



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 5 OF 2012**

REPUBLIC.....PROSECUTOR

VERSUS

ARAB MAALIM HASSAN.....ACCUSED

**JUDGMENT**

The accused **ARAB MAALIM HASSAN** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The facts of the case were that:

**“On the 16<sup>th</sup> day of January, 2012 at Macknon Location, Kongoni Ranch, Taita Taveta County within Coast Province murdered ABDI ABDULLAHI.”**

The accused who was represented by **MR. OBARA** Advocate entered a plea of ‘*Not Guilty*’ to the charge. The trial of the accused commenced on 18<sup>th</sup> July, 2012. The prosecution led by **MR. TANUI**, learned state counsel called a total of eleven (11) witnesses in support of their case. **PW1 SIMON KIPSANG KIPROP** told the court that he is a ranger with the Kenya Wildlife Service (hereinafter referred to as ‘KWS’). On 13<sup>th</sup> January, 2012 he and other rangers were on normal patrol duties in Ukinga Ranch. They received a call from **PW3 JOEL MWANGIRA** who was carrying out a sampling exercise in the area, that he had heard gun shots. **PW1** and his colleagues immediately rushed to the scene at Kongoni Ranch in order to establish the source of the gun shots. Upon arrival they saw blood and upon following the trail of footsteps they came across three men in Taita Ranch. One of the men was armed with a gun and began to fire at them. **PW1** and his colleagues lay down to avoid being shot. Unfortunately their colleague named ‘Abdi’ was shot in the shoulder. They immediately evacuated the injured man to Voi District Hospital where he sadly succumbed to his injuries. The spent cartridges recovered from the scene of shooting were produced as exhibit **Pexb 6**. Two days later on 15<sup>th</sup> January, 2012 **PW7 OMAR SHURE** a KWS ranger received information that a man had been spotted in a hotel in Macknon. He went and arrested the suspect who turned out to be the accused. The accused admitted to police that he was a poacher and led them to where he had hidden his gun. Upon digging up the ground police recovered an AK 47 rifle serial No. 618394 together with two (2) magazines and sixteen (16) rounds of ammunition **Pexb1, Pexb2, Pexb3** and **Pexb4**. The firearm and ammunition were forwarded to the Ballistics Examiner for analysis. The accused who had initially been charged with possession of a firearm was later charged with this offence of murder.

At the close of the prosecution case the accused was ruled to have a case to answer and was placed onto his defence. He gave sworn defence in which he admitted having been in possession of the firearm and ammunition, which he told the court he used for poaching but the accused categorically denied having murdered the deceased.

In a charge of murder the prosecution is required to prove the following three (3) ingredients:

1. The fact and cause of death of the deceased.
2. That the death of the deceased was a direct result of an unlawful act or omission on the part of the accused.
3. That said unlawful act or omission was committed with malice aforethought.

The fact and cause of death of the deceased are not in any doubt. **PW1** and **PW5 MOSES ECHAKAN MOREWA** were both eyewitnesses to the unfortunate shooting of their colleague. They told the court that immediately after the shooting they evacuated their injured colleague to Voi hospital for treatment. They both identify the deceased whom they knew very well as ‘*Abdi Abdullahi*’ also a KWS ranger.

**PW6 DR. CHARO WILSON** is a medical officer from Voi hospital who conducted the autopsy on the body of the deceased. He confirmed that he saw a gun-shot wound on the left shoulder. He opined that the cause of death was ‘*cardiopulmonary arrest secondary to hemorrhagic shock due to a gun-shot wound*’. **PW6** filled and signed the post mortem form which he produced as an exhibit **Pexb5**. It is therefore clear that the deceased met his untimely death as the result of the act of unlawful shooting.

The next question to be determined is whether there is sufficient proof that it was the accused who shot and killed the deceased. **PW1** and **PW5** who were both eyewitnesses to the incident identify the accused as the man who shot and fatally injured the deceased. The court must interrogate carefully the circumstances of such identification. Both **PW1** and **PW5** state that they had rushed to Kongoni Ranch after being alerted that gun-shots had been heard in the area. They got there at about 4.30 p.m. It was broad day light and visibility was good. However, it must be noted that the two (together with their colleagues) were under attack by an armed man. Both state that they lay on the ground in order to evade the bullets. This was in a forest which is a bushy and grassy area. **PW1** states that the gunman was about 50m away. In such circumstances I have serious doubts as to whether the witnesses were in a position to make a clear and reliable identification. **PW1** describes the man who shot the deceased as a “**brown slender man of average height**”. This is a description which would fit a wide section of the male adult population in this country. Despite **PW1** claiming in his evidence in chief that he had a good look at the shooter, under cross-examination by defence counsel he is unable to describe the type of clothes the man was wearing. He also failed to provide a description of the shooter in his written statement. No identification parade was conducted to enable either **PW1** or **PW5** to confirm their identification of the accused. In my view the circumstances were not conducive for a positive identification. If anything the two witnesses may have only caught a fleeting glimpse of the shooter from 50 m away. They were under attack and logically would have been more concerned with their own safety. **PW5** in his evidence admits that “*I lay down to protect myself*”. Both witnesses admit that after the deceased had been shot their attackers all ran away and escaped. Again **PW5** states:

**“We did not chase the poachers. We were concerned with our injured a colleague.”**

I find that an identification of a person shooting at the two cannot be said to have been reliable.

There is of course the element of recovery of a firearm in the possession of the accused. The accused in his defence concedes that he did lead police and showed them where he had hidden the AK 47 rifle which he concedes he used for poaching. However, no tangible links shown between this recovered rifle and the firearm that shot and killed the deceased. The cartridges from the firearm used to kill the deceased were recovered at the scene and were produced as exhibits **Pexb3**. **PW10 CHIEF INSPECTOR ALEX MANDAWIRO** a firearms examiner told the court that he made a comparison between the recovered cartridges and the AK 47rifle serial No. 618394. His evidence was unequivocal.

**“I found the spent cartridges were not fired from the rifle.”**

His report dated 25<sup>th</sup> January, 2013 **Pexb7** says as much. Thus it is obvious that the rifle recovered on the accused was **not** the firearm from which the shots that killed the deceased were fired. It would appear that the police decided to charge the accused hastily before all loopholes had been tied up. Indeed **PW8 CHIEF INSPECTOR DUNCAN MUNYIKI** one of the investigating officers admitted under cross-examination that

**“By the time we received this report [from the firearms examiner] we had already charged the accused in court. Our decision to charge accused was made before we completed our investigations.”** [*my emphasis*]

Why would police rush to charge a suspect before a crucial report had been received and before investigations were complete? The mere fact that the accused was found in possession of a firearm and ammunition does not mean he is the one who shot and killed the deceased. I find that a doubt remains as to whether it was the accused who unlawfully shot and killed the deceased. The benefit of this doubt must be accorded to the accused. I find that the ‘*actus reus*’ for the offence of murder has not been proved as against the accused. I therefore enter a verdict of ‘*Not Guilty*’ and acquit him of this charge. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Mombasa this 28<sup>th</sup> day of October, 2013.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Jami for State

Mr. Nabwana h/b Mr. Obara for Accused

Court Clerk Mutisya