



**REPUBLIC**

**VERSUS**

**ERICK AKEYO OTIENO**

.....**ACCUSED**

**JUDGMENT**

1. The accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. On the first count, it is alleged that on 25.2.2005 at Merille Trading Centre in Marsabit District he murdered Michael Obunga and on the 2<sup>nd</sup> count that in the same place and on the same date he murdered Abdi Ahmed Ali.

2. The evidence in summary was as follows: PW1, Mohammed Ahmed Ali stated that on 25.2.2005 at midnight he was asleep in his house within Merille Trading Centre when he was woken up by a gun-Shot and when he dashed out, he found his cousin Mohammed Suleiman struggling with an Administration Police Officer whom he identified as Eric Okeyo and Suleiman shouted to him to help him and that Abdi, PW1's brother had already been killed by the accused. When PW1 approached, the accused fired his rifle at the witness who ducked and fell down. Suleiman held the accused and PW1 got up and together they disarmed him and took the gun and magazine as the accused ran away. Because of the commotion, people had woken up and one group took Abdi to Laisamis Hospital while another took charge of the accused's gun while yet another stood guard over another body and a gun next to it.

3. PW1 said that he identified the accused because of moonlight and also because he had known him before.

4. PW2, Abdi Ker Hassan recalled that on 25.2.2005 he was sitting outside Yassin Hotel at about 12.15a.m within Merille Trading Centre when Abdi, the deceased, the accused and one P.C Obunga, another deceased started quarrelling loudly. That P.C Obunga was focusing his torch on Abdi who protested about it and Obunga then hit him with the torch and then ordered the accused to shoot Abdi. He did so but Abdi ducked and the bullet hit Obunga instead. Abdi tried to run towards the plot where he lived but the accused chased him and shot at him but missed. The second shot caught him and he fell. PW1 then came and together with Mohammed Suleiman they disarmed the accused. The accused then ran away towards the Police Station nearby. Later the body of Obunga was taken by the police.

5. PW3, Mohammed Suleiman, said that on 25.2.2005, he heard an argument at the verandah of Yassin Hotel within Merille Centre and as he went out to check, a gunshot rang out. Before he could tell what was going on, Abdi, his cousin and now deceased came running in a crouching position. The second gunshot again missed him but the third hit Abdi and PW3 could see from the moonlight that it was the accused whom he had known before who was shooting. PW3 grabbed him and PW1 helped him to disarm the accused who ran off. PW3 saw that Abdi had been shot in the back and he was taken to hospital. Since P.C. Obunga's body was also in the verandah, another group stood guard and Abdi was pronounced dead at the hospital.

6. PW4, James llempiru Leupale stated that he is the Chief Merille Location and recalled that on 25.2.2005, he was sitting in front of his shop at Merille Centre when he saw the accused and P.C. Obunga

using the full moon on that night. He knew both of them well and he heard the accused saying to Obunga;

**"Follow me as I am going to kill someone today."**

7. The two walked away and at about 12.10 a.m a gunshot rung out and PW4 picked his gun and raced towards the center. He found Obunga's body and his gun was nearby. He also saw Abdi lying 7 metres from Obunga and so PW4 took Obunga's gun to the Police Station where he found the accused without his gun.

8. In cross-examination, PW4 said that he took no action when he heard the accused saying that he was going to kill someone because he did not take him seriously and that 5 minutes later, the first gun-shot rung out.

9. PW5 Lawrence Ndhiwa, a firearms examiner examined G3 rifle No.369369 and FN rifle No.2332. He concluded that the six cartridges picked from the scene were all fired from the G3 Rifle No.369369.

10. In cross-examination he said that the number of the gun is indicated on its body.

11. PW6, Francis Okello Oyoire, a relative of P.C. Obunga confirmed that he was present when the post-mortem on his body .was conducted on 25.2.2005.

12. PW7, P.C. Martin Munene was woken up on 25.2.2005 at 1.30 am while at Sabare Police Station and together with I.P Stanley Nyaga and a Mr. Mohammed, District Officer, Dukana Division, they proceeded to the scene, and saw the body of Michael Obunga in a pool of blood. The next day, he attended the post-mortem on Abdi's body.

13. PW8, P.C Godfrey Cheruiyot recalled that on 25.2.2005 at about 11.50p.m he heard gunshots from Merille Centre and then heard screams and people shouting "**Kill him! Kill him!**" He went there and as he approached he heard the words; "**He has killed our brother and his colleague.**" He then heard gunshots and saw someone talking in the Luo language and when he identified him as the accused he told him to speak in Swahili and the accused told him that Obunga had been shot but could not tell who had done so. He also said that he had shot Abdi and that his rifle had been taken away. PW8 escorted the accused to Merille Patrol Base and one P.C. Rodney Mogoi told him the last two gunshots had been fired by him as he rescued the accused from a hostile crowd. The two returned to the scene, saw Obunga's body in, a pool of blood and when they tried to get the accused's gun, the people refused to do so until the OCS came and took it.

14. PW9, P.C Rodney Mogoi recalled that at 11.30 p.m on 24.2.2005 he was in his house within Merille Patrol Base when he heard a gunshot and was woken up by Michael Obunga's wife who said that her husband and one Administration Police Officer had gone to the centre with their guns and she had shortly thereafter heard a gunshot. PW9 proceeded to the Trading Centre and at Yassin Travellers Hotel, he heard someone shouting for help and he recognized the voice as that of the accused who he knew very well. He was being beaten and he heard someone asking for a knife to slaughter him. PW9 fired in the air to scare off the crowd and only after a second gunshot did they disperse and release the accused who escaped. PW9 followed him and the accused was shouting in the Luo language. He asked him to speak in Swahili and accused said that Obunga and one Kadogo had quarreled and someone shot Obunga and the accused then shot the said Kadogo.

15. PW9 returned to the scene, saw Obunga's body but the owners of Yassin Hotel refused to hand over the accused's gun and he and PW8 returned to the base as the crowd was very hostile.

16. PW10, Ibrahim Ahmed Ali, brother of Abdi, the deceased was present when the postmortem on his body was conducted on 25.2.2005.

17. PW11, I.P Paul Wandaka received the report about the shooting on 25.2.2005 at 3.30am and he proceeded to Laisamis Police Station where the accused was being held and then went on to the scene

where he saw Obunga's body and he also saw a pool of blood where Abdi fell. The body was taken away and he took the G3 rifle, FN rifle and six empty cartridges for examination by the Chief Firearms Examiner.

18. PW11 said that the gun issued to the accused was serial No.359359 and not 369369 and that an error was made in recording the gun No. as 369369 and not 359359. He also confirmed that all the ammunition given to Obunga were not used and were accounted for.

19. PW 12, Dr. Mutonga Mwenda David performed the postmortem on the body of Abdi Ahmed Ali Gele and it was is evidence that he had a gunshot through the chest and it caused massive bleeding leading to cardio-pulmonary arrest and death.

20. PW13, C.I.P. Stanley Nyaga went to the scene on the night of the incident but not before going to his office at Laisamis Police Station where he was the OCS and saw the deceased, Abdi, who told him that he had been shot by the accused. The said Abdi died later that night. At the scene he saw Obunga's body, took the 6 empty cartridges, recovered the G3 rifle issued to the accused and at the Merille Patrol Base found the accused under the custody of PW8 and he re-arrested him and later charged him with the offence.

21. The accused in his defence called DW1, Ahmed Abdi, an Administration Police Officer who produced the Arms Movement Register of Laisamis D.O.'s Office and that Register showed that the accused was issued with G3 rifle No. EMP 359359 on 7.11.2004 and the same had never been returned to the Armory. He also had 60 rounds of ammunition.

22. In his defence, he stated that on the material night he was on patrol duties with P.C. Michael Obunga and he had his G.3 rifle No.359359 with 60 rounds of ammunition and at 11 p.m. they saw a group of people walking towards Yassin Hotel and they followed the group. There was a lorry parked in front of the hotel and the two separated. Obunga approached the front of the lorry while the accused approached the rear. Suddenly, he heard 10 gunshots simultaneously and he took cover, He was then ordered to surrender his gun and he did so. He was picked up and assaulted and when his attackers heard gunshots from a distance, they released him and when he heard his name being called, he ran that way and met PW9, and he told him what had happened. He denied telling him that he had shot Obunga and when he and PW8 and PW9. returned to the scene, they found the lorry parked in front of the hotel driving off towards Isiolo and saw Obunga's body lying near the verandah and without his gun. He was arrested at 7.00 am and he denied having rifle No. 369369.

23. In cross-examination, he denied firing any shot that night and he had no reason to shoot his good friend Obunga. He did not know why PW8 and PW9 who were his colleagues implicated him. Although he knew PW1, PW2 and PW3 quite well, he did not know why they also mentioned him.

24. The honorable assessors upon evaluating the evidence above reached the conclusion that the accused is guilty of the offence of murder.

25. On my part, I should begin by determining the only unclear piece of evidence given in this case; the murder weapon. The Republic has put forth the argument that the alleged murder weapon is G3 rifle serial number 359359 officially issued to the accused and not G3 rifle serial number 369369 which appeared in the records of PW5, Lawrence Ndhiwa the firearms examiner. The explanation given by PW11 was that an error was committed when recording the serial number of the gun and that the murder weapon was the same gun issued to the accused and that there was no evidence that. G3 rifle serial number 369369 was ever involved in the alleged murder. The defence counters this argument by saying that the accused's gun was never involved in the murder and there is no connection between him and the murder weapon.

26. I have carefully read other evidence tendered and I am convinced that the explanation given by PW11 is honest, reasonable and wholly answers the contentions by the defence. I say this and without shifting the burden of proof to the accused because the gun issued to the accused was recovered at the scene

having been repossessed by PW1 and PW3 who refused to hand it over to anyone other than PW 11 who later sent it for examination by PW5. It is wholly incomprehensible that even if there was an attempt at framing the accused person, I do not see how in the tragic circumstances of this case, gun serial number 369369, so close to serial number 359359 could have been exchanged with the real one and the results pointing to it as the one from which cartridges recovered at the scene were discharged from. Even if I am wrong, the other evidence as I shall evaluate below would lead to certain inescapable conclusions.

27. The evidence is this; the accused was well known to PW1, PW2 and PW3 who said that it was he who shot and killed the deceased persons and in spite of the episode unfolding at night, it has not been suggested that he was not properly identified or that he was not at the scene. In fact he admitted being at the scene on the material night. PW4, PW7, PW8 and PW9 all gave evidence pointing to the fact that the accused person and the late Obunga all armed themselves and went to Merille Centre and the evidence of PW4 was that they had the sole intention of killing someone, a fact corroborated by the evidence of PW1, PW2 and PW3. There is little more to say because the evidence of all these witnesses was consistent, unchallenged and pointed to the circumstances under which the accused shot the two deceased persons; he had been ordered to shoot Abdi and when he did so, one of the bullets hit Obunga although it was not meant for him. He was then disarmed and was rescued by PW9 because the milling crowd had wanted to lynch him. PW7, PW8 and PW9 were all police officers who met the accused in a confused state after the incident and had no reason whatsoever to lie about his conduct that night and I believe their evidence as I believe that of PW1, PW2, PW3 and PW4.

28. On his defence that he was attacked, disarmed and assaulted at the scene on the material night by unknown people, sadly the same is an afterthought, an attempt at escaping blame and in the face of the overwhelming evidence against him; the accused person has no credible defence to offer. On both counts of murder, he is found guilty for the above reasons and I am in agreement with the honourable assessors on that point.

29. Having so found, the accused is sentenced to death on the first count and sentence on the second count stands suspended pending whatever appeal may be preferred and the execution of the first sentence.

30. Orders accordingly.

Dated and delivered at Meru this 28<sup>th</sup> day of January 2008

**ISAAC LENAOLA**  
**JUDGE**