



**Republic v Gina & 2 others (Criminal Case 4 of 2020)  
[2024] KEHC 6012 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6012 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL CASE 4 OF 2020**

**JN NJAGI, J**

**APRIL 5, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LUBA IBRAHIM GINA ..... 1<sup>ST</sup> ACCUSED**

**HIRBO MANI SHARYO ..... 2<sup>ND</sup> ACCUSED**

**WOCHÉ BOKO GALKE ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The three Accused are facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on the 20<sup>th</sup> day of May 2020 at around 2100 hours at Manyatta in Moyale sub- country within Marsabit County jointly murdered one Woche Boko (herein referred to as the deceased).
2. The prosecution called 12 witnesses in the case at the close of which the court found the accused with a case to answer and placed them to their defence. The accused defended themselves and called 7 witnesses.

**Case for prosecution**

3. Maryian Abdullahi PW1 testified that she lives at Manyatta Bulji village in Moyale town where she operates a shop at her house of residence. That the three accused were her neighbours. That on the 19/5/2020 at around 9 pm, she was inside her house/shop when she heard a gun shot. She went to the side of her shop and checked through shop window. She saw the 1<sup>st</sup> and the 2<sup>nd</sup> accused holding the deceased on the road outside her shop. There was a third person a distance away whom she did not identify. She got shocked as to what was happening and closed the window. On the same night she learnt that the deceased had been killed. She attended his burial on the following day.



4. It was the evidence of Shukri Boko Woche PW2 that he is a brother to the deceased. That on the material day at 9 pm he was at the house of his mother-in-law when he heard a gun-shot. He went out of the house and heard a second gun shot. He went along the road towards where the gun shots were coming from. When he reached the house of the 2<sup>nd</sup> accused he saw three people coming along the road while carrying something. They went towards him and he hid in the fence. The people reached the gate of the 2<sup>nd</sup> accused and dropped what they were carrying. He recognized the people as the three accused. The 1<sup>st</sup> and the 3<sup>rd</sup> accused had rifles while the 2<sup>nd</sup> accused had a pistol on his hand. The 2<sup>nd</sup> and 3<sup>rd</sup> accused entered into the compound of the 2<sup>nd</sup> accused. The 1<sup>st</sup> accused fired a shot at what they had dropped and followed the others into the compound of the 2<sup>nd</sup> accused. He, PW2, moved to where the people had dropped the thing they were carrying and found that it is his brother, the deceased, who had been killed. Abdinasir (PW9) and Abdi Lucha (PW5) went to the place. Abdinasir brought his vehicle and they rushed the deceased to hospital. He was pronounced dead on arrival at the hospital.
5. The wife to the deceased, Hado Boko Woche PW4, testified that she is a neighbour to the 1<sup>st</sup> accused. That on the 19/5/2019 her husband had left their home at 6 pm. That at around 9 pm she was in her house when she heard gun shots. She came out of her house and saw Shukri, Nassir and Abdi carrying someone. She was told that her husband had been killed. Her husband was put in a vehicle and taken to hospital. She followed them on a motor bike. The deceased was pronounced dead at the hospital.
6. It was further evidence of PW4 that on 14/10/2019 the 1<sup>st</sup> accused had threatened to shoot the deceased with a gun. She reported the incident to the police. Further that the 1<sup>st</sup> accused had constructed a cement slab in his plot and when it rained water was flowing into PW4's compound. That the deceased and the 1<sup>st</sup> accused quarreled over it.
7. Further that on 14/4/2020 the 1<sup>st</sup> accused had fixed a high voltage security light in his compound that was reflecting into her compound. She sent her son to the 1<sup>st</sup> accused to complain about it. The 1<sup>st</sup> accused chased her son with a panga. She reported the incident to the police.
8. Abdi Lucha Guyo PW5 testified that the deceased was his neighbour. That on the evening of 19/5/2020, he was at his house with his family members, Abdinasir and the deceased. That the deceased left for his house at around 9 pm. His house was about 50 meters away. That shortly afterwards they heard gun shots on the road. He and Abdinasir (PW9) went towards the road. When they reached the shop of Maryan (PW1) they heard another gun shot and they hid at Maryian's fence. They saw two people standing against a person who was on the ground. There was a third person standing separately from the other three. The people were on the road outside the shop of Maryan. There was security light outside the shop of Maryan and he identified the people who were standing against the person who was on the ground as the 1<sup>st</sup> and 2<sup>nd</sup> accused. He identified the person who was standing separately as the 3<sup>rd</sup> accused. He could not identify the person who was on the ground. The 1<sup>st</sup> and the 3<sup>rd</sup> accused were carrying rifles while the 2<sup>nd</sup> accused was holding a pistol. He heard the 2<sup>nd</sup> accused saying in Burji language, "hold this one we throw him down there". The 1<sup>st</sup> and 2<sup>nd</sup> accused carried the person who was on the ground down the road. The 3<sup>rd</sup> accused went with them. Shortly after they heard a person shouting, "Oh, oh, they have killed my brother." They rushed to the place and found Shukri (PW2) holding the deceased outside the gate of the 2<sup>nd</sup> accused. The deceased was bleeding profusely. Abdinasir brought his vehicle and they rushed the deceased to hospital. He died before he could be attended to at the hospital.
9. It was the evidence of Abdinasir Gabayo Tilo (Dash) PW9 that on the evening of 19/5/2020 he and Abdi Lucha (PW5) left the mosque and he accompanied Abdi to Abdi's home to watch evening news and to take coffee. That on getting there they found the deceased herein at Abdi's house. After a short



while the deceased left for his house. Shortly after they heard a gun-shot. He and Abdi ran towards where the gun shot had come from. On getting to the road he saw four people outside the shop of a person called Abdullahi Kilo. There was security light outside the said shop. Two of the people were standing next to a body that was on the ground. A third person was standing a distance away from them. He identified the two who were standing against the body as his neighbours, Luba and Hirbo, the 1<sup>st</sup> and 2<sup>nd</sup> accused respectively. The two had long rifles. He did not identify the other one who was standing away from them. He and Abdi were in hiding that time. After some time, the 1<sup>st</sup> and the 2<sup>nd</sup> accused carried the body towards the gate of the 2<sup>nd</sup> accused. The third person followed them. They disappeared into the darkness and he heard them say in Burji language that the person was dead. He heard another gun shot from their direction. Soon after they heard a man shouting that his brother had been killed. They rushed there and found the deceased lying on the ground outside the gate of the 2<sup>nd</sup> accused. The deceased's brother, Shukri PW2, was there screaming. The deceased was bleeding from the thigh. He was dead. He, PW9, brought a vehicle and took the body to Moyale General hospital. The deceased was confirmed dead on arrival.

10. Mohamed Boko Wocho PW6 testified that he was a brother to the deceased. That on the 14/10/2019 the deceased called him and told him that the 1<sup>st</sup> accused had shot at him. That on the following day, he PW1, Abdikarim Woche, Jibril and the deceased went to the police station and recorded statements. That while they were there the 1<sup>st</sup> accused went to the police station and the deceased was arrested and placed in the cells. He PW6 went and complained to the DCIO and the 1<sup>st</sup> accused was also placed in the cells.
11. It was further evidence of PW6 that on the 19/5/2020 he was called by his brother Shukri and the wife to the deceased who told him that the 1<sup>st</sup> accused had shot the deceased. He went to Moyale County Referral Hospital and confirmed the death of the deceased. He reported to the police. Later he identified the body to some doctors and a post mortem was performed on the body.
12. The area chief PW 10 testified that on the 19/5/2020 at around 9 pm he was at his house in Moyale town. That he heard gun shots about 500 meters away. He called the OCS Moyale police station and informed him. He rushed to the scene of the shooting and found a big crowd of people who were screaming that Luba had killed Woche. Police officers went to the place but he stayed a distance away for fear of violence. The mob burnt down the houses of Luba and Hirbo. On the following day there were riots in town over the killing.
13. The OCS Moyale Police Station CIP Robert Kipkoech Krop PW11 testified that on the 19/5/2020 he was in his house at 9 pm when he was called by the Chief Manyatta Location, PW10, who informed him that there was a shooting incident within his area. That he mobilized other police officers and proceeded to the place. They found a charged crowd that was trying to break into the house of Luba, the 1<sup>st</sup> accused on allegations that he was involved in the shooting. He entered into the compound of the 1<sup>st</sup> accused but he did not find anybody there. The crowd alleged that the suspects had taken refuge in the house of the 2<sup>nd</sup> accused. He and his officers headed towards the house of the 2<sup>nd</sup> accused. On the way they saw stains of blood on three patches. On reaching the gate of the 2<sup>nd</sup> accused they heard gun shots behind his house. The crowd had by then entered the compound. He collected a pair of sandals at the gate of the 2<sup>nd</sup> accused which he was informed that they belonged to the deceased. The crowd had by then entered the compound and was unruly. He went back to the police station to seek for reinforcement. A crowd went to the 1<sup>st</sup> accused's shop, vandalized it and burnt down his vehicle. At 3 am, the 2<sup>nd</sup> accused was taken to the police station by his relatives.



14. It was further evidence of the witness that on 20/5/2020 at 6 am he received information that some youths were causing mayhem in town. He went and dispersed them. Two children were killed by stray bullets in the cause of quelling the riots.
15. He then received information that a gun had been burnt in a house in the 1<sup>st</sup> accused's house. He went to the 1<sup>st</sup> accused's house with elders and the chief, PW10. They found a burnt gun in a room next to the gate. They entered the 1<sup>st</sup> accused's main house and collected 12 burnt cartridges and 8 burnt bullet heads.
16. CIP Robert Kipkoech Krop further testified that on 23/5/2020, the 1<sup>st</sup> accused surrendered to the police at Moyale police station and the 3<sup>rd</sup> accused did so on the following day. He handed them over to the DCIO to continue with investigations. He later learnt that the house of the 1<sup>st</sup> accused had been burnt down after they left the place.
17. It was also the evidence of the witness that the 1<sup>st</sup> accused was not in good terms with the family of the deceased. That there were several complaints made to the police by either of the families against each other.
18. Both Dr. Dambe Dawe PW3 and Dr. Ibrahim Kontoma PW8, testified that they conducted a post mortem on the body of the deceased. That they found the body with a gun-shot entry wound on the upper third of the left thigh anteriorly measuring 2 x 2 cm and an exit wound measuring 4 x 2 cm. They opined that the cause of death was as a result of severe hemorrhage due to perforating gun-shot wound. The report was signed by D. Ibrahim. Dr. Dambe however stated that there were three doctors present when the post mortem was performed while Dr. Ibrahim stated that it is him and Dr. Dambe who performed the post mortem.
19. The prosecution called the ballistics examiner PW7 who testified that on the 29/6/2020 their office received a rifle, a cartridge, cartridge cases and bullets from PC Mambo Edward. That he examined the exhibits and found that the rifle was a Russian made AK 47 but that it was burnt to the extent that it was incapable of firing. He examined the cartridge and found it to be of 7.62 calibre. It had some of its parts missing. He examined the cartridge cases and found some of them to be of 303 inches calibre and some of 7.62 x 39 mm calibre. Both types of cartridge cases were exploded.
20. The ballistics expert examined the bullets and found some of them to be of 303 inches calibre and some of 7.62 x 39 mm calibre. Both types of cartridge cases were exploded.
21. The Investigating officer, Sgt Mohamed PW 12, testified that on the 19/5/2023 at around 9 pm he was at his house within Moyale town when he heard gun shots at Manyatta Ore. He then received information that a person had been killed in that area and the body had been taken to Moyale Referral Hospital. He went to hospital and confirmed the death.
22. The witness testified that on the same night at 2 am, the 2<sup>nd</sup> accused went to the police station and claimed that he was fearing for his life. He placed him in custody. That on the following day he attended the post mortem of the body by Dr. Ibrahim. Later the OCS handed over to him one burnt AK 47 rifle, 12 cartridges of bullet heads and plastic sandals. Later, the other two accused persons surrendered to the police. He recorded statements of witnesses and charged the accused with the offence.

### **Defence Case**

23. When placed to his defence the 1<sup>st</sup> accused stated in a sworn statement that the deceased was his neighbor. That the deceased had differences with his wife and stayed away from home for a period of 5 years. That he returned to his wife after the death of his (deceased's) father.



24. That after the return of the deceased he started to complain that rain runoff from the 1<sup>st</sup> accused's compound was flowing into his (deceased's) compound. That the deceased demolished a slab that the 1<sup>st</sup> accused had constructed in his compound to contain the water. That he, the 1<sup>st</sup> accused, reported the matter to the police. The elders intervened and he diverted the run off water away from the deceased's plot. He paid the elders Ksh.30,000/= to give to the deceased. The issue was resolved.
25. That after that the deceased told him to switch off the security light. Some people came to his house at night and started to stone his house. He reported to the police. Two of the people, Tuke and Wote were arrested. They were charged in court. Elders intervened and he withdrew the case.
26. That after a few days the son of the deceased Boko Woche went to his house and told him to switch off the security light mounted on his veranda. He refused. Some people started to stone his house again. He reported to the police. He went to the police station and he was arrested. Boko also went to the police station and he was arrested. Elders intervened again.
27. That on 18/5/2020 the OCS called him to the police station. He went there and he was told that a person called Guyo Lucha had made a report to the police that he, the 1<sup>st</sup> accused, had hit his son with a stone. He was released on bond and ordered to appear in court on the following day. He went home.
28. That on the evening of that day he was in his bedroom balancing his business accounts when a person called Siko told him that there were some gun shots. He went out of his house and heard the wife of the deceased and a certain man shouting that Luba had killed Woche. He called the OCS and the Chief and informed them. Villagers started to gather outside his gate. His family members escaped through the rear gate of the compound. He remained behind and hid at a rock behind the plot. The OCS came with other policemen. He climbed over the gate. He saw a young man holding a panga to the OCS. The OCS went away. The mob then set his generator and the house on fire. Boko Woche was among the people who did so. He stayed in hiding up to 5am. He escaped to the Ethiopia side of the border. He surrendered to the police after 3 days. He denied that he killed the deceased. He said that there was no case pending between him and the deceased when the deceased was killed. He said that he had no reason to kill the deceased.
29. The 1<sup>st</sup> accused further testified that the 3<sup>rd</sup> accused was his watchman but that he was not on duty on the day the deceased was killed. That three days earlier, the 3<sup>rd</sup> accused had been assaulted by some young men and he had taken him to hospital where he was treated and discharged.
30. The 2<sup>nd</sup> accused stated in his defence that he was a neighbour to the 1<sup>st</sup> accused and the deceased, Woche. That a person called Machu Lucha was also his neighbour. That on the 29/4/2020 he was beaten by members of the family of Machu Lucha. They also stoned his house. He made a report to the police. The people also stoned his house on 8/5/2020 and he reported to the police again. That on the evening of 19/5/2020 he was sleeping when his wife woke him up at around 9pm. He heard his neighbor Machu Lucha shouting that Woche had been killed by a rich man. Villagers started to gather. They started to stone his house and that of the 1<sup>st</sup> accused. He heard gun shots. He escaped with family members by the rear gate. He went to the police station. He spent the night there. He later heard that Woche had been killed. He denied that he was involved with his death. He said that he had no grudge with Woche. He said that Woche, the deceased, had no family relationship with Machu Lucha.
31. The 3<sup>rd</sup> accused stated in his defence that the deceased was his friend. That sometimes back they were selling livestock together. That a month before the deceased was killed, he (the accused) was working as a watchman for the 1<sup>st</sup> accused. He was guarding his house. That the deceased went to him and told him that his (deceased's) family was planning something bad against him. That while he was working for the 1<sup>st</sup> accused, Guyo Lucha was hit with a stone. He alleged that it is the 1<sup>st</sup> accused who had hit



- him with a stone. Three days after Guyo Lucha was hit with a stone he (3<sup>rd</sup> accused) was beaten up his elder brother, Abdi Lucha and other children of Guyo Lucha. He was admitted in hospital. After he was discharged he reported to the police. Two weeks after he was beaten Woche was killed. That on the day the deceased was killed he was at his house. He heard gun shots. He did not know where the gun shots were coming from. A neighbor called Hama told him that the deceased had been killed. He heard the mother of the deceased saying that it is Luba and Woche (himself) who had killed Woche, the deceased herein. He feared for his life. He went to the home of his brother at Lami sublocation and hid there for one week. He then surrendered to the police.
32. The 1<sup>st</sup> accused called his two sons, Adan Luba DW4 and Jamal Luba DW6 and his wife, DW9 as witnesses in the case. Their evidence was that on the day the deceased was killed the 1<sup>st</sup> accused returned home at 6.30 pm. That later in the evening the 1<sup>st</sup> accused was in his bedroom where he was working on his business accounts when they heard gun shots. The 1<sup>st</sup> accused came out of his bedroom on hearing the gun shots. They heard Machu Lucha saying that Woche had been killed. A certain man said that it is Luba who had killed Woche. People gathered outside their house and started to stone their house. The 1<sup>st</sup> accused told them to pick the children and escape. They escaped by the rear door.
  33. The 2<sup>nd</sup> accused called his wife DW5, his son DW7 and daughter DW8 as witnesses in the case. The evidence of his wife was that her husband was beaten by children of Machu Lucha sometimes in the month of April 2020. Further that on the evening of 19/5/2020 her husband went to bed at 8pm. That at 9pm she heard gun shots. She went to the bedroom and woke up her husband. They came out of the house. They heard Machu saying that Woche had been killed. Some people attacked their house with stones. There were gun shots still being fired. They escaped. She denied that her husband was involved with the death of the deceased.
  34. DW7 testified that on the evening of 19/5 2020 his father returned home at 5pm. He DW7 went to bed at 8pm and left his father at the verandah of their house. Later his father woke him up. He heard the roof of their house being stoned. There were sounds of gun shots. He escaped.
  35. DW8 testified that on 19/5/2020, her father returned home at 5pm. He went to bed at 8pm. That later she picked her IDD kanzu from her father's bedroom and fitted it in the sitting room. She returned it in her father's bedroom. Her father was still asleep. She then went to her bedroom to sleep. Before she did so she heard gun shots. Her mother went and woke up her father. Her parents went out of the house. They heard stones being thrown to their house. Her father told them to escape. They broke the rear fence and escaped.
  36. The accused further called the evidence of PC Suleiman Ouma Makhoha DW10 of Moyale police station who produced various extracts of OB reports made by the accused persons at the police station. In OB No. 9 of 10/2/2020, D.Exh,1, the 1<sup>st</sup> accused reported that on the previous night he was at his residence when he heard stones being thrown to his house. He came out and found Tulge and Waito who injured him slightly on the right hand.
  37. In OB report No.17 of 29/4/2020, D.Exh.4, the 1<sup>st</sup> accused made a report that one Boko Woche in company of other people had thrown stones to his house thereby damaging his property.
  38. In OB report of 29/3/2020, D.Exh.3, one Hirbo Mamo reported that he had been assaulted by people known to him who had also damaged his property.
  39. In OB report No. 20 of 8/5/2020, D.Exh.6, Hirbo Mamo reported that on the previous night some unknown people had thrown stones to his house.



40. In OB report No. 20 of 3/5/2020, D.Exh. 5, one Woche reported that he had been assaulted by one Abdi Lucha and Lamo Lucha.
41. In OB report No.35 of 20/5/2020, D.Exh.7, Hirbo Mamo reported that his house had been burnt down by angry neighbours for reasons not known to him.

### **Submissions**

42. Both the prosecution and the defence made submissions in the case.

### **Appellant's Submissions**

43. The defence counsel submitted that the prosecution had failed to prove its case beyond reasonable doubt. It was submitted that the prosecution witnesses who testified did not identify the accused persons as the ones who were at the scene of the incident. That Maryan PW1 who claimed to have identified the 1<sup>st</sup> and 2<sup>nd</sup> accused by aid of electricity light that was outside her shop could not identify the person who was lying on the ground.
44. It was submitted that Shukri PW2 testified that all the accused persons had covered their heads with the covers of their jackets whereas Maryan PW1 stated that the 1<sup>st</sup> and 2<sup>nd</sup> accused did not have their heads covered and that it is the third person who was a distance away who had his head covered.
45. The appellants submitted that Abdi Lucha PW5 in his initial statement stated that the 1<sup>st</sup> accused shot the deceased when he was lying down outside the shop of Maryan. That he later recorded another statement stating that the 1<sup>st</sup> and 2<sup>nd</sup> accused had only carried the deceased away and had not shot at him as stated in the initial statement. The appellants submitted that the correction was neither signed nor dated. That the evidence is not credible.
46. It was submitted that Shukri PW2 stated that there was light inside the compound of the 2<sup>nd</sup> accused which was reflecting outside the 2<sup>nd</sup> accused's gate that enabled him to identify the accused persons. However, that PW 5 said that it was dark outside the gate of the 2<sup>nd</sup> accused and they had to use their phone lights to light up the place where the deceased was found.
47. It was submitted that there was no evidence that the accused persons were armed with guns since Abdi PW5 and Abdinasir PW9 said that all the accused were armed with guns but that Maryan PW1 who claimed to have seen the accused persons at close range did not confirm that they were armed with guns.
48. It was submitted that Maryan recorded her statement 11 days after the accused took plea and there was no explanation for the delay.
49. The appellants submitted that Shukri PW2 told the court that the 1<sup>st</sup> accused shot the deceased once after they dropped him outside the gate of the 2<sup>nd</sup> accused. That the investigating officer PW12 testified that he stepped on a pool of blood as he moved towards the house of the 2<sup>nd</sup> accused. However, that the two doctors who conducted the post mortem, PW3 and PW8, found the body with only one gun shot injury on the left thigh. It was submitted that the findings in the post mortem are inconsistent with the oral evidence of the prosecution witnesses.
50. The appellants submitted that there was no evidence that the burnt gun produced in court was the murder weapon as it might have been planted there by the mob when it burnt down the 1<sup>st</sup> accused's house. That the scene of the incident was interfered with by the multitude of people who invaded the place after the killing of the deceased. That no photographic evidence was produced of the scene.



51. The appellants submitted that the defence offered by the accused is water tight and that their alibi has been sufficiently corroborated by the witnesses called by the defence. That the witnesses for the prosecution are not credible as they are relatives of the deceased. That it was shown that the witnesses from the deceased's family had a grudge against the 1<sup>st</sup> and 3<sup>rd</sup> accused.

### **Prosecution's Submissions**

52. The state through the Senior Principal Prosecution Counsel, submitted on three grounds that form the ingredients of the offence of murder which are: first, prove of the death of the deceased; secondly, prove that the accused committed the unlawful act which caused the death of the deceased and thirdly the existence of malice aforethought in causing the death of the deceased.
53. On the first issue the state submitted that the death of the deceased was as a result of a gun shot would as testified by the two doctors who conducted the post mortem, PW3 and PW8.
54. On the second issue, the state submitted that the accused persons were identified by Maryan PW1, Shukri Boko Woche PW2, Abdi Lucha PW5 and Abdinasir Gabayo (alias Dash) PW9 as the people who killed the deceased. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> accused were well known to Maryan PW1 as her immediate neighbours. That the three of them were known to PW2, 5 and 9. That there was sufficient light that enabled them to recognize the accused persons. That Maryan PW1 was able to describe their physique, gender and the clothing they were putting on during the commission of the act.
55. It was submitted that the evidence of PW2, 5 and 9 that the accused dragged the deceased from where they had killed him to the gate of the 2<sup>nd</sup> accused was credible. That the prosecution witnesses had sufficient time to recognize the accused persons as the persons who killed the deceased.
56. On the third issue, the state submitted referred to the definition of malice aforethought as defined in section 206 of the *Penal Code* and submitted that several gun shots were fired on the deceased. That the act of dragging the deceased's body after killing him showed that the killing was planned.
57. The state submitted that there were several reports made to the police of attempts made by the 1<sup>st</sup> accused to kill the deceased as testified by the deceased's wife PW4, the OCS PW11 and the investigating officer PW12.
58. It was submitted that Maryan PW1, Shukri PW2, Abdi PW5 and Abdinasir PW9 testified that the 1<sup>st</sup> accused was wearing a trench coat at the time of the commission of the offence. That the accused was found wearing the same coat at the time of his arrest.
59. On the alibi defence of the accused persons, the state submitted that the burden of proving the falsity of an accused's alibi lies with the prosecution. The state cited the case of *Victor Mwendwa Mulinge v Republic* (2014) eKLR where the court stated that:

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja v Republic* [1983] KLR 501..... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”



60. It was submitted that the prosecution witnesses placed the accused persons at the scene. That the defences by the accused persons are a mere denials and ought to be dismissed and the accused convicted accordingly.

### **Analysis and Determination**

61. It is the duty of the prosecution in a criminal case to prove the case against an accused person beyond all reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say on that standard of proof:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

62. The accused are charged with murder under Sections 203 as read with section 204 of the [Penal Code](#) that state as follows:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person who is convicted of murder shall be sentenced to death.”

63. The elements of the offence of murder under sections 203 and 204 of the [Penal Code](#) were stated in the case of [Republic versus Andrew Omwenga](#) 2009 EKL to be as follows:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder 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 the 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”.

64. I have to interrogate the three ingredients of the offence of murder and determine whether the offence was committed in this case.

### **The death of the deceased**

65. The death of the deceased in this case is not in doubt. A post mortem was conducted on the body of the deceased by Dr. Dambe PW3 and Dr. Ibrahim PW8 who found it with a gun-shot wound on the left thigh. They opined that the cause of death was as a result of severe hemorrhage due to perforating gun-shot wound. I have no reason to doubt the evidence of the two doctors. I find that the deceased died as a result of a gun-shot wound as opined by the two doctors.



66. The OCS, PW11 said that he recovered a burnt gun, P.Exh.2, in the house of the 1<sup>st</sup> accused which he considered to be the murder weapon. However, there was no evidence that this was the murder weapon. The gun was examined by a ballistics expert PW7 who did not find any evidence to associate it with the murder. That notwithstanding, the fact of the matter is that the death of the deceased was caused by a gun shot. It is immaterial that the murder weapon was not recovered.

#### **Whether the accused committed the unlawful act that led to the death of the deceased**

67. The second issue is whether the accused are the ones who killed the deceased. The material witnesses for the prosecution who testified on how the deceased met his death are Maryian PW1, Shukri Boko Woche PW2, Abdi Lucha PW5 and Abdinasir PW9. The witnesses testified that they knew the accused before and that they identified them by aid of electricity light. The question then is whether the witnesses identified the accused persons on the material night by aid of electricity light.

68. The Court of Appeal in *Maitanyi vs. Republic* 1986 KLR 198 dealt with an issue of identification at night and stated as follows:

“...It is at least essential to ascertain the nature of the light available. What sort of light its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not careful test of one if these matters are unknown because they are not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State Counsel and defence counsel, in the absence of all these safe guards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries...”

69. The offence in this case was committed at night. The court has therefore to be satisfied that the circumstances were favourable for positive identification of the accused persons.

70. Shukri PW2 told the court that when he reached the kitchen of the 2<sup>nd</sup> accused he saw three people coming along the road while carrying something. That he did not identify the people at that point. That the people dropped what they were carrying near the gate of the 2<sup>nd</sup> accused. He said in his evidence-in-chief that he identified the three people when they reached near the house of the 2<sup>nd</sup> accused by aid of light coming from inside the compound of the 2<sup>nd</sup> accused which could help someone see outside the 2<sup>nd</sup> accused's house. That he saw the 1<sup>st</sup> and 3<sup>rd</sup> accused armed with rifles and the 2<sup>nd</sup> accused with a pistol. That the 2<sup>nd</sup> and 3<sup>rd</sup> accused entered into the compound of the 2<sup>nd</sup> accused. That the 1<sup>st</sup> accused shot at the deceased at the place where they had dropped him before following the others into the compound of the 2<sup>nd</sup> accused.

71. The witness however stated in cross-examination that the people had head covers on when they reached the gate of the 2<sup>nd</sup> accused. That they dropped the head covers when they entered the compound of the 2<sup>nd</sup> accused. That he clearly saw them as they entered the compound of the 2<sup>nd</sup> accused. That he saw them through the fence. That by then he had moved to the scene and was about 3 meters away from inside the compound.

72. The question then is whether Shukri PW2 identified the accused persons when they reached outside the gate of the house of the 2<sup>nd</sup> accused or when they entered into the compound of the 2<sup>nd</sup> accused. If the people were wearing head covers when they reached the gate of the 2<sup>nd</sup> accused, how did he identify them while he said that there wasn't sufficient light outside the gate of the 2<sup>nd</sup> accused? It has to be noted that Abdi PW5 said that it was dark outside the gate of the 2<sup>nd</sup> accused and they had to use torch



- lights. How then did PW2 know that it is the 1<sup>st</sup> accused who shot at the deceased before he followed the others into the compound?
73. It was further evidence of Shukri that he identified the people after they removed their head covers on getting into the compound of the 2<sup>nd</sup> accused. That he identified them through the fence which is a life fence. However, the witness did not give details of how he managed to identify the people at that point. Did he peep through the fence or he just saw the people from where he was hiding? How was this fence that enabled him to identify the people? Was it a thick fence or light fence? How far was the light that enabled him to identify the people inside the compound of the 2<sup>nd</sup> accused.? With these unanswered questions, I do not find sufficient evidence that Shukri PW2 identified the accused persons as the people whom he saw carrying the deceased towards the house of the 2<sup>nd</sup> accused.
74. It was the evidence of Maryan PW1 that she heard a gun-shot and rushed to her shop window. That she saw the 1<sup>st</sup> and 2<sup>nd</sup> accused holding the deceased on the road outside her shop. The deceased was lying on the ground while the 1<sup>st</sup> accused was on the right side of the deceased and the 2<sup>nd</sup> accused was on the left side of the deceased. That the place was lit up by electricity security light that was outside her shop. That the accused were about 2-3 meters from her when she identified them. That on seeing what was happening she asked, “Why are neighbours killing each other?” She got shocked and closed the window. It was her further evidence that there was a third person about 6 meters away but she did not identify him. He had his head covered but the 1<sup>st</sup> accused did not have his head covered. That on the same night she learnt that Woche had been killed.
75. Abdi Lucha PW5 testified that he and Abdinasir went towards the place the gunshots were coming from. That on reaching the plot of Maryan they hid in the fence of her plot. He saw the 1<sup>st</sup> and 2<sup>nd</sup> accused standing beside the deceased who was lying on the ground. The 1<sup>st</sup> accused was on the right side of the deceased while the 2<sup>nd</sup> accused was to his left. That the 3<sup>rd</sup> accused was a distance away from them. That the 3<sup>rd</sup> accused said in Bulji language that they throw the person away. That the 1<sup>st</sup> and 2<sup>nd</sup> accused carried the deceased down the road. The 3<sup>rd</sup> accused followed them. After a short while they heard somebody shouting that his brother had been killed. They went there and found Shukri PW2 and the deceased.
76. It was the evidence of Abdi Lucha PW5 that the three accused were standing outside the shop of Maryan. That he and Abdinasir were hiding about 10-15 meters from them. That there was electricity light from Maryan’s shop. That the 3<sup>rd</sup> accused had his head covered but he could see his face. The witness further stated that he lives in a rented house at Manyatta village. That he had no grudge with the 1<sup>st</sup> accused. That he was aware that the 1<sup>st</sup> accused had disagreed with his family members but he was not present when they did so.
77. Abdinasir PW9 on his part stated that he and Abdi Lucha PW5 were hiding about 20 meters from where the people were. That he managed to identify the 1<sup>st</sup> and 2<sup>nd</sup> accused as they were facing towards him and he saw their faces. That the two were his neighbours. They were about 5 meters from the shop of Maryan. That there was bulb electricity light outside the shop of Maryan and the two were facing the electricity light. That their faces were not covered. He said that he had known the 1<sup>st</sup> accused for a period of 7 years and the 2<sup>nd</sup> accused for 5 years. However, that he did not identify a third person who was wearing a cap and had his back towards him.
78. The three accused gave alibi defences that at the time they are alleged to have killed the deceased they were at their respective homes with their family members. The burden of proving the falsity of an accused’s alibi lies throughout with the prosecution - see *Victor Mwendwa Mulinge v Republic* (supra).



79. I have examined in detail the evidence of the three prosecution witnesses - Maryan PW1, Abdi Lucha PW5 and Abdinasir PW9 and considered their evidence against the alibi defences of the accused persons. I have no doubt that the three witnesses identified the 1<sup>st</sup> and 2<sup>nd</sup> accused persons as the people who were standing beside the deceased outside the shop of Maryan PW1. It is clear from the evidence of the three witnesses that the area outside the shop of Maryan was well lit by electricity security light that was outside the shop of Maryan. The witnesses were not far away from where the accused were with the deceased. Maryan put the distance at 2-3 meters. Abdinasir estimated the distance they were from them at 20 meters while Abdi PW5 estimated it at about 15 meters. The 1<sup>st</sup> and 2<sup>nd</sup> accused were people who were well known to the three witnesses. It was therefore a question of recognition of the accused persons. In the case *Anjononi and Others vs Republic*, (1976-1980) KLR 1566, the Court of Appeal held the following on recognition:

This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.

80. According to Abdinasir PW9 the 1<sup>st</sup> and 2<sup>nd</sup> accused were facing the security light from the shop. He said that their faces were not covered. I find that Abdi Lucha PW5 and Abdinasir PW9 could clearly see the 1<sup>st</sup> and 2<sup>nd</sup> accused persons at a distance they were from them. I find that the three witnesses recognized the 1<sup>st</sup> and the 2<sup>nd</sup> accused persons as the two of the people who were in the company of the deceased outside the shop of Maryan. I do not believe the evidence of the 1<sup>st</sup> accused and that of his witnesses that he was at the material time at his home with the witnesses who testified in court on his behalf. I was convinced that the 1<sup>st</sup> accused's witnesses who are his sons and his wife were out to protect him.

81. Similarly, I do not believe the evidence of the 2<sup>nd</sup> accused and his witnesses that they were at their home at the material time when gun shots were fired. I am convinced that the witnesses of the 2<sup>nd</sup> accused who are his wife and children were out to protect him. The evidence adduced by the prosecution witnesses, PW1, PW5 and PW9, was overwhelming that they saw the 1<sup>st</sup> and 2<sup>nd</sup> accused in the company of the deceased at the time that the deceased was killed. Though I did not see the witnesses when they testified, I am convinced that they were truthful. They placed the accused at the scene of murder on the material night. The witnesses did not have any grudge against the accused and therefore they did not have reason of lying against them. Though the family of Abdi Lucha PW5 had differences with the 2<sup>nd</sup> accused, he was not involved with the dispute. His evidence that he saw the 1<sup>st</sup> and 2<sup>nd</sup> accused in the company of the deceased was corroborated by Abdinasir PW9 who was an independent witness. The 1<sup>st</sup> accused admitted that he had no differences with Abdinasir PW9. Though Maryan recorded her statement with the police about 3 weeks after the incident, I am convinced that she witnessed the incident. I find that the three witnesses were truthful and credible.

82. The 1<sup>st</sup> accused gave evidence that he was left behind when his family members escaped. He said that he saw the mob burning his house when he was stepping on some rocks that are behind his house. However, his son DW4 said that one cannot see the front of the house when stepping on those rocks. I do not believe that the 1<sup>st</sup> accused was at his home when his family members escaped. He must have been lying that he saw the mob burning his house.

83. Both the prosecution and the defence witnesses testified that they heard several gun shots at the time that the deceased was killed. The deceased however had only one gun shot on his body. It is possible that the many gun shots heard by the witnesses were fired in the air and not directly on the deceased.



84. As regards the 3<sup>rd</sup> accused, I do not find sufficient evidence that he was the person who was standing a distance away from the other two. According to Maryan and Abdi PW5, the person had his face covered. Maryan said that the person did not face her directly. Abdinasir PW9 said that the person was wearing a cap and had his back to him. Though Abdi said that he identified the person despite the fact that he had his face covered, his evidence to that end was not convincing. It is clear from the evidence of the three witnesses that circumstances were not favourable for positive identification of the 3<sup>rd</sup> accused. The 3<sup>rd</sup> accused was thereby not identified to have been among the people who were in the company of the deceased outside the shop of Maryan PW1.
85. In view of the foregoing, I find that the 1<sup>st</sup> and 2<sup>nd</sup> accused participated in the killing of the deceased herein.

### **Malice aforethought**

85. Malice aforethought is defined in Section 206 of the *Penal Code* in the following terms:
- (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
  - (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.
86. The Court of Appeal in the case of *Joseph Kimani Njau v Republic* (2014) eKLR, held as follows on malice aforethought:
- “Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
- i) The intention to cause death.
  - ii) The intention to cause grievous bodily harm.
  - iii) Where the accused knows that there is a serious risk that death or grievous 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 the result of those acts.
- It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”
87. In *Republic vs Tebere s/o Ochen* (1945) 12 EACA 63, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
88. In the case of *John Mutuma Gatobu v Republic* [2015] eKLR the Court of Appeal stated:
- “Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal.....”



There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, its it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.”

89. Malice aforethought can be inferred from the circumstances of the case. In *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) the Court held:

“The question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

90. In this case, the deceased died as a result of a gun shot on the left thigh. The shooting of the deceased with a gun revealed an intention to kill him.

91. The 1<sup>st</sup> accused admitted that there was a dispute between him and the deceased over rain water run-off from his compound that was flowing into the deceased’s compound. The deceased’s wife PW4 testified that the 1<sup>st</sup> accused had previously threatened to shoot the deceased with a gun and the deceased had made a report at Moyale police station. The OCS PW10 confirmed this report vide OB No.53 of 14/10/2019.

92. There was also a dispute between the wife of the deceased, PW4, over a high voltage security light mounted in the 1<sup>st</sup> accused’s compound that was lighting up PW4’s compound. The deceased’s wife reported the incident to the police on 28/4/2020 and the 1<sup>st</sup> accused reported the incident to the police on 29/4/2020.

93. The 2<sup>nd</sup> accused reported of being beaten by people from the family of Lucha. He made a report of assault to the police. He however stated that he had not quarreled with the deceased.

94. The 1<sup>st</sup> accused told the court that his dispute with the deceased had been settled by elders by the time the deceased met his death. However the OCS PW10 produced an OB extract report of No.22 of 29/4/2020, P.Exh.9, made by the deceased that he had been threatened of his life by the 1<sup>st</sup> accused. In that report the deceased referred to the incident made vide OB No.53 of 14/10/2019 that the 1<sup>st</sup> accused had threatened him with a pistol. The report of 29/4/20 was made barely a month before the deceased met his death. It is therefore not true that the dispute between the 1<sup>st</sup> accused and the deceased had been settled by the time the deceased died. The accused did not call any of the elders who settled the dispute.

95. It is clear from the evidence that the 1<sup>st</sup> accused had differences with the deceased and members of the deceased’s family. It is clear that this is the reason the 1<sup>st</sup> accused decided to eliminate the deceased so as to solve the problem once and for all. He involved the 2<sup>nd</sup> accused in the killing. They shot the deceased dead by used of a gun. I find that malice aforethought was proved against the 1<sup>st</sup> and 2<sup>nd</sup> accused.

96. The upshot is that the prosecution has proved beyond all reasonable doubt that the 1<sup>st</sup> and 2<sup>nd</sup> accused murdered the deceased herein. I find them guilty of murder as charged and convict them accordingly.

97. The charge against the 3<sup>rd</sup> accused has not been proved beyond all reasonable doubt. I find him not guilty of the offence and acquit him accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> APRIL 2024**



**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Otieno for prosecution

Mr. Behailu for Accused

Mr. Kinuthia W/B for victim`s family

Court Assistant - Jarso

14 days Right of Appeal.

