



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 48 OF 2012**

**REPUBLIC .....APPLICANT**

**VERSUS**

**GABABO HUKA DIKE ..... RESPONDENT**

**JUDGMENT**

By the information dated 25/6/2012, **Gababo Huka Dike** was charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**.

The particulars of the charge are that on the night of 13/6/2012 at Kenya Wildlife Services Maili Saba Station, in Isiolo, Isiolo County, he murdered **Noordin Farah**. Accused denied the offence. The prosecution called a total of 10 witnesses in support of their case. At the close of the prosecution case, the Accused was found to have a case to answer. He testified on oath but did not call any other witness. Accused was represented by Mr. Omari while State was represented by Mr. Mulochi.

**PW1 No. 8295 Olive Masai** of Isiolo KWS Station was on night duty at the station with the Accused on 12/6/2012. She reported to work at 6.00 p.m. and left the Accused at the gate as she went to check the compound and switch on security lights. When near some office where investigations are done about 7.30 p.m, she heard gun shots. She took cover in a corner for a while to assess the situation and after about 10 minutes, she continued to switch on the light. She then saw somebody lying beside a vehicle. She challenged the person but he did not respond. She moved near and then went to the canteen to enquire what had happened as the person was about 20 metres from the canteen. On enquiring, all the people in the canteen went to see the person. The people checked and found that the person was dead. PW1 said that CPL Galma came to the scene and said that it is Gababo, – Accused who had murdered the deceased. PW1 said that it was a bit dark at the gate and when she flashed a torch there, the accused whom he had left there did not respond. She went and hid behind the shop till a motor cycle arrived with CPL Nzoya whom she informed about the death; that CPL Nzoye checked and found a pistol on the body of deceased and he took it. Other wardens were mobilized from other camps and started to search for Gababo but he was not traced. At 5.30 a.m. the Chief of Operations one Omondi informed them that Gababo had surrendered to the police; that police came to the camp at about 8.00 a.m. and asked her to record a statement. She told the court that Gababo (accused) was her in charge while Noordin (deceased) worked at another post but used to come to this camp once a month. She denied having noticed any bad blood between Accused and Noordin; she denied seeing who shot Noordin.

**PW2 Abdi Guyo Galma**, recalled that on 13/6/2012 about 7.00 p.m. he was returning from work with Noordin and the driver Nyachuba. They arrived at the KWS Isiolo Camp. When the vehicle was parked, he rushed out to get to the canteen which was about 30 – 50 metres away and was about to close.

He left behind the driver PW8 and Noordin. When near the canteen, he heard gun shots; he took cover because he did not know what was happening. After about 20 minutes, he raised his head and saw the driver running towards the store and he ran there to find out what had happened. He reached the driver and asked for Noordin but he denied knowing where he was and soon thereafter another ranger arrived asking who was lying below the vehicle. He went to the parking and saw Noordin lying near the vehicle. He observed and noticed that he was dead and there was blood at the scene. He reported to Sgt. Ngugi, then the District Warden, Mr. Mureithi (PW4); that PW4 called for reinforcement from other camps to help locate the person who had committed the murder. They noticed that Gababo who was one of the sentries was missing from the camp. He was found at his house. They went to search for him in Isiolo town and at 6.00 a.m., he received a call from one Cheruiyot, the Investigation Officer, that Gababo had surrendered himself to the police with his gun. PW2 said that Noordin was his friend and he had a cordial relationship with Accused. He further stated that the relationship between Accused and deceased was not good. He recalled that Accused had called him, CPL Adan Bakata, CPL Talicha and CPL Halima in May 2012 whereby he alleged that somebody was having an affair with his wife, but did not disclose the name of the suspect. They met and pondered the issue and called Accused again and informed him they had no idea who he was suspecting and he should suspect with good reasons. He said that Accused got upset that they were pretending not to know of the issue and they advised him to go and sort out the issue. PW2 said that at the said meeting, Noordin was not present. PW2 said he confronted Noordin over the issue which he denied.

**PW3, Assistant Warden III Adan Bakata**, recalled that sometime in May 2012, Accused called him, CPL Talicha, Halima and Galma, and informed them that somebody was spoiling his house; that Accused was reluctant to name the person but they insisted and he told them it was Noordin. They asked him to give them time to investigate and one day he met their boss, Mr. Mureithi (PW4) who asked about the issue between Noordin and Accused. PW4 asked him to give Accused feedback and that all those who had been tasked by Accused to intervene met and informed Accused that they had not found any evidence to confirm Accused's allegations and they advised him to go and make peace with his family. PW3 said that they also left it to PW4 to deal with the matter.

**Silas Mureithi PW4**, was then County Warden of Isiolo. He recalled that on 19/5/2012 about 1.00 p.m. he was in his house when Accused went there and reported to him that somebody was interfering with his house by befriending his wife; that at first Accused declined to name the person but later said it was Noordin. PW4 said he informed PW3 CPL Bakata to get other CPLs in the camp to go to his office next day which they did. PW4 told the Corporals about the Accused's allegation that Noordin had gone to the canteen boasting about his relationship with Accused's wife but the Corporals denied having heard of it; that Accused also alleged he had heard the wife talking to Noordin on phone but could not say what they talked about; that Accused also alleged that Noordin had sent money to the wife. He asked the CPLs to investigate the allegations and they said that Accused had also talked to them about it. The CPLs denied having found any evidence to support the allegations; that the Corporals investigated but came back without any information on the allegation. PW4 also tasked Stephen Okoth who had worked with Accused before to investigate the issue and did not find any truth; that Noordin went to his office on 13/6/2012 and complained that Gababo was making false allegations against him with the wife and he denied having any relationship with the Accused's wife and that in any event, he was not staying at their camp but only came there sometimes on duty. He was still pleading to try and resolve the issue when he heard the blast of bullets following each other. Soon thereafter, Galma, PW2 went to inform him of the death of Noordin. He called for reinforcement, police came, the camp was searched but Gebabo was nowhere though he was supposed to be on duty at the camp as sentry. Next day, he heard that Gababo had surrendered to police at Isiolo.

**PW5 CPL Muhiyadin Abdi Buro**, a cousin of Noordin is the one who identified his body to the Doctor before post mortem was conducted.

**PW6 Johnstone Munyoki Mwangela**, in charge – Ballistic Section at CID Headquarters Nairobi, produced the Ballistic Report of Chief Inspector Immanuel Lagat as an exhibit. Inspector Lagat had left employment. The exhibits were an AK 47 Assault Rifle PEx. No. 1 and Magazines (PEx. No. 2), 2 rounds of ammunition (PEx. 3) and 4 expended cartridges (PEx. 4). The rifle was found to be complete

with all its components. PW6 testified that he test fired had 4 rounds of ammunition picked at random (D1-D56). He found the magazine (PEX. 2) to belong to an A47 Assault Rifle, and the ammunition caliber was 7.62 x 39 mm like that produced in court as Ex. No. 1. The expert formed the opinion that Ex. No. 1 was a firearm and ammunition Ex. No. 2 and 3 were ammunition and that Ex. No. 4, they fired cartridges (except C4) were fouled from one firearm.

**PW7 Sgt. Michael Ngugi** of KWS Isiolo recalled that on 9/6/2012, he was in charge of the armoury and he issued Accused with a firearm AK 47 Serial No. 8062 at 5.00 p.m. to 6.00 p.m. because he was reporting to duty and that he was on duty as a sentry from 9/6/2012 till 13/6/2012, for a week. He recalled hearing a big blast of gun shots on 13.6.2012 about 7.30 p.m. when he was in his house which is near the office and some people took cover in his house – CPL Galma (PW2) and Nyachuba (PW8). They later ran towards the parking where the blasts had emanated from and Galma reached the body first and said Noordin had been shot and the body lay next to the vehicle and they reported to their boss, PW4 but could not trace the assailant. PW7 told the court that he had good relations with the deceased and the Accused as colleagues. In cross examination, he admitted that Noordin had been issued with a gun on 13/6/2012 and that it was returned to the armoury on 14/6/2012 yet he had died on 13/6/2012. He said that it is CPL Bakata who was at the armoury on that day and Bakata could explain who returned it.

**PW8 Nahason Nyachuba**, a Ranger Driver with KWS recalled that on 13/6/2012, he left Archers Post with CPL Galma and Noordin Farah in the vehicle he was driving KAV 888E; that they arrived at the camp about 7.30 p.m., that CPL Gababo (the Accused), opened the gate for them; that at the parking, PW2 alighted first and he was left with Noordin who received a call and started to talk on phone and left the door of the vehicle open. PW8 was left closing the vehicle and after a few seconds it is then he heard gun shots and lay down. When lying there, he saw a ranger in jungle uniform, carrying a gun and hat went towards the gate where they had come from. He got up and went to the house of Dorcas Serem and was in shock and that it is then Olive Masai (PW1) passed by crying saying that Noordin had been killed. Together with others, they went and saw Noordin lying down and confirmed that he had been shot at the shoulder and back. They got reinforcement and the body was later removed. PW8 said that Noordin went behind the vehicle as he spoke on phone – as if going to the canteen. He denied that Gababo's wife was with them in that vehicle.

**PW9, CPL Wilfred Muindi** of Isiolo Police Station recalled that he was on night duty about 8.30 p.m. when he got information that a murder had occurred at KWS Camp. The OCS went to the scene with some officers and he was left in the office; that at and about 5.00 a.m. on 14/6/2012 when inspecting beat men, he was called by report officer and informed that, there was a KWS Ranger with a gun and uniform and he informed them that he had shot his colleague and had come to surrender. PW9 received the gun and ammunition and counted 56 bullets; and gun was AK 47 MH 8062 which he kept and placed him in cells. He later handed over rifle to to his in-charge.

**Dr. Stephen Kiluva (PW 10)** of Isiolo Hospital performed post mortem on deceased on 14/6/2012. He found both the right and left arms to be deformed and had fractures, a gunshot wound on the left mid arm 5x4 mm and on same hand was a bullet wound 3x7 mm; right arm, a rugged wound exposing fatty tissues 3 x 1.5 cm; a gaping wound and this exposed muscles 5.5 x 4 mm; on chest, left side wound 6 x 1 cm, and outer 5 x 6 mm, right chest, near armpit, a deep wound 3.4 x 5.5 cm. There were other wounds on the posterior; the neck was perforated and 3<sup>rd</sup> rib fractured and lungs were damaged. He formed the opinion that the cause of death was severe haemorrhage from the penetrative chest injury from gunshots.

In his defence, the Accused testified that indeed, he worked at KWS, Isiolo and that on 13/6/2012 about 7.30 p.m., while at work, he was at the gate with (PW1) Masai. After she asked for permission to go, inside the Camp, a Land Cruiser KAV 888E came to the gate. He checked and found 3 people with no visitor, PW2, 8 and Noordin. He opened for them. He sat in the sentry room when somebody entered and he could not see him well. When he asked who it was, the person said he was Noordin; that Noordin called him a dog and had reported him to the elders. The Accused said that on 15/5/2012, he had met in the canteen with CPL Bakata, Guyo, Noordin and him; that Noordin told them that he had removed Accused's wife when he was asleep and slept with her outside and returned her; that he reported to elders that Noordin was vexing him and the elders settled the issue and they were told to live in peace; that on

that day, Noordin started abusing him; that he had come from his wife and did not fear the elders; that Accused removed his pistol from the pocket and cocked it and that it is then he cocked his and shot at him and he fell down. He went to report at Isiolo Police Station. He denied intending to kill him.

After the close of the defence case, Mr. Omari, Counsel for the Accused submitted that the prosecution failed to prove its case to the required standard and that the deceased was the author of his demise because he went back to the gate with unknown intention; that malice aforethought was not proved because after the killing, it is accused who walked over 14 kilometres to Isiolo Town to report the incident. Counsel relied on the decision in **CRA 27/1998 Wyclife Oluoch Odhiambo v Rep** where the court considered when malice aforethought is established.

The State relied on the submissions made at the close of the prosecution case where Counsel submitted that the circumstantial evidence was overwhelming and only led to the inescapable inference that the Accused is the perpetrator of the offence based on the evidence of PW1, 2, 3, 4, 6, 7, 8 and 9.

To establish an offence of murder, the prosecution has to establish two elements:

1. That it is the accused who committed the act that caused the death (*actus reus*);
2. That the accused had the intention to cause the death (*mens rea*). *Mens rea* is also known as malice aforethought.

**Section 206 of the PC** defines malice aforethought as an intention to cause grievous harm or cause death. In this case, the Accused has admitted that he did cause the death of the deceased when he shot him. His claim is that it is the deceased who attacked him while at the gate and he shot him for fear that the deceased would shoot him because he was also armed. The only question for the court to determine is whether the prosecution has proved malice aforethought?

Mr. Omari, Counsel for Accused relied on the case of **Wycliffe Oluoch Odhiambo v Rep (Supra)** where the court considered whether or not malice aforethought was proved. In that case the court observed that there was no evidence as to what happened immediately before the moment of the killing and found the accused guilty of manslaughter instead of murder. Although Counsel did not say it, it seems Accused wanted the court to find that Accused committed manslaughter.

From the evidence of PW2, 3, and 4, all testified to Accused having alleged that Noordin was having an affair with his wife. All of them said that they investigated the allegation in May, 2012 but did not find any substance and advised the accused of their findings and that he should try to make peace in his family. They said that Noordin had denied the said allegation. Accused admitted the same in his defence though he alluded to Noordin having come to taunt him that he was moving with his wife and had just been with her. However, the Accused admitted to knowing that his wife was at the Camp even at that time when Noordin arrived at the Camp. In cross examination of the witnesses, it seemed that the defence was suggesting that his wife was in the vehicle in which Noordin, PW2 and 8 drove into the Camp that evening. The allegation of Noordin having an affair with Accused's wife was not proved. The Accused admitted that the said issue had been discussed but he never alluded to the reason for his suspicions or was it mere obsession. There is therefore no doubt, that there was very bad blood between Accused and Noordin.

No doubt, Noordin was armed with a pistol on the fateful evening. From the evidence of PW7 and the copy of Arms Movement Book (PEX. No.7) the deceased was issued with Glock Pistol on 11/6/2012 with 14 rounds of ammunition. It was returned to the armoury on 14/6/2012 after Noordin's death and it had not been used. It is not clear how the said pistol was returned to the armoury. Though PW7 said that PW3 (CPL Bakata) is the one who received it back at the armoury. When Bakata (PW2) testified, no such question was put to him. The fact however, is that Noordin did not use his firearm.

Contrary to what the Accused told the court that he shot the deceased while at the gate of the Camp, there is overwhelming evidence from the witnesses PW1, 2, 7 and 8; all of them told the court that the

deceased's body was found next to the vehicle where PW8 had just parked in the parking. The vehicle was in the parking near the offices about 30-50 metres from the gate as per the estimation of the witnesses. PW2 specifically told the court that after the vehicle arrived in the parking, he hurriedly left the vehicle, leaving behind Noordin and PW8 as he headed for the canteen. He heard of gunshots before reaching the canteen. After the gunshots, PW2 found the body of Noordin had fallen next to the vehicle. PW8 also explained that when he was left with Noordin in the vehicle after parking, , Noordin received a call and got out of the vehicle as he talked on phone leaving the door of the vehicle open. As PW8 was locking the vehicle, he heard the shots. In fact, PW8 told the court that when Noordin got out, he went to the back of the vehicle as if going towards the canteen but not the gate; that the gate was in the opposite direction. PW8 first of all fled on hearing the gun shots but upon return, found Noordin had fallen next to the vehicle. PW8 also said that he had seen a warden walking towards the gate after the shooting but did not know who it was. PW1 who seems to have been the first to notice Noordin's body found the body next to the vehicle. I find that there is overwhelming evidence to demonstrate that Noordin was not shot at the gate but at the parking where the vehicle in which he had entered the camp was parked. PW2 and 8 said they had just left Accused at the gate when he opened for them. That means that Accused must have followed the vehicle from the gate where PW2 and 8 had just left him. I do not believe Accused's defence that the deceased went to accost him at the gate and threatened him by cocking his gun.

When asked in cross examination how many shots he fired, Accused said he fired only once but could not tell how many bullets. The witnesses at the Camp PW1, 2, 3, 4 and 7 who heard the gun shots said it was not one gunshot but several and that is supported by the number of gunshot wounds found on Noordin's body during post mortem by PW10. Accused had been issued with 60 rounds of ammunition, 4 were found to have been used and 56 were still in the magazine which PW9 removed and kept at the Isiolo Police Station upon Accused surrendering to him. It is obvious that the Accused did not mean to disarm Noordin but meant to kill him. The gun shots were concentrated around the chest and upper body and the cause of death was found to be severe haemorrhage from penetrative chest injury from gunshots. The Accused must have sneaked behind the vehicle in which Noordin arrived at the Camp on the fateful night and pumped the bullets into him once he was out of the vehicle. Accused's action must be a direct result of the unproved allegations he had earlier made against Noordin. This is not a case of provocation or self defence, but a well calculated move to eliminate Noordin. I dismiss the Accused's defence as untrue. The facts in this case are distinguishable from the case of **Wycliffe Oluoch (supra)**. In this case, there was an outstanding suspicion by Accused that Noordin was his wife's lover which had not been resolved. In **Oluoch's case**, the accused and deceased were friends who had been drinking together and the fight may have arisen due to disagreement over *miraa* and the court rightly found that there was no intention to kill.

I find that the prosecution has proved that accused harboured malice against Noordin and that is what prompted the attack on the unsuspecting Noordin. The prosecution has proved its case to the required standard beyond any doubt. I find Accused guilty as charged and he is accordingly convicted pursuant to **Section 322 of CPC.**

**DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF OCTOBER, 2015.**

**R.P.V. WENDOH**

**JUDGE**

**27/10/2015**

**In the Presence of:**

Mr. Mulochi for the State

Mr. Omari for Accused

Ibrahim/Peninah, Court Assistants

Accused, Present