REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 17 OF 2015

REPUBLIC……...……...……PROSECUTOR

Versus

ADAN GODANA GALGALO……..…...….....ACCUSED

JUDGEMENT

ADAN GODANA GALGALO hereinafter referred as the accused on 7/4/2013 was arraigned before the High Court at Machakos charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. As per the particulars of the offence on the night of 14/2/2013 along Loitokitok Outward Bound Centre Murram Road within Loitokitok Sub-County, Kajiado County, the accused murdered **HENRY NDUNGU**. The accused denied the charge and the court entered a plea of not guilty.

The prosecution case was conducted initially by Mr. Gitonga counsel for the state and later when the accused was transferred to Kajiado High Court, Mr. Akula, the senior prosecution counsel took over the matter. The accused was defended by Mr. Tamata advocate. The denial of the charge by the accused person placed the prosecution under a duty to prove all the necessary ingredients of the offence of murder as stipulated under section 203 of the Penal Code (Cap 63 of the Laws of Kenya). As our constitution rightly puts it under Article 50 (2) (a), ***"every accused person has a right to be presumed innocent until the contrary is proved."***

The duty under the law to prove the contrary beyond reasonable doubt is case on the prosecution. See the principle in the case of ***Miller v Minister of Pensions [1947] 2ALL ER 372.*** The key proposition in this case as elucidated by Lord Denning, ***"proof beyond reasonable doubt does not mean proof beyond a shadow of doubt."***

Under section 107 (1) (2) of the Evidence Act Cap 80 of the Laws of Kenya provides as follows:

> **"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact is said that the burden of proof lies on that person."**

The prosecution in compliance with the constitutional mandate and statutory provisions embarked to discharge the burden of proof for the offence of murder against the accused by calling sixteen (16) witnesses. The essential ingredients to be proved beyond reasonable doubt constitute the following:

> **(1) The death of one Henry Ndungu on 14/2/2013.**

(2) That the death of Henry Ndungu was caused by some unlawful act of omission or commission.

(3) That the unlawful acts of omission or commission was actuated by malice aforethought.

(4) That in all the above three incidents it was the accused who caused the death of the deceased.

The prosecution witnesses brief summary as examined and cross examined by the defence contained the following:

PW1 NO. 8827 JOSEPHAT WANGIGE who is based at KWS Loitokitok as the armourer testified that on 13/2/2013 he issued a firearm to the accused containing a magazine of twenty rounds of ammunition. In his testimony he placed before court the serial number of the firearm as No. 9FN 1700925 entered in the armoury register as No. 2484 of 13/2/2013 in the name of the accused. PW1 further stated that the firearm body number as 1900925 with a calibre of ammunition of 7.62mm. According to PW1 the same firearm was received back on 14/2/2013 with nineteen rounds of ammunition in place of the twenty issued on 13/2/2013 to the accused. The witness later received information that the firearm and ammunitions issued to the accused was a subject to an inquiry to a murder incident which occurred along murram road. The firearm movement register was admitted in evidence as exhibit 2 and together with the firearm and 19 (nineteen) rounds of ammunition as exhibit 1.

PW2 NO. 23222 SGT KAISENE NKURAIBE told this court that in his presence PW1 issued a firearm and twenty rounds of ammunition to the accused on 13/2/2013. The testimony by PW2 was further to the effect that in the course of the early hours on the 14/2/2013 he received a report on the loss of accused motorcycle. In the same time a report came in that the accused had discharged a firearm in the night of 13/2/2013. According to PW2 the two issues became a subject of inquiry as to the whereabouts of the motorcycle and whether indeed the accused had discharged the firearm. PW2 stated further that on going through the record and movement register it became clear that one ammunition of the twenty issued to the accused was discharged or lost. PW2 told this court as per the emerging issue a criminal inquiry was underway because the death of a human being along murram road had reached the attention of the police.

PW3 NO. 9806 LYDIA GITONGA an officer with KWS testified that she was asked to take over duty from the accused with effect from the 14/2/2013 at 6am. On arrival in the office PW3 stated that she did not find the accused nor any standby officer at the time. PW3 further testified that she made the necessary entries in the occurrence book in absence of the accused and reported the matter to her superiors. PW3 further stated that she learnt that the accused had left the station to go and follow up leads on the theft of his motorcycle. The entries on takeover made in the OB was admitted in evidence as exhibit 3(a), (b).

PW4 GEOFREY MUNGAI NDUNGU the father to the deceased testified as to the injuries sustained by his son on 13/2/2013. It was his evidence that the injuries occasioned an admission at Kenyatta National Hospital for twenty one (21) days undergoing treatment. According to PW4 during the treatment of the deceased at Kenyatta National Hospital he spent most of the time together. In the course of their communication PW4 stated that the deceased was able to explain the circumstances upon which he was shot at on the night of 13/2/2013. PW4 further stated that on the fateful day while riding his motorcycle the deceased was able to identify the accused as the one who shot at him. According to PW4 testimony the deceased succumbed to the injuries while undergoing treatment. He was therefore later to be called upon to identify the deceased body to the pathologist who performed the postmortem.

PW5 TOBIAS KIPLAGAT KIPLIMO of Kenya Wildlife Service confirmed to this court that on 14/2/2013 he accompanied the accused person in tracing his stolen motorcycle. In the evidence of PW5 the search and find mission took him to Kilombero in Tanzania where they apparently heard information the alleged thief had crossed over after stealing the motorcycle of the accused. Despite the search PW5 confirmed that there was no recovery made. According to PW5 they made a decision to return back home.

PW6 NAIYO NDOIPO testified as KWS driver based at Loitokitok station. In his evidence PW6 stated

that on 13/2/2013 he drove motor vehicle registration KBN 221V. PW6 deposed that he was called by Pw5 to go and pick him together with the accused from the area they went to search for the stolen motorcycle.

PW7 DAVID KIOKO KIVULI also of KWS testified that he received information from PW5 that the accused motorcycle was stolen. PW7 further stated that on receipt of the information he accompanied PW6 to where PW5 and accused were pursuing leads of the stolen motorcycle. PW7 confirmed that they returned back to the station without any recovery but the incident of the shooting and one ammunition missing from the twenty issued to the accused came up. PW7 denied knowing the circumstances the one ammunition was used or discharged from the magazine by the accused.

PW8 CHIEF INSPECTOR ALEX CHIRCHIR the ballistic examiner testified as to the analysis done to one rifle S/No. 1700925, one magazine and the 19 rounds of ammunition at the laboratory in Nairobi. In his testimony PW8 confirmed that the rifle was in good condition and capable of firing using the ammunition calibre of 7.62mm. PW8 further confirmed that the examination and analysis of the rifle revealed presence of burned gun powder in the chamber of the rifle. The report on the findings by PW8 was admitted in evidence as exhibit 5.

PW9 JACKSON MWANGI testified that on 14/2/2013 at 4.00am he received a telephone call from the deceased that he has been shot at and required urgent assistance. In addition PW9 deposed that he rushed to the scene together with a neighbour by the name Salash and Dan (PW10 and PW11 respectively). On arrival at the scene they assisted to take the deceased to Loitokitok Hospital. PW9 stated that the first observations made at that time indicated that the deceased had suffered injuries to the buttocks and the thigh region. At the trial PW9 was able to identify the blood stained clothes worn by the deceased on the material day when they escorted him to the hospital.

PW10 LEIYAN SALASH testified to the effect that he accompanied PW9 and PW11 to the scene on request made by PW9. It was the evidence of PW9, PW10 and PW11 that as the first people to arrive at the scene on or about 4.00 am they noticed the injuries suffered by the deceased. PW9, PW10 and PW11 all testified that during the rescue of the deceased from the scene though in pain he was talking and narrating the circumstances upon which he was shot at along murram road. Furthermore PW9, PW10 and PW11 deposed that the deceased mentioned that he had been shot at by a Kenyan Wildlife Service ranger. The three witnesses later told this court that the person they had taken to the hospital died as a result of the injuries suffered in the night of 13/2/2013.

PW11 DANIEL WANJERI's evidence which corroborate PW9, PW10 evidence was to the effect that on or about 5.10 am on the 14/2/2013 he was woken up at his house by PW9 and PW10. PW11 further testified that on rising up he also found voice message from the deceased sent at 4.58 am. The text message from PW9 and PW10 indicated that their friend the deceased had been shot near Loitokitok Boys School. PW11 who knew the deceased testified that together with PW9 and PW10 they proceeded to the alleged scene that is when they discovered the deceased soaked in blood but still alive. PW11 further stated that they made arrangements by securing a vehicle to take the deceased to Loitokitok Hospital where he was admitted to undergo treatment.

The three witnesses PW9, PW10 and PW11 were categoric that a quick observation of the deceased revealed a penetrating wound at the rear of the buttocks which had disabled him and resulted in heavy bleeding.

PW12 LEORNARD WANYOIKE NDUNGU testified that on 19/3/2013 he was with PW4 Geofrey Mungai Ndugu when they identified the deceased body at Kenyatta National Hospital Mortuary where the postmortem was carried out by the pathologist.

In the testimony by PW13 CIP Peter Mugwika testified that the investigations carried out revealed that the deceased a boda boda rider had been shot in the night of 14/2/2013. In the testimony of PW13 the investigations led them to arrest the accused a ranger with KWS based at Loitokitok Station. PW13 further stated that he went through the KWS registers on the issue of firearms, and ammunitions and also

the occurrence book. According to PW13 he was able to trace evidence of the accused being on duty in the night of 13/2/2013 – 14/2/2013 period. The witness through the assistance of the KWS office at Loitokitok caused the ballistic examiner to examine and analyse the firearm and the magazine with ammunitions issued to the accused person. PW13 further deposed that the deceased who had been transferred to Kenyatta National Hospital from Loitokitok underwent treatment until he passed on the 18/3/2013. It is further PW13 testified that prior to the deceased death he had travelled to Kenyatta National Hospital on 18/2/2013 where he recorded the statement from the deceased person. It is the case by PW13 that the deceased gave a chronology of events to the effect that he was riding a motorcycle KMCX 510M. According to the statement recorded by PW13 the deceased had an encounter with KWS officers in a motor vehicle whose registration he could not recall vividly. The occupants of the motor vehicle which the deceased positively identified belonged to Kenya Wildlife Services. In the statement the rangers had a short conversation with him before they proceeded on with the patrol. PW13 further stated that the deceased parted ways with from the KWS team and about one kilometre distance when a person in KWS uniform without uttering a word shot at him in the right leg. The injury disrupted his driving as he fell down on the ground and the attacker did not manage to go near him to help or assist in any way. That is when he managed to reach for his mobile and telephoned PW9 who came with PW10 and PW11 to take him to Loitokitok Hospital. PW13 on compiling the statement forwarded to PW15 the head investigator for further action.

PW14 PC OBED BALESA a gazetted scenes of crime officer testified on the role he played to preserve the scene of the murder through taking of photographs. The various photographs taken of the deceased body revealed nature of injuries sustained. The photographs were admitted in evidence as exhibit 8 (a).

PW15 IP KIBET GEOFREY who was tasked with the crime investigations gave a summary of the witness statements taken; the exhibits gathered both documentary and others like the rifle ammunitions to support the case against the accused person. PW15 also testified on the arrangements made to have a postmortem carried out following the death of the deceased on 18/3/2013. According to PW15 the investigations revealed that the accused who was issued with a rifle and twenty rounds of ammunition on 13/2/2013 had something to do with the shooting of the deceased. PW15 further testified that when the accused returned the firearm and the ammunition on 14/2/2013 they were less one bullet. According to the investigations conducted by PW15 the accused could not account for the use or missing of the ammunition and yet he signed for the twenty on 13/2/2013. PW15 placed before court as exhibits, work tickets for motor vehicle KBN 221V and motor vehicle KBQ 680D, logbook for KMCX 510M, two receipts for motorcycle KMCX 510M, logbook for KMCM 571V, exhibit memo in support of the prosecution case. According to PW15 armed with the statements of PW1 – PW16 and documentary evidence he formed an opinion that the accused had something to do with the death of the deceased. He therefore recommended that a prosecution for the offence of murder be mounted against him before a court of law.

PW16 NELLY MOREEN a government chemist testified as to the analysis done to a pair of blue trousers stained with blood. According to PW16 the investigations from PC Samburimo was to ascertain the presence of gun powder residues in the item. On examination and analysis PW16 told this court that no such gun powder was found with the blood stained pair of jeans trouser.

At the close of the prosecution case the accused elected to give a sworn statement of defence. He denied the charge of murder. The accused admitted that in the month of February 2013 he was working as a ranger with KWS attached at Loitokitok station. The accused further admitted that he reported on duty between the 13/2/2013 at 6 pm and was to check out at 6.00 am on the 14/2/2013. The accused further deposed that on the material night he noticed that his motorcycle was missing from its parking bay. He therefore decided to inform his colleagues including PW1 who assisted in the search and recovery mission of the motorcycle. According to the accused the search and inquiries took them out of station. The accused person further admitted that in the course of patrolling he came across a motorcycle rider driving at high speed. He however stated that he managed to read the registration as KMCX 571V being the one he was looking for. As the rider did not stop the accused told this court that he decided to fire in the air to draw his attention to stop. The accused confirmed that the rider did not stop despite the gun fire. In his defence he thought the motorcycle had been driven to Kilombero Tanzania. That therefore was the

reason they sought permission to travel to Tanzania on 14/2/2013 to continue the search of the motorcycle. The accused further stated that having made a theft report at Kilombero police station they came back to station at Loitokitok. It was while in Kenya he was confronted with the information that someone was shot at murram road. This incident according to the accused prompted investigations/involving the police and KWS station. He however denied that he shot anyone person on the night of

13-14/2/2013 as alleged by the prosecution.

SUBMISSIONS BY MR. TAMATA COUNSEL FOR THE ACCUSED:

Mr. Tamata learned counsel for the accused submitted that the case by the prosecution is purely circumstantial and the elements of the offence of murder were not proved beyond reasonable doubt. According to learned counsel the evidence by the sixteen witnesses as to who killed the deceased did not implicate the accused in any manner. The learned counsel invited the court to appraise the evidence on how the deceased is alleged to have been killed. It was learned counsel contention that the deceased was stopped by Kenya Wildlife Service motor vehicle KBQ 680D. After a short conversation with the people in the motor vehicle they parted ways and shortly thereafter he was shot at by purportedly by KWS officer. According to learned counsel the location where the deceased was killed and the place he met with the KWS officer was said to be 4kms away. There is no evidence according to learned counsel that the accused left his station for murram road to go and shoot at the deceased. The learned counsel submitted that the accused gave a plausible defence on the sequent of events involving the theft of his motorcycle, the search to trace it which took them all the way to Kilombero in Tanzania. According to learned counsel the accused had to receive information about the killing when they came back from Tanzania. That is when he was asked to record a statement with the police and his movements in the night of 13&14/2/2013 commenced by the investigator. Learned counsel contended that the accused fired in the air in the night of 13&14/2/2013 and the person he aimed at was a motorcycle rider who drove at high speed towards Tanzania. Learned counsel further contended that from the ballistic expert examination and the government analyst report PW14 and PW16 respectively there are no positive findings to link the accused with the murder of the deceased. It was learned counsel contention that the evidence of PW14 and PW16 was too weak and left many gaps to be believed by this court to indict the accused. In summary learned counsel submitted that the prosecution failed to establish the ingredient of unlawful acts of omission or commission, the ingredient of malice aforethought and that the accused was the one who fired and shot the deceased. In absence of cogent evidence learned counsel submitted that the benefit of doubt should be resolved in favour of the accused person and benefit with an acquittal. Learned counsel referred to the following court decisions on circumstantial evidence which is applicable to this case in support of his submissions: ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990, Daniel Musyoka Muasya & 2 Others v Republic Cr. Case No. 42 of 2009*** at Mombasa. What the learned counsel urged this court to find is that the accused never participated in the killing of the deceased.

THE PROSECUTION COUNSEL SUBMISSIONS:

In reply, Mr. Akula the senior prosecution counsel submitted that the evidence tendered before court, by the sixteen (16) witnesses, the exhibits including documentary evidence established existence of the ingredients of the offence of murder against the accused. The learned prosecution counsel submitted that the testimony of PW4, PW12 and the postmortem report proved the death of the deceased. It was further learned prosecution counsel submissions that PW9, PW10, PW11, PW4, PW13 and the postmortem report all point to the unlawful death of the deceased. Learned prosecution counsel advanced the argument that the cause of death was as a result of the gunshot wounds inflicted on the 14/2/2013. Learned prosecution counsel contended and attributed the injuries to the accused who fired from his firearm and injured the deceased. The learned prosecution counsel pointed out that malice aforethought can be deduced from the motive of the accused. The learned prosecution counsel submitted that the prosecution led evidence that the accused motorcycle KMCM 571V had been stolen from the yard at his house. The accused then left the station to go for a patrol to see whether he could come across his motorcycle with any of the boda boda riders within the Loitokitok area. According to the senior prosecution counsel the accused does not deny firing on the fateful night save that the gunshot was not

aimed at the deceased. In the case before court learned prosecution counsel argued that the accused used a firearm to inflict injuries and the same was under mistaken belief that he was riding his motorcycle. According to learned prosecution counsel contention, the prosecution has proved malice by demonstrating the weapon used, the conduct of the accused before, during and after shooting the deceased. All that put together counsel submissions goes to establish beyond reasonable doubt the element of malice aforethought. In closing learned counsel contended that the prosecution has placed before court both direct and circumstantial evidence to show that the death of the deceased occurred unlawfully and it was the accused with malice aforethought who participated in his killing. He anchored his submissions in the legal principles in the case of ***Abanga alias Onyango v Republic (Supra).*** The accused action portrays a general manifest of recklessness over other peoples' lives and safety. Ample evidence was adduced at the trial to show the accused used his firearm, a deadly weapon in a dangerous manner. This shot was aimed at the deceased in the night when visibility is poor but it ended up at the thigh side of the body. Mr. Akula finally urged this court to find that at the conclusion of the trial the defence has not controverted the candid and credible evidence from the prosecution witnesses.

Having considered the evidence and submissions from both counsels in the trial of this case, i shall now proceed to deal with each elements of the offence to establish whether the prosecution discharged the burden of proof beyond reasonable doubt as required in legal principles set out in ***A. Abonyo & Another v Republic [1962] EA, Woolmington v DPP [1935] AC 462, Miller v Minister of Pensions (Supra).***

1. Death of the deceased Henry Ndungu:

Under Article 26 (1) of the Kenyan Constitution:

> **"Every person has the right to life.**
>
> **(2) A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law."**

The prosecution adduced evidence that prior to the 14/2/2013 at about 3.45 am the deceased Henry Ndungu was alive attending to his customers as a motorcycle rider at Loitokitok. In the course of his duties the deceased was shot at by a person he refers to have come from KWS offices. As a result of the shooting the accused telephoned PW9, who in turn asked the company of PW10 and PW11. The three witnesses visited the scene and confirmed that Henry Ndungu had sustained injuries to the buttocks and in pain. Henry Ndungu was treated intitially at Loitokitok Hospital. However he was later to be transferred to Kenyatta National Hospital. The deceased died on 18/3/2013 while undergoing treatment. A postmortem was conducted on 19/3/2013 by Dr. Walong who confirmed the cause of death to be abdominal penetrating injury due to gunshot wound. According to PW4 and PW12 the father and an uncle to the deceased they positively identified Henry Ndungu, as the deceased person to the pathologist who performed the postmortem. The prosecution adduced medical evidence to prove the death of the deceased. There is no dispute that the said human being in the name of Henry Ndungu is dead.

2. The second element to be answered is whether the death of the deceased was unlawfully caused.

Under Article 26 (1) of the Constitution the right to life is embodied. Under this provisions every persons, institutions including state actors and non state actors within our borders have express constitutional mandate to protect human life. The general principle of law therefore is that every homicide is unlawful unless it is excusable or is authorized by law. See the case of ***Guzambizi S/O Wesonga v Republic [1948] 15 EACA 63.***

I have considered both submissions by Mr. Tamata learned counsel for the accused and Mr. Akula learned prosecution counsel for the state. The evidence by the prosecution weighed alongside the testimony by the defence. Under this ingredient i find the medical evidence through the postmortem report admitted in evidence by consent as exhibit 9 relevant. It is clear from the report by Dr. Walong that the deceased injures and subsequent death are traceable to the gunshot wounds inflicted on 14/2/2013. PW9. PW10 and PW11 were the first witnesses to be telephoned by the deceased while still alive

groaning in pain from the injuries. The testimony by PW9, PW10 and PW11 is categoric that on arrival the deceased together with his motorcycle were at the scene where he was shot. PW9, PW10 and PW11 confirmed to this court that the deceased has severe injuries to the buttocks, thigh area and bleeding profusely in pain. According to PW4 the deceased gave the name of Godana of KWS as the person who shot at him in the fateful night. The prosecution also adduced the evidence of PW13 CIP Mugwika who recorded the statement of the deceased on 18/2/2013 while admitted at the Kenyatta National Hospital when his condition improved to narrate the events of the day. In the evidence of PW13 the deceased pointed at alone KWS guard as the one who shot at him while riding his motorcycle to go and pick a customer from outbound area. PW14 the scenes of crime officer took photographs of the deceased at Kenyatta National Hospital. The photographs were admitted in evidence as a bundle as exhibit 8(a) together with the certificate as exhibit 8 (b). The inference to be drawn from the injuries noted are that they are the sort of injuries which were inflicted by a third party. The medical report by Dr. Walong was crystal clear that the gunshot wounds were the cause of death. What the medical report did was to exclude any possibilities that the deceased died of any other causes from what the medical examination revealed. The defence did not rebut the fact as to the unlawful death of the deceased. The accused in his testimony only denied that if the deceased died of gunshots he was not the one who participated in shooting him. The accused maintained that he had no intention of harming anybody when he shot in the air to cause the person driving his motorcycle to stop. It has not been established by way of cogent evidence that another motorcycle drove by besides that of the deceased on the material day and time along murram outbound road. I am satisfied that the deceased did not die through a road accident, natural causes or through defence of property or self.

In the persuasive authority from our neighbouring country in the case of ***Uganda v Mbubali [1973] 112B 225*** the court stated as follows on self defence, **"that the defence of self can only be availed if the following four elements exist:**

> **1. There must be an attack on the accused.**
>
> **2. The accused must, as a result of the attack, have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm.**
>
> **3. That the accused must have believed it necessary to use force to repel the attack made upon him.**
>
> **4. The force used by the accused must be such force as the accused believed on reasonable ground to have been necessary to prevent or resist the attack"**

On the evidence on record it would not be said that the accused was under attack to have used the firearm against the deceased. He cannot therefore avail himself defence of self or property. This case against the accused is being with proximity on the day and time where the assault took place creates a nexus strongly implicating him as the one who shot at the deceased. In view of the evidence by the prosecution i am satisfied that the prosecution has proved beyond reasonable doubt that the death of the deceased was unlawful.

3. The third element under section 203 of the Penal Code is that of malice aforethought on the part of the accused.

The integral ingredient of the offence of murder which distinguishes it from other homicides is the presence of malice aforethought. Malice aforethought has been defined and provided for under section 206 of the Penal Code.

> ***"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 grievious 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 death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by a wish that it may not be caused.

(c) An intention to commit a felony; and

(d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it."

The acts of grievious harm as stipulated under section 231 of the Penal Code involves,

"Maim, disfigurement or serious permanent injury, disability, wounding by use of any means whatever……"

The prosecution under the ingredient of malice aforethought ought to show by way of evidence that the accused in firing the gunshot intended to cause death or grievious harm to the deceased or had the knowledge that his unlawful act will result in death or grievious harm to the deceased. The courts have labored and considered widely this element of malice aforethought under section 203 of the Penal Code. in the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** **Sir Joseph Shiridan, CJ Sir Norman Whitley CJ and Sir John Gray CJ** held that it was the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part or parts of the body where the harm is inflicted, the conduct of an accused person before or after killing the deceased. In the persuasive authority from the Supreme Court of Uganda in the case of ***Nanyuiyo Harriet & Another v Uganda Cr. Appeal No. 24 of 2002*** the court held:

"In a case of homicide the intention and/or knowledge of the accused person at the time of committing the offence, is rarely proved by direct evidence more often than not the court finds it necessary to deduce the intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used and the part of the body assaulted and injured."

The Court of Appeal in the case of ***Dickson Mwangi Munene & Another v Republic [2014] eKLR*** stated as follows:

"The definition of malice aforethought in section 206 of the Penal Code comprises of not only the intention but also of reckless acts causing grievious harm committed with indifference of their consequences."

In ***Paul Muigai Ndungi v Republic [2011] eKLR*** it was also held by the same court on the subject that:

"Malice aforethought is deemed established by evidence proving an intention to cause death of or to do grievious harm to any person."

The general principle stated in the cited authorities is that, ***"malice aforethought can be express malice or implied from one circumstances of each case."***

In the present case the prosecution adduced evidence to show that the accused firearm was used to shoot the deceased. It is also not in dispute that the accused motorcycle KMCN 571V make Skygo red in colour had been stolen from the yard of his house. There is no dispute from the evidence of PW1, PW2 and PW15 that the accused was issued with a firearm make 9FN Serial Number 17000925 with a magazine containing twenty rounds of ammunition. It is also not in dispute that the accused returned the firearm on the 14/2/2013 with only nineteen rounds of ammunition with one less and not accounted for at the time of surrender. There is circumstantial evidence from the firearm examiner PW14 who examined the firearm and the ammunition in question and did confirm that both were in good condition capable of firing by using the caliber of ammunition 7.62mm.

The inference therefore is that the firearm issued to the accused was in good working condition. The accused was issued with twenty rounds of ammunition on 13/2/2013 during the time he was guarding the KWS station. On this issue under section 111 (1) of the Evidence Act the accused was under duty to rebut the presumption that the ammunition was not used to shoot the deceased as deposed by the prosecution witnesses. As deduced from the evidence on record the accused admitted firing the one shot but alleged that it was used in respect of a suspect of his motorcycle KMCN 571V. According to the accused the gunshot did not hit the suspect who managed to drive at high speed to Kilombero – Tanzania. The explanation by the accused in my own opinion did not controvert the prosecution case as the possession of the ammunition and its usage in the night of 13/2/2013 at wee hours of 14/2/2013. In this case the weapon used was a firearm with lethal consequences. The gunshot fell on the buttocks part of the body exiting to thighs. The deceased was found bleeding from the injured area as stated by PW9, PW10 and PW11 who were the first people to visit the scene. The logical conclusion to be inferred from the above appraisal of evidence is that the accused had no plan to kill the deceased however his actions were unlawful and did not constitute someone who shot in the air. When one observes the postmortem report (the thighs) this part of the body to me can be reached on target and not a straying bullet as the accused wants this court to believe. The accused was lawfully armed by being issued with a firearm and ammunitions in the course of duty. What transpired thereafter was an officer who turned into a floric of his own without the authority of the employer to unlawfully use the gun against an innocent motorcycle rider. The grievious harm against the deceased finally led to his death three weeks after the shooting.

What can be deduced from the evidence of this case is proof of unlawful and intentional act that resulted in the death of the deceased but there is no premeditation on the part of the accused. Malice aforethought under our penal code is deemed to be proved by the persecution proving an intention to cause death or to do grievious harm to the person with whose murder the accused is charged. According to the prosecution evidence after the accused unsuccessful pursuit of his stolen motorcycle he fired at the deceased thinking it was his motorcycle. In my view the accused had no necessary intention to kill the deceased. However there was sufficient evidence that the accused in firing his gun performed unlawful act. The same act was dangerous which was likely to injure the deceased and did inflict fatal harm on the deceased. The unlawful act caused the death of the deceased. I can draw an inference from these set of circumstances that a man is guilty of manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the resultant of death which makes him guilty of manslaughter.

On the other hand it must be demonstrated that the actions of causing death did not fall under any of the expectations recognized by law. This legal provision has been discussed by the Court of Appeal in the case of **Nzuki v Republic [1993] KLR 171** the court stated as follows:

> **(i) The intention to cause death.**
>
> **(ii) The intention to cause grievious harm.**
>
> **(iii) Where the accused knows that there is a serious risk that death or grievious bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as a result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in more of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievious harm is likely or highly likely to ensue from his conduct it is not by itself enough to convert a homicide into a crime of murder. (See also Hyman v DPP [1975] AC 55."**

Reverting to the murder charge against the accused there is a thread of evidence that he had lost his motorcycle in the night of 13/2/2013. This was noticed while he was at his duty station on night shift. In the normal course of business he must have been on the look out to see whether he could spot any rider on a motorcycle with a view to trace the one stolen from his backyard. It is clear from the testimony of PW3 that accused was not at his work station at 6.00 am. The evidence by PW9, PW10 and PW11 points at the

shooting of the deceased to have occurred at or about 3.45 am – 4.00 am on the 14/2/2013. There is circumstantial evidence from the prosecution that the deceased came to face with a KWS officer who shot at him. The evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7 all from KWS point to the accused who was issued with firearm on 13/2/2013 with twenty rounds of ammunition. It is not in contestation that in the night of 13/2/2013 and 14/2/2013 the accused discharged one ammunition. What is disputed is the fact that the shot was not aimed at the deceased. Though the cartridge was not recovered the postmortem report by Dr Walong opined the cause of death to penetrating gunshot wounds due to an assault. The only firearm which was within the proximity of the deceased murder scene is the one issued to the accused. It is intriguing that when the deceased encountered the KWS motor vehicle on patrol at the end of their conversation they cautioned him to take care. The mystery of that cautionary statement was heightened due to the fact that a few metres the deceased was apparently shot while innocently riding his motorcycle. Was this an accident of events or a premeditation on the part of KWS officer to shoot at anybody on a motorcycle that night under the pretext of searching his own stolen motorcycle. That finding on malice aforethought depended upon the prosecution to prove this element beyond reasonable doubt.

In my view the evidence and circumstances prevailing in this case did not favour the prosecution with sufficient material to conclusively disclose existence of malice in causing the death of the deceased. What however comes out clearly is that the prosecution failed to prove the prerequisite *mens rea* on the part of the accused to bring his conduct under section 203 of the Penal Code.

The real point of this charge turns upon the legal provisions under section 213 of the Penal Code on what acts would constitute an accused person to be held responsible for the death of another. Section 213 provides:

> **"(a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which caused his death.**
>
> **(b) He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living.**
>
> **(c) He by actual or threatened violence causes such other person to perform an act which causes the death of such person such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused.**
>
> **(d)……..**
>
> **(e) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person accused or of other persons."**

The prosecution evidence by PW4, PW9, PW10 and PW11 showed that the deceased sustained gunshot wounds on the 14/2/2013. He was admitted at Kenyatta National Hospital for medical treatment for the injuries. The deceased however died on 18/2/2013 while undergoing treatment at the hospital. The death of the deceased is traceable to the gunshot wounds inflicted on the 14/2/2013 by the accused. The postmortem report by Dr. Walong admitted in evidence as exhibit 5 corroborates the testimonies by PW4, PW9, PW10 and PW11 as to the circumstances on how the deceased suffered the injuries. Dr. Walong opined the cause of death to gunshot wounds.

Similar circumstances were considered by the Court of Appeal for Eastern Africa in the case of ***Republic v Mwagambo s/o Gishodi [1941] 8 EACA 28*** where the court observed that an appellant had inflicted two deep and serious wounds on the deceased, who died as a result of sepsis from the wounds. In the opinion of the court there was no evidence that the dresser or negligence was attributed to the medical treatment. The appellant was held to be liable for the death of the deceased.

In our closer home in the case of ***Muli v Republic Cr. Appeal at Mombasa No. 96 of 1996*** in the

circumstances of this case the appellant had been convicted of the murder of his cousin who died in hospital while undergoing treatment eleven days after he was assaulted by the appellant. The appellant was held liable for manslaughter.

The prosecution therefore has brought the case against the accused under the provisions of section 213 (a) of the Penal Code.

4. The fourth ingredient is centered on identification of the accused at the scene of the crime

The case for the prosecution was entirely circumstantial. It is trite that in a case based on circumstantial evidence the circumstances from which the conviction of guilt is drawn should be fully proved and such circumstances must be conclusive in which the circumstances should be complete forming a chain and leave no gap in the chain set out by the prosecution. The circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his defence. The principle of circumstantial evidence has been reiterated by our courts in a plethora of cases. It has been consistently and drawn by the Court of Appeal that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The circumstances from which an inference has to the guilt of the accused is drawn have to be proved beyond reasonable doubt. See ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990 UR, Simon Musoke v Republic, Kipkemong Koske v Republic***.

On considering of the matter in the case at hand there was no eye witness of the occurrence and the case rests on circumstantial evidence. It is the case of the prosecution that the accused was issued with a firearm and 20 rounds of ammunition on 13/2/2013 at 6pm. The accused returned the firearm with only 19 rounds of ammunition on 14/2/2013. The deceased was shot at on 14/2/2013 at 3.45 am along murram road. According to the postmortem report exhibit 9 the deceased had received one bullet injury to the left side of the abdomen transcending to the abdominal wall, colon, small intestine, acelabulium and left glutted region. This was confirmed by Dr. Walong as to the cause of death. The only firearm which was used to fire that night is the one issued to the accused by PW1 and PW2. The accused admitted firing one gunshot but not aimed at the deceased but a suspected thief who stole his motorcycle. There is no evidence any motorcycle drove along the said scene save for the deceased. My view is that any other firearm injury is therefore meted out. It is being alluded by the defence that there was some other person who might have shot the deceased on the night of 14/2/2013. The absence of gun powder trail on the jeans belonging to the deceased does not vitiate the evidence by the prosecution.

In my view the government analyst report and ballistic report does not cast a shadow of doubt on the prosecution story. In any event it is clear from the record by prosecution witnesses PW1, PW5, PW6 and PW7 the accused on the material day was on a mission to do anything to ensure recovery of his motorcycle. I agree with the prosecution counsel in reference to the legal proposition in the case of ***Libambula v Republic [2003] KLR 683,*** where the Court of Appeal held as follows:

> **"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove malice aforethought."**

The value to be placed on the opportunity the accused had to commit the offence to amount to corroboration has been well illustrated in the case of ***Erusani Sekhi & Another [1947] EACA 74 at pg 76*** where the court held:

> **"Whereas mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves amount to corroboration."**

In the instant case the accused must have created the opportunity for the purpose of setting out to look for his stolen motorcycle but ended up attacking an innocent motorcycle rider who was not aware accused had lost his motorcycle. This process in which the deceased was shot at was purely engineered by the accused was alone ranger when he shot at the deceased and not with rest of the KWS officers on patrol in the alleged motor vehicle KBQ 680D. The accused was on a mission to recover his stolen motorcycle. He had the advantage of being lawfully armed and issued with both a firearm and twenty rounds of ammunition as indicated by the evidence of PW1 and PW6. It is on record from the prosecution case that the accused was on duty with effect from 13/2/2013 at 6.00 pm. He was expected to be at the work station upto 6.00 am on 14/2/2013 to handover to PW3. According to PW3 on reporting to duty the accused was nowhere to be seen. The accused presence can only be accounted from around 6.50 am on the 14/2/2013 when he was accompanied by his colleagues PW5, PW6 and PW7 to patrol the town looking for the stolen motorcycle. This is inconstrast with the time when the prosecution adduced the circumstantial evidence from PW9, PW10, PW11 that the deceased was shot on or about 3.45 – 4.00 am on the fateful day of 14/2/2013.

In addition to these observations during the hearing the accused alluded to the fact that he was not at the scene where the deceased was shot. In a way the accused was raising an alibi defence. The general principle of law is that if an accused person alleges that he was not present at a place at the time an offence was committed and that he was at another place away from the scene he is said to have set up an alibi defence. It is also trite that an accused person who puts up an alibi defence does not in any way assume any burden of proving the answer to that defence. It is sufficient that an alibi defence introduces into the mind of a court doubt that is not unreasonable. See the case of ***Said v Republic [1963] EA.***

I have weighed the alibi defence alongside the prosecution evidence by PW9, PW10, PW11, PW13, PW15. It can be demonstrated that the prosecution proved the guilt of the accused beyond reasonable doubt. The circumstantial evidence that the one ammunition the accused did not surrender back to the amoury on 14/2/2013 is irresistible and amounts to one conclusion the accused was the perpetrator of the killing of the deceased.

I therefore dismiss the alibi defence.

I am satisfied that the circumstances cumulatively put together places the accused at the scene of the crime. The prosecution has therefore discharged the burden of proof beyond reasonable doubt. However in absence of malice aforethought I find the offence of murder contrary to section 203 of the Penal Code has not been proven beyond reasonable doubt. Instead the offence of murder is hereby substituted with that of manslaughter contrary to section 202 as read with section 205 of the Penal Code (Cap 63 of the Laws of Kenya). I find the accused guilty of manslaughter and do convict him accordingly.

Dated, singed and delivered in open court at Kajiado on 27th day of February, 2017.

……..

R. NYAKUNDI

JUDGE

Representation:

Mr. Tomata for the accused present

Mr. Akula for the Director of Public Prosecutions present

Mr. Mateli Court Assistant present

Accused present

SENTENCING REMARKS AND VERDICT

ADAN GODANA GALGALO you were initially charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code for killing Henry Ndungu. As had pleaded not guilty to the charge, if fell upon the prosecution to establish your guilt for the offence of murder. This court carefully heard the sixteen (16) witnesses presented evidence on what they knew of the circumstances of the case.

At the close of the prosecution case you had a chance to answer the charge as provided for under section 306 (2) of the Penal Code. This court through scrutiny and evaluation of the evidence in totality arrived at a conclusion that the prosecution case more to manslaughter contrary to section 202 as read with section 205 of the Penal Code than the earlier indictment. The court therefore substituted the offence of murder with that of manslaughter as provided for under section 179 of the Criminal Procedure Code.

It now falls on me to sentence you under the provisions of section 205 of the Penal Code. This offence was committed on 14/2/2013 along outbound centre murram road in Loitokitok. The victim herein referred as the deceased was going about his business as a boda boda operator. It is also not disputed that this offence was committed when you were an employee with Kenya Wildlife Services attached to Loitokitok Sub-station. On the material day you were assigned night shift duties with a firearm and magazine containing twenty rounds of ammunition. When you returned the firearm and ammunitions issued to you later on the 14/2/2013 you could not account for one round of ammunition and in which circumstances it was discharged. This became a subject of police investigations which ended up implicating you with the death of the deceased. The explanation you gave in your defence was that the one round of ammunition was discharged in the night of 13/2/2013 and 14/2/2013 when you were in hot pursuit of searching for your stolen motorcycle. In the course of tracing and searching you spotted a motor rider outside your work station which you positively identified. One of the action you took according to the evidence is firing in the air to prompt him to stop but in the explanation before court the suspect could not be deterred. However the evidence establishes that the deceased was shot at the very time and place within the locality where your pursued the recovery of your motorcycle. The web of evidence placed before this court implicated you with the death of the deceased for unlawful acts of commission of discharging the firearm in your possession.

The Victim:

A notice to attend was sent to the family of the deceased but efforts to secure their attendant was not successful. It is unfortunate that their presence at this stage of the proceedings could have been useful. The court was looking forward to the victim impact statement before making a final order on sentencing.

Mitigation:

Mr. Tamata the defence counsel submitted on your behalf and highlighted the following:

That you are remorseful to the offence and did regret the unfortunate incident. Mr. Tamata further alluded to the fact that you have been in remand custody for about 4 years. Learned counsel invited the court to consider remand period as it considers an order on sentence against you in this case. Mr. Tamata further mitigated that prior to your indictment in the year 2013 you were gainfully employed with KWS which job was lost in the course of this pending trial. Mr. Tamata finally made reference to your family background as the head of the family, married and blessed with six children who all look after you for support and dependency. He submitted that the court do exercise discretion for non-custodial sentence.

Prosecution remarks:

Mr. Akula for state in his submissions on sentence advanced to the court to give due regard to the purpose and objective of criminal law geared towards punishing crime. Mr. Akula further advanced the argument that the offence which you have been convicted is a serious offence attracting a maximum sentence of life imprisonment. Mr. Akula urged the court to consider the aggravating factors of this offence though no

previous record relevant to the instant case exist against you.

Pre-sentence report:

The pre-sentence report was called for expeditiously prepared by the Director of Probation Kajiado County Ms Leah Kadali. The report covers well points on your profile and family background. The community through the area chief talked well of you as a law abiding citizen. In this case as of this year you are aged 56 years. You have no previous conviction in respect of any offence or any relevant to the one you have been found guilty and convicted. Your personal antecedent family and community remarks during the interview the mitigations as rendered by you through your counsel have been taken into account. Before this offence you worked with KWS stationed at Loitokitok.

As regards sentence it is clear to me as well illustrated in the Sentencing Policy Guidelines 2016 what a trial court ought to factor in exercising discretion in sentencing. It is not lost on me that the cardinal objective of criminal justice is to ensure that the offender is adequately punished for the offence. In doing so courts should endeavour to incorporate the principle of proportionality. Under this principle a sentence should neither exceed or be less than the gravity of the offence. See ***Veen v The Queen [1988] CLR 465***. The other principles are to prevent crime by deterring the offender and sending a message to the would be offenders and other people from committing similar offences. Thirdly the protection of the community from the offender. Fourth, to promote the rehabilitation of the offender. It is also a requirement of criminal law that an offender should be made to account for his or her actions in crime. In addition there is the element of paying attention and recognition to the harm done to the victim of the crime and the community at large. All these principles would not be considered in isolation but adopt a holistic approach to the circumstances of the case in other jurisdictions. Applying these principles requirement a kind of score card before a final order on sentence is made by the sentencing court. Score card is a kind of awarding a score on each category under well established criteria on sentencing. This country does not have a Sentencing Act but a policy on Sentencing Guidelines. It is however a positive step in the right direct law to enact the principles and materials to guide the trial court in exercise of discretion on this area. There is much authority on the subject in sentencing and what courts ought to look for is making a determination on sentence.

I draw guidance from the holding in the case ***of Yussuf Dahar Arog v Republic*** where the court stated as follows on sentence:

> **"Such is of course, a maximum sentence and within that constraint, the court has a wide discretion which it exercises on judicial principles. Such principles would I believe, take into account the ordinary span of life of a human being, the general circumstances surrounding the commission of the offence, the possibility that the culprit may reform and become a law-abiding member of the community, the goals of peace and mutual to tendance and accommodation among people – those who are injured and those who have occasioned injury."**

These principles mirror well in the decision I am going to make against you. There is no dispute that your unlawful acts were dangerous which a reasonable man in your circumstances could not have attempted without weighing the risk of discharging a gun on target of a human being. You do not have a previous record, though there has been no victim – offender mediation with an opportunity for you to offer an apology to the family of the victim. I take it that your word remorse in mitigation is a regret of committing this offence. However that is in so far as the mitigation has been factored in this hearing.

This court take judicial notice that your trial has taken almost four years to complete. I will therefore factor the four years in remand custody awaiting conclusion of your case. The four years in remand however do not factor the component of rehabilitation of offenders to be good citizens and amend their ways. There is no evidence that home-based framework rehabilitation and transformation exist in the circumstances of your case. The maximum sentence for manslaughter is life imprisonment. This is not one such case where the maximum sentence is justified weighing one factor after another as illustrated herein. This is one offence where custodial sentence is called for to give you a chance for your

rehabilitation.

I will in this case besides rehabilitation punish crime and also send a message to society that whoever commits an offence of this nature the law would be appropriately applied. In all circumstances of this case I do hereby sentence you to six (6) years imprisonment.

14 days right of appeal explained.

Dated, singed and delivered in open court at Kajiado on 23rd day of March, 2017.

……..

R. NYAKUNDI

JUDGE

Representation:

Mr. Tamata for accused present

Accused present

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant