the evidence of PW1. There were stones placed on the road and the vehicle had to stop. According to PW6 the vehicle was moving very fast. The incident occurred at about 6.00pm. PW1 and PW6 were seated at the front of the vehicle and both testified that they saw the accused at a distance of about seven (7) metres. PW2 was behind the vehicle and saw the accused at a distance of about ten to twelve metres. All the identifying witnesses saw the accused armed with a rifle and in Police uniform. PW2 was able to identify another person by the name of **Gulacho Elema**.

From the evidence on record, I am satisfied that the conditions were conclusive for positive identification or recognition. This is not a situation where the vehicle was being driven very fast past the road blocks. The vehicle was shot at from the back side as there was no injury to those who were seated at the front. The driver had to slow down between the first and second road blocks. All witnesses confirm that the fatal shooting was done by those who were in the second road block including the accused. It does not matter whether the accused is the one who made the fatal shot. It is evident that he was amongst those who shot at the vehicle. Section 20 of the Penal Code states as follows:-

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

The appellant was amongst those who were shooting. He took part in the shooting and was therefore abetting the commission of the offence. According to PW6 she saw the accused shoot at the deceased. It is evident that PW6 was in front of the vehicle and could not have seen the exact fatal shot at the back of the vehicle. PW4 saw the accused running towards the vehicle. Although there is indication that the deceased rifle could have fallen inside the vehicle, it is established from the evidence of PW8, the driver of the vehicle, that the deceased's rifle fell down. This is the rifle that was recovered by PW7. The accused was seen running towards the vehicle trying to pick the rifle. The accused's evidence that the Shur chief is against him does not raise any doubt on the prosecution case. Indeed the Shur chief did not have any adverse evidence against the accused.

The ballistic expert report is not the one connecting the accused with the offence. The same applies to the spent cartridges. The fact that the accused's rifle still had 30 rounds of ammunition does not disprove the prosecution evidence that the accused was at the scene and participated in the shooting. The prosecution evidence is that the accused was armed with a rifle and shot at the moving vehicle. He was part and parcel of those who were shooting at the vehicle.

Mr. Biwott submitted that there is no motive for the murder. The prosecution is not required by law to prove the motive of the murder. Section 203 of the Penal Code requires the presence of malice aforethought. Section 206 defines malice aforethought as follows:-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- a. An intention to cause 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.

Malice aforethought is not something tangible. It is not formed after the lapse of time. It does not require long period of thought and decision making. An abrupt decision to shoot at moving vehicle while knowing very well that the occupants may suffer death or grievous harm leads to a conclusion that the person committing the shooting is driven by malice aforethought.

In the case of **MURUBE & ANOTHER V REPUBLIC (1986)KLR, 356**, the Court of Appeal held as follows on identification:

1. In the evaluation of the evidence of the identifying witness, the court was to ensure beyond all reasonable doubt that the witness was honest and unmistakable about her identification of the appellants.
2. The witness evidence of identification by recognition left no doubt in the Court's mind that she had recognized the appellants among the persons who murdered the deceased.

Similarly in the case of **KARANJA & ANOTHER –V- REPUBLIC, (2004) 2 KLR, 140**, the Court of Appeal held inter alia:

1. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.
2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.
3. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.

In the case of **Republic –V- Ndalania & 2 others (2003) 658** Osiemo J. (as he then was) reiterated the need for the Court to be careful when the prosecution case is ground on identification of the accused. The learned Judge held:

1. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of the identification.
2. Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends be sometimes made.

For the offence of murder, malice aforethought is deemed to be established by evidence showing knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by the indifference whether such death or grievous harm will occur.

The appellant raised the defence of alibi. He was not at Shur on the 12.4.2017 at about 6.00pm. In the case of **KARANJA –V- REPUBLIC (1983) KLR 501**, the Court of appeal dealt with the alibi defence and held inter alia:

1. The word “*alibi*” is a Latin verb meaning “elsewhere” or “at another place”. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e when he was initially charged.
2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early state in the case and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought

The Prosecution evidence places the accused at the scene of the crime. PW1, PW2, PW4 and PW6 all saw him at the scene on that day.

PW2 and PW6 are categorical that it is the accused who shot at the deceased. PW2 had known the accused for over one month. He testified that the accused's hot hit the deceased. Similarly, PW6 knew the accused for over five years. She saw the accused at a short distance of about 7 metres. The accused shot at the vehicle. Although the vehicle was moving and there was shooting, I am satisfied that pW1, PW2, PW4 and PW6 were able to identify the accused. This is a case of recognition which does not require several minutes for one to confirm the person he/she is seeing. It was at around 6.00pm and all witnesses did not state that it was dark. PW4 saw the accused running towards the vehicle. He recognised the accused. The alibi defence is displaced by the prosecution evidence. I am satisfied that the prosecution has proved beyond reasonable doubt that the accused murdered the deceased.

The upshot is that the accused is found guilty of the offence of murder contrary to Section 203 as read with section 204 of the Penal Code and is convicted of that offence accordingly.

Dated, Signed and Delivered at Marsabit this 26th Day of November, 2019

S. CHITEMBWE

JUDGE