



REPUBLIC OF KENYA



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**Republic v Duale & another (Criminal Case E007 of 2022)  
[2025] KEHC 4935 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4935 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E007 OF 2022  
JN ONYIEGO, J  
APRIL 25, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ABDULLAHI HASSAN DUALE ..... 1<sup>ST</sup> ACCUSED**

**RASHID IBRAHIM ABDI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons are jointly charged with two counts of murder contrary to Section 203 as read together with Section 204 of the, *Penal Code*. The particulars in respect of count I are that; on 01.02.2022 at Bulla Towfiq area in Garisaa Sub County, within Garissa County, jointly with others not before the court unlawfully murdered Abdi Yerrow Ibrahim.
2. In respect to count II, particulars are that; on 01.02.2022, at Bulla Towfiq area in Garisaa Sub County, within Garissa County, jointly with others not before the court unlawfully murdered Ibrahim Diriye Absha.
3. Having pleaded not guilty, the prosecution called ten (10) witnesses in support of their case.
4. Briefly, PW1, Bashir Mohamed Osman testified that he knew the 1<sup>st</sup> accused person as a good friend with who, they jointly owned land. Similarly, he also jointly owned land with Yerrow Ibrahim (the deceased in respect of count I) who was his distant cousin. That the 2<sup>nd</sup> accused person was also known to him as they come from the same clan. He told the court that on 1.02.2022, he was in Garissa town when he called Ibrahim as they had agreed to meet at the land located at Garissa – Modika road.
5. He stated that he chose to go for lunch while Ibrahim and Abdi headed straight to the said land. At 2.30 p.m., he tried to reach Ibrahim and Abdi in vain as they did not pick their calls and therefore, together with Yusuf Hareth, they proceeded to the said land. Upon reaching there, he saw Ibrahim's



car registration no. KCR 180W with the doors as Ibrahim lay dead outside the said car. That he had gunshot wounds around the eye and the right rib.

6. That he noted that their vehicle was also sprayed with bullets and so, he took him to the car and thereafter called the OCS Garissa Police station who told him to call his deputy and report the incident. On the other hand, Abdi Yerrow lay outside the car with blood all over his body. According to him, Ibrahim prior to his death had received death threats from the accused persons. On cross examination, he stated that he did not witness the shooting incident in as much as there existed a grudge between the accused persons and the deceased. On re-examination, he stated that amongst the five people previously arrested, two of them were before the court.
7. PW2, Yussuf Burale Gorre stated that he knew Ibrahim as they jointly owned some piece of land while Abdi Yerrow was his brother. That on 1.02.2022, he met with Ibrahim and together proceeded to Hidgi hotel as they had planned to go to the said farm thereafter. That prior to them leaving for the said land, his brother had arrived with some goats which they decided to sell first. After selling the goats, he headed home as he had with him a technician who was to repair his broken water pump. After 1.00 p.m., he went for prayers and thereafter tried calling Abdi Yerrow and Ibrahim but none was picking his call.
8. He further stated that he called Bashar who also confirmed that Abdi Yerrow and Ibrahim were not picking their calls and so, they agreed to meet at Soko Ng'ombe so that they could head to the farm together. Off the highway, they saw Ibrahim's car parked with doors open and upon arrival at the scene, they found two bodies lying on the ground dead. Together with PW1, they called the police who arrived and processed the scene and thereafter took away the bodies.
9. He further stated that the accused persons had previously threatened them over the said land and warned them not to lay foot there. On cross examination, he said that he did not see the deceased being killed and further, the land in question is clan land with many claimants.
10. PW3, Abdi Rashid Haji Ibrahim stated that he knew the deceased persons Ibrahim Diriye and Abdi Yerrow who was his cousin. He further told the court that on the material day, together with five other persons, they visited the scene where the deceased persons met their death. That upon arrival, they found Ibrahim and Abdi lying dead with gunshot wounds on their bodies. On cross examination, he said that he knew the deceased as his relatives but he was not aware how they met their death.
11. PW4, Amina Yakub Bishar, a business lady, stated that on the material day, she was in the house when her husband Ibrahim Diriye left home to see some piece of land at Modika. She told the court that she tried to call him in vain and upon becoming desperate, together with other family members, they started looking for him. In the evening, one Bashane informed her that her husband had been shot dead in their farm. She recalled seeing the body with the injuries on the chest, eyes and jaws.
12. PW5, No. 84624 Cpl. Stephen Ngotho recalled that he was the arresting officer. That on 03.03.2022 at around 5.30 – 6.00 p.m., together with other officers, they held an operation looking for people with illegal arms. Having information of the case herein, and on further investigations, they got wind of the people with guns that had been used in killing the deceased persons. That there were two plots where those gun holders were staying and so, they proceeded to Towfiq Garissa Township where the accused persons herein lived.
13. That they proceeded to the house of Abdullahi Hassan (accused I) and knocked the door. Upon opening, somebody identified himself (Accused 1) as the owner of the house. That they told him what they were looking for and so, they searched the whole house. That when PC Lokedi climbed over the ceiling, he found an AK 47 gun with no magazine tied in a sack. That when they ordered the 1<sup>st</sup> accused



- person to open the locked door he became violent. Consequently, he gave them keys and upon opening the room, they found an AK47 S/No 1708134 with a magazine with 30 live ammunitions and a further extra two magazines under the bed.
14. That one of the magazines was empty and the other was loaded with 16 rounds of ammunition. He went further to state that they arrested the suspect, recorded an inventory which he signed along Cpl. Kipkoech and IP Okilu and thereafter, charged him with the offences herein. On cross examination, he stated that he was not the investigating officer in as much as they found the 1<sup>st</sup> accused person with guns.
  15. PW6, No. 23857 IP Jese Iworete Okilu testified that on 03.03.2022, he was with his OCPD when conducting an operation to recover illegal firearms. That around that time, there were frequent shooting incidents within Bulla Towfque. That along with the OCS Garissa and many other officers, they carried out a house to house operation with the view to recovering illegal firearms. He stated that they proceeded to Abdullahi's house (accused I) and upon ordering him to open for them, they conducted search.
  16. That after one PC Lokedi climbed into the ceiling, he recovered a gun without a serial number wrapped in a sack and tied with a rubber band. That next to Abdullahi's house, was the house of Rashid Ibrahim Abdi (accused 2). when they knocked his door, his wife opened the house and Rashid allowed them to search the house. Upon conducting search, they recovered an AK47 rifle S/No. E3099 together with two magazines in navy blue carrier bags.
  17. He described that Abdullahi's house had two rooms and that he witnessed the recovery of the gun from the ceiling from the first room and from the second room, recovery of the second gun under the bed. On cross examination, he said that from the first room, they recovered a gun from the ceiling board and that they did not recover the 2<sup>nd</sup> gun from the next room. He explained that they proceeded to the 2<sup>nd</sup> accused's house and in the presence of IP Memus, the 2<sup>nd</sup> gun was recovered.
  18. PW7, No. 110337 PC Joseph Lokedi recalled that he was part of the contingent of the officers who went for an operation in search of illegal firearms. That they were divided into two groups with the first one led by the OCPD and the second group by the OCS Garissa police station. He stated that they proceeded to the first house wherein they searched the whole house and consequently extended the said search to the ceiling where he recovered a sack tied with rubber band. Upon opening, they found an AK47 rifle. That while there, they asked Abdullahi to open the next room where they met resistance from him but nevertheless, he gave them the keys. Upon opening, Cpl. Ngotho recovered a gun under the bed with two magazines in a red carrier bag and so, they arrested the duo.
  19. PW8, No. 231845 SSP Florence Karimi testified that on 04.03.2022, some exhibits were submitted to the ballistic lab by No. 69632 Cpl James Nema from DCI Garissa. The exhibits were 3 AK47 assault rifles marked exhibit A-1, A-3, AK47 rifle magazines marked B1-B5, 98 rounds of ammunition marked C1-98. She stated that she was tasked to confirm the following: whether exhibit marked A1-A3 were firearms under the [Firearms Act](#), whether exhibit B1-B5 were magazines, whether the calibre of exhibits C1-C98 were ammunitions according to the [Firearms Act](#), whether exhibits A1-A3 were serviceable and whether exhibits 1C-C98 could be fired using exhibits A1-A3.
  20. She said that she did test fire six of the 98 rounds of ammunitions. She further examined the exhibit A-1 – A-3 and found that the exhibit A1 was Yugoslavian AK47 rifle being S/No. XB1387 on calibre 7.62 mm. On physical examination, it appeared rusty and the receiver cover slightly worn out. The fixed butt stock was missing and therefore, she improvised a pistol grip and gas pot. The A-1 was faulty hence could not be test fired.



21. Exhibit A-2 was a Chinese type 56 AK47 assault rifle S/No 1708134. It was in calibre 7.62 mm and at the same time, it had an improvised butt stock. Additionally, it had a gas pot which was in fair mechanical condition. That she successfully test-fired the same using 3 rounds of ammunition picked from exhibit No. C1-C98 and which cartridges she recovered. According to her, the exhibit A-3 was an AK 47 rifle S/No. E3099 (MFI 20) which was in good and general mechanical condition complete with all its component. It was successfully test fired using 3 rounds of ammunition picked from exhibit C1-C98.
22. Exhibit B1-B-5 being rifle AK47 assault rifle magazines with full capacity of 30 rounds of ammunition of calibre 7.62 by 39 mm each was in good working condition. In respect to C1-C98 rounds of ammunition of calibre 7.62 mm by 39 mm, each was capable of being fired. That she picked 6 rounds randomly and test fired in A2 and A-3. From her examination, she formed the opinion that A1-A3 were firearms and C1-C98 were ammunitions as defined under the Firearms Act chapter 114 of the Laws of Kenya.
23. She also did a comparative microscopic examination of the test cartridges which she fired through exhibit A2 –A3 in conjunction with outstanding similar calibre crime fired cartridge case. That exhibit A-2 matched with exhibit cartridges marked A1-A9 submitted by DCI Garissa vide Cr. No. 511/60/2022 Lab reference No. 59/22. She produced the report dated 14.03.2022 as Pex5. On cross examination, she said that she found that 9 cartridges recovered from the crime scene were fired by AK47 marked A-2. On re-exam, she said that the essence of test firing is to find whether the gun would have been used in committing an offence and in this case, A-2 was the gun that was used to commit the crime.
24. PW9, Dr. Abbas Aden Sanweine, a general surgeon practicing at Garissa general hospital testified that he conducted post mortem on the body of Abdi Yarrow Ibrahim and Ibrahim Diriye. That he did not conduct an internal examination but externally. In respect to the body of Abdi Yarrow Ibrahim, there were gunshot wounds on the chest both right and left and on the left side of the shoulder. He formed the opinion that the cause of death was as a result of chest gunshot wounds.
25. In respect to Ibrahim Diriye, the body had multiple injuries consistent with gunshot wounds. There was a gunshot wound on the right side of the head, in front of the ear, knee joint, left curve behind the left knee joint while on the left upper arm the bone was shattered. As a result, he concluded that the cause of death was penetrating gunshot wound on vital organs of the chest. On cross examination, he said that the two victims died of bleeding (hemorrhage due to gunshot wounds).
26. PW10, No.69632 Cpl. James Mandi, the investigating officer stated that on 01.2.2022, two Somali adults were fatally shot within Bulla Towfiq. A report was booked at Garissa police station by one Bishar (PW1) thus prompting the officers from Garissa Police station proceed to the scene. That they found the bodies of Ibrahim Abshir and Yarrow Diriye who allegedly had been attacked while on their business in a probox KCX 180W. He stated that the said probox was being driven by Abdi Yarrow Ibrahim in as much as the vehicle belonged to Ibrahim Diriye Abshir. The officers thus secured the area, collected the spent 9 cartridges and the bodies that were partly inside the vehicle and partly outside. He took the photos of the scene and further noted that the bodies were shattered with gunshots.
27. He stated that post mortem was done on the bodies after which the same were released to the family members for burial. That according to the doctor, the cause of death was bleeding due to gunshot wounds. He also prepared an exhibit memo to the ballistic examiner after which he embarked on carrying out investigations. He reiterated the evidence of other prosecution witnesses on how an operation was conducted that led to the recovery of the guns, magazines and ammunitions. He stated how he did an inventory of the recovered items and further said that the firearm examiner report linked



- the death of the deceased persons with the firearm S/No 1708134(Ex.6) as the murder weapon which was recovered from Abdullahi.
28. That during the investigations, they were informed that Ibrahim Diriye had a case in court wherein Rashid Abdi had been charged among 4 others. The offence was malicious damage to property being a motor vehicle registration No. KCX 180W belonging to Ibrahim Diriye. From the foregoing, he formed the opinion that the two accused persons were involved in the murder of the deceased persons herein. He explained further that the 1<sup>st</sup> accused person was charged with the offence herein noting that his gun was used to shoot the deceased while the 2<sup>nd</sup> accused person was connected to the offence by virtue of having a dispute with Ibrahim in regards to the land and the fact that he had a gun.
  29. On cross examination, he said that he was not part of the raid team and that in as much as he produced three guns, only one of the three was used in the incident herein. He also stated that the 2<sup>nd</sup> accused person was not charged in the criminal case at the lower court.
  30. The prosecution closed its case and via a ruling delivered on 14.11.2024, the court found that the prosecution had established a prima facie case against the accused persons warranting them to be placed on their defence.
  31. DW1, Mr. Abdullahi Hassan, in his sworn testimony denied committing the offence herein. He averred that he was framed as he was only arrested a month and a day later. He urged that on the day that the deceased persons were allegedly killed, he was indoors in as much as he had wanted to go to town. He conceded that indeed search was carried out in his house but no gun was recovered as the said house had neither a ceiling nor toilet. That in as much as his co-accused was his neighbour, nothing was recovered from his house.
  32. DW2, Rashid Ibrahim Abdi, recalled that in as much as he knew his co-accused, he did not know the deceased persons. It was his case that they did not conspire in any way to kill the deceased persons and therefore, he was not aware why he was arrested. He confirmed that indeed two people were killed at Towfiq and that police also searched his house but found nothing. He was later arrested after a period of two months together with his cousin and an in-law.
  33. According to him, he was shocked to see the guns before the court as nothing was recovered from his house. On cross examination, he said that he was aware of a case in respect to a traffic offence but not a case in relation to malicious damage to property. That he was arrested but was later set free as there was no complainant.
  34. The court directed the parties to file their respective written submissions.
  35. The prosecution filed submissions dated 19.12.2024 urging that it had met the criteria for proof of a murder case beyond reasonable doubt. While relying on the case of Anthony Ndegwa Ngari vs Republic, [2014] eKLR, it was urged that prosecution had proved the following elements: that death occurred, that the accused persons caused the said death unlawfully and that they caused the said death intentionally.
  36. On the element of death, it was urged that indeed death was proved as PW9 who produced a post mortem report showed that he performed post mortem on the bodies of the deceased. On the second element, it was argued that the manner in which the deceased persons met their death could not be justified at all. That there existed animosity between the deceased persons and the accused persons and as such, the same could have led to the move to kill the deceased persons.
  37. On malice aforethought, it was urged that the killing herein was well calculated by the accused persons as they hit their targets with the intention to kill them. That the kind of weapon used clearly showed



- the intention to not only cause serious harm but also to kill. This court was therefore urged to find the accused persons herein guilty of the offence of murder.
38. The defence in opposing the prosecution's case filed submissions dated 20.12.2024. It was submitted that the prosecution evidence was contradictory more so in reference to recovery of the alleged guns. That they all went to the said operation yet none carried a camera to document any of these recoveries or even video record the same. It was urged that they all admitted that the inventories exhibit 9 and 12 were prepared at the police station by PW10 who was the investigating officer and who never signed any of the inventories as a maker.
  39. In buttressing the argument that contradictions ought to lead to an acquittal, the defence relied on the holding in the case of Kipyegon Masudi Reuben v Republic Criminal Appeal 131 of 2014 where the appellant was convicted based on contradictory evidence. The Court of Appeal observed that while there were different dates on when the victim died, there were manifest contradictions in the prosecution's case and the court allowed the Appeal.
  40. That prosecution did not produce the so called A1 to A9 in court as proof that they actually existed. He confirmed that even the sketch map of the scene did not show any spent cartridges that were eventually marked as A1 to A9 that were allegedly relied on by PW8 the ballistic expert who randomly picked ammunition not specifically from the magazine that was allegedly found on exhibit 6.
  41. Similarly, counsel submitted that the search and entry into the accused persons premises in the current matter was tainted with illegality, botched, unprocedural and therefore null and void to the extent that it was unconstitutional. Reliance was placed on the case of Robert Mwangi Mugo vs OCS Nyahururu Police station, Inspector General of Police and another, constitutional Petition No. 10 of 2019 where the court held that the entry, search and seizure carried out in the Petitioner's house and premises was arbitrary and in breach of the Petitioner's right to privacy and dignity. In the end, it was urged that the prosecution failed to prove its case beyond any reasonable doubt and therefore, the case against the accused persons ought to be dismissed.
  42. I have considered the evidence adduced by the prosecution witnesses and the defense proffered by the accused persons and submissions thereof. In my view, the main issue for determination is whether the prosecution proved its case against the accused persons beyond reasonable doubt to sustain a conviction for the offence of murder as charged.
  43. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. Section 203 of the *Penal Code* provides: "203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."
  44. In the case of Republic vs W.O.O. [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were restated, as guided by the Court of Appeal in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, as follows: "For the offence of murder to be proved, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:(a) the death of the deceased and the cause of that death;(b) that the accused committed the unlawful act which caused the death of the deceased and(c)that the Accused had the malice aforethought."
  45. Before tackling the matter herein, I do note that the defence in their submissions urged that the searches carried out by the police in the accused persons' houses aren't tenable. That the police officers ought to have sought for search warrants first and noting that none was presented before this court, the proceedings herein are thus void. It is trite that indeed, if the circumstances of a case, in the opinion



of a police officer, would prejudice investigations, then it is permissible to proceed with a search in the absence of a warrant. The two provisions of the *[national Police Service Act](#)* I find to be self-evident read as follows: -

57. Power to enter premises and stop vehicles, etc., without warrant:

(1) Subject to *[the Constitution](#)*, if a police officer has reasonable cause to believe— (a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or (b) that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

(2) A police officer may stop, search and detain any vehicle or vessel which the police officer has reasonable cause to suspect is being used in the commission of, or to facilitate the commission of, an offence. Power to search without warrant in special circumstances

(1) When a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the *[Criminal Procedure Code](#)* (Cap. 75) will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing. (2) Sections 119, 120 and 121 of the *[Criminal Procedure Code](#)* (Cap. 75) as to the execution of search warrant, and the provisions of that Code as to searches shall apply to a search without a warrant under this section.

[ Also see the case of Stephen Mangira & another vs Senior Principal Magistrate, Shanzu & 9 others [2020] eKLR].

46. I do therefore find that the searches conducted at the 1<sup>st</sup> and 2<sup>nd</sup> accused persons' houses were legal and validly conducted in accordance with the law it being not in contention that the persons who conducted the searches were police officers conducting investigation.

47. On the merits of the prosecution's case, the first element to be established is death and cause of death. Through the testimony of PW9, it was established that the cause of death in regards to Abdi Yarrow Ibrahim was gunshot wounds on the chest. In respect to Ibrahim Diriye, the doctor observed that the cause of death was penetrating gunshot wound on vital organs of the chest. On cross examination, he said that the two victims died of bleeding (hemorrhage due to gunshot wounds). It is not controverted that post mortem can only be carried out on dead bodies and therefore, the first element in my view was proved.



48. Was the act leading to the deceased's death unlawful? According to the postmortem report, the deceased died of multiple gunshot wounds. The officers who testified as having visited the scene recovered spent cartridges implying that the deceased were fatally shot using a gun which was not authorized nor in self defence. To that extent, I do hold that the act of shooting was unlawful hence an unlawful act.
49. The key element to prove is whether the accused persons were responsible for inflicting the unlawful fatal injuries upon the deceased persons. From the evidence, no prosecution witness saw or identified the accused persons attack, shoot, injure or kill the deceased persons. The prosecution relied on circumstantial evidence which suggested that the cartridges found at the scene of murder were fired from an Ak47 rifle (exhibit6) allegedly found in the 1<sup>st</sup> accused's possession. That suggestion does presuppose that the gun in question was found in possession of the 1<sup>st</sup> accused.
50. It is trite law that before a court can draw an adverse inference of guilty from circumstantial evidence, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt [see *Sawe vs Republic* [2003] KLR 364].
51. It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else [see *Teper vs Republic* [1952] ALL ER 480 and *Musoke vs Republic* [1958] EA 715].
52. In this case, PW5,6,7 and 10 confirmed that an operation was carried out at Bulla Towfiq where guns Chinese type 56 AK47 assault rifle S/No 1708134 and AK 47 rifle S/No. E3099 (MFI 20) together with magazines and ammunitions were recovered from the accused persons. PW8 testified that exhibit A-2 matched with exhibit cartridges marked A1-A9 which had been submitted by DCI Garissa vide Cr. No. 511/60/2022 Lab reference No. 59/22. She further found that 9 cartridges recovered from the crime scene were fired by AK47 marked A-2 (pex 6) which was allegedly recovered from the 1<sup>st</sup> accused person's house.
53. On his part, the first accused denied being found in possession of the gun connected with killing the deceased on three grounds; Firstly, he was not found in possession of any gun; secondly, no inventory was done at the point of recovery and thirdly, the cartridges allegedly recovered from the scene of crime were not produced as exhibits; It is true that the inventory of the gun alleged to have been used to kill the deceased was not done at the point of recovery but instead it was done at the police station. That begs the question whether that was procedural and therefore fatal to the prosecution's case.
54. In the case of *Leonard Odhiambo Ouma and another vs Republic* (2011)e KLR the court of Appeal discussed the effect of failure to prepare an inventory on recovery and held as follows;  

“Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for that reason, the omission did not vitiate the trial. We find no substance in this ground as well”



55. Similar position was held in the case of Stephen Kimani Robe and others vs Republic (2013) eKLR where the court observed that;
- “The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence”.
56. In related circumstances, the court in the case of David Letira Lekai v Republic (2016)e KLR observed that;
- “The failure to record an inventory or a complete inventory duly signed by a suspect cannot in this case discredit oral evidence largely consistent by pw14 and 15 on the recovery...”
57. In the circumstances of this case, the accused do not dispute signing the inventory. They only claim that they were forced to sign the inventory and that the signing was not done at the point of recovery. There was of course no proof of such coercion. In my opinion, the signing of the inventory at the police station when booking the recovered items was proper and does not prejudice the accused in any way. In other words, failure to sign an inventory immediately upon recovery and at the point of recovery is not prejudicial nor a fatal procedural defect.
58. Having considered the above quoted case law, I have no doubt, the inventory was properly executed by the accused. Pw5-pw7 confirmed that they took part in the recovery of the Murder weapon from the house of the accused I.
59. Accused I does not deny being arrested from his house. Pw5-pw6 confirmed arresting accused one from his house where they recovered the murder weapon besides other guns and ammunitions. This fact is corroborated by the signing of the inventory by the 1<sup>st</sup> accused. I have no doubt that the exhibit associated with the murder of the deceased was recovered from the 1<sup>st</sup> accused’s house where he was the only one at the material time.
60. As to whether the alleged murder weapon was indeed used in the killing of the deceased persons, the answer lies in the testimony of pw8 who examined the weapon in question and the cartridges recovered from the scene of crime and confirmed after test firing the same hence concluded that he same gun was the one that fired the shots that killed the deceased persons.
61. Pw10 who visited the scene confirmed that 9 cartridges were recovered from the scene which later turned out to have been fired by a gun marked as A-2 (pex 6) recovered from the 1<sup>st</sup> accused’s house. Mr. Bosire contended that the alleged spent cartridges were not produced although identified. The recovery of the spent cartridges is not disputed.
62. The fact that there were spent cartridges recovered from the scene is not challenged. The fact that pw8 received them and analysed the same is not denied. Failure to produce them due to the technicality does not overshadow the rest of the oral evidence that there were spent cartridges. Having confirmed that the gun recovered from accused 1 was used to shoot the deceased, the burden of proof now shifts to the 1<sup>st</sup> accused to explain circumstances under which a gun recovered from his house found its way to the crime scene. See sections 111(1) and 119 of the [Evidence Act](#)].
63. The 1<sup>st</sup> accused person ought to have explained how he found himself there and what exactly he was doing at the scene. Having connected the murder weapon with the 1<sup>st</sup> accused person, the most



logical conclusion adverse inference to make is that the 1<sup>st</sup> accused having not rendered any plausible explanation must be held culpable in the murder of the deceased persons.

64. As to the 2<sup>nd</sup> accused, he was only connected to the murder based on an alleged land dispute he had with the deceased persons. The investigating officer confirmed that he had nothing else to connect him with the murder of the deceased. As to the recovery of the firearm from his house, that is not for this court to determine as the offence of possession is not before me nor was any gun allegedly recovered from his house connected with the murder of the deceased.
65. I will not hesitate to quote the Court of Appeal finding in the case of Joan Chebichii Sawe vs Republic [supra], where the court stated that “suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt. [ Also See Mary Wanjiku Gichira vs Republic (Criminal Appeal No 17 of 1998) (unreported)]”.
66. Having found that there is no evidence to connect the 2<sup>nd</sup> accused with the murder of the deceased, I am inclined to acquit him for lack of sufficient evidence. He is hence forth set free unless otherwise lawfully held.
67. The next element to establish is whether from the evidence, the 1<sup>st</sup> accused person bore malice aforethought. In Ogelo vs Republic [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm, malice aforethought is deemed to have been established by evidence presented by the prosecution.
68. Thus, malice aforethought can also be inferred from the manner of killing. See the case of Ernest Bwire Abanga Onyango vs Republic [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and case law is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission or to commit the murder.
69. In this case, PW9 described the manner in which the bodies of the deceased persons were strewn with obvious gun shots manifested. He concluded that they died as a result of hemorrhage due to gunshot wounds. The multiple shooting of the deceased persons is self-evident that the attack was meant to completely finish the deceased hence malice aforethought is proved against accused one.
70. Taking into account the totality of the evidence on record and circumstances under which the offence was committed, it is my finding that the prosecution has proved the offence against the 1<sup>st</sup> accused person beyond any reasonable doubt. Accordingly, accused one is found guilty of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#), and consequently convict him accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25<sup>TH</sup> DAY OF APRIL 2025**

**J.N. ONYIEGO**

**JUDGE**

