



**Republic v Wendot (Criminal Case 57 of 2015)
[2023] KEHC 4067 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 57 OF 2015**

RK LIMO, J

MAY 8, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

JUSTUS WENDOT ACCUSED

JUDGMENT

1. Justus Wendot, the accused herein, is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars as per the information provided are that on the August 3, 2013, along Mama Ngina Road in Kitui Town within Kitui County, he murdered Zebed Maina Kariuki (the deceased herein).
3. The accused denied committing the offence and the prosecution presented twenty-three witnesses to prove their case against him.
4. The accused on the other hand defended himself on oath and called no witness on his part.
5. A brief summary of this case shows that, both the accused and the deceased were Police Officers attached to Director of Criminal Investigations Kitui Central and both were involved in an operation of pursuing suspected kidnappers when a shoot-out ensued within Kitui Town and the deceased who was a Chief Inspector of Police (CIP) at the time got shot as he struggled to apprehend the suspects who were later found to be unarmed. The accused herein, was among the Police Officers who carried out the operation to nab the suspects and it is the Prosecution’s Case that he shot the deceased deliberately using his AK 47 rifle as a result of which he later succumbed.
6. The accused on the other hand, denied shooting at his Senior colleague insisting that, he remained in his car- the Police Car, as instructed and only heard the gun shots from around 30 metres away from the scene of crime.



7. The following is the testimonies of witnesses who testified during the trial herein.
8. Mary Mumbi Njogu (PW1) a business woman from Ruai testified that she was in company of her husband on August 2, 2013 when she received a call from somebody she did not know and that the person demanded a ransom in exchange of release of her five-year-old daughter named Cynthia whom they said had been kidnapped.

The witness stated that the caller asked for Kshs 70,000/- and the couple reported the matter at Ruai Police Station where the couple was informed by the police that the caller was in Thika Town and were advised to return to the station the following day. That the next day, they reported to the station and the police informed them that the caller was in Weteithie Estate but shortly after, the police stated that the kidnappers were headed to Matuu and the couple proceeded to follow them using their private vehicle. The witness stated that her brother in law also a police man called Chief Inspector James Mwangi, accompanied the couple to Kitui Police station. The witness stated that, at Kitui Police Station they were informed that the kidnappers had been traced at Kisasi and the team left for Kisasi in pursuit of kidnappers. That before they left Kitui Town, another report came in stating that the kidnappers were then within Kitui Town. That the team started driving around the town and the police went to into a bar in their search with the witness remaining behind as she waited, she saw a person she suspected and called the deceased to inform him of the same. She stated that the deceased followed the person who was identified by the witness and arrested him but it turned out that she had mistaken him for her herdsman whom she suspected to be the culprit behind the kidnapping. She stated that she then heard gunshots and saw a lot of smoke and saw CI James Mwangi holding a gun adding that he had blood on his hands. She also saw the deceased and the person he had arrested on the ground. She later learnt that the deceased had passed away at the hospital. The witness stated that she was asked to collect her child from Wakulima Market August 4, 2013 but during cross examination she also stated that the child had not been released to her by August 23, 2013.

9. James Wahome Mwangi (PW2) a Police Officer told the court that he was stationed at Ruaraka Traffic Base at the material time. He also stated that Mary Mumbi (PW1) was his sister in law. With regards to the case, the witness stated that he was called by his wife on August 2, 2013 with information that her niece, PW1's daughter had been kidnapped. The witness stated that he asked for the number that the alleged kidnappers were using to demand for a ransom and when the same was provided he forwarded it to his colleagues for tracking. The officer also stated that he advised PW1 and her family to report the incident at Kayole Police Station. The witness stated that he joined PW1's family on August 3, 2013 at Thika Police Station where the police advised them that the callers had been traced to Witeithie-Thika and later at Matuu. That a team headed to Matuu and upon reaching there, they were advised that the mobile number line had been traced at Kitui. He added that the team proceeded to Kitui Police Station where they met Corporal Nyamondo and the accused, PC Wendot. The deceased also joined the team and they set out for the rescue operation. He testified that the Kitui Criminal Investigations Department Unit had advised them that the caller had been traced at Kisasi on the outskirts of Kitui Town. He told this court that as the team proceeded to Kisasi, they were called by Corporal Rono who advised them to change their search from Kisasi to Majengo in Kitui Town. He testified that the officers went to Majengo and commenced their search in social places where they searched until they got tired and they decided to take a break and as they looked for a place to eat, he stated that PW1 alerted him stating that she had seen a suspect heading in the officers' direction. He testified that, he saw the suspect in the company of another person and that the deceased gave instructions to Corporal Nyamondo to arrest the other individual as the deceased arrested the other suspect. He testified that a scuffle erupted as the suspect was arrested by the deceased as he resisted arrest and that shortly after he heard a gunshot, the deceased fell on the ground saying that he had been shot. The witness stated that



- the accused as well other the other Police Officers dressed in civilian clothes were all armed. He stated that the accused had an AK47 riffle while the deceased had a Ceska type of gun. He also stated that he saw the accused holding his gun while pointing upwards but he did not see him firing it. He also stated that he took the deceased's gun as it was not hoisted and the deceased was lying on it. He stated that the Ceska pistol was an automatic gun which did not have a safety pin and that meant it could discharge a bullet at any time on application of pressure.
10. George Kavindu Sua (PW3) who happened to be one of the suspected kidnappers being sought testified that he was walking with his friend in Kitui Town on the material date and time when they were suddenly confronted by the Police and forced to lie on the ground which they did. He testified that, as he was lying down, he heard a loud bang and shortly saw someone blood on the ground. He stated that later he was taken to the Police custody together with his friend and later escorted to the hospital for treatment as they sustained injuries during the commotion. He added that, he was with his friend Daniel Nguma Wanyama (PW4).
 11. Daniel Nguma Wanyama (PW4) stated that he was in the company on PW3 on the material day when they were arrested by people who claimed to be Police Officers. He stated that he was shot in the leg in the process of their arrest but he could not tell how he was shot. He stated that he was treated at Kitui General Hospital and later at Kikuyu PCEA Hospital.
 12. CPL Omollo Bonvix Nyamondo (PW5) a Director of Criminal Investigations Officer attached to Kitui South testified and recalled receiving a call from one PC Sila who was a Criminal Intelligence Officer on August 3, 2013. He told the Court that the nature of the call was to inform him about the presence of some people at the Police Station who required assistance. He stated, he talked to one of the people on phone and the person introduced himself as an officer from Criminal Investigations Department Offices. The witness added that he went back to the office and found two men and a lady seated at the office and that one of them introduced himself as Chief Inspector George Mwangi from Ruaraka Headquarters and introduced the other two as his sister in law named Mary and her neighbour called Daniel.
 13. The witnesses proceeded and testified that CIP Mwangi (PW2) then briefed him about kidnapping case informing him that the daughter of Mary (PW1) had been kidnapped and the kidnappers had been traced to be within Kitui Area. He stated that he notified his immediate boss CIP Maina (Deceased), who was then the Deputy Director of Criminal Investigations Officer and that he immediately went to the office where they were briefed by CI Mwangi (PW2), the deceased and instructed him to get ready and that he went to Sergeant Olweny who gave him a Ceska Pistol loaded with 14 rounds of ammunition while P.C Wendot (the accused herein) was issued with an AK 47 Assault Rifle by Corporal Adan Hilo (PW22).
 14. He further testified that after getting armed and ready, they went in for another briefing by the deceased who instructed them to go after the kidnappers. He stated that he consulted CI. Gicheru to give them the location of the kidnappers and he informed them that they were at Kisasi. He testified that together they travelled with other officers in motor vehicle Registration No KBT 606T that was driven by the deceased himself with the accused at the back seat while the witness sat at the co-driver's seat. He further stated that another vehicle driven by CI. Mwangi (PW2) carried Mary (PW1) followed them as they headed to Kisasi. He stated that it was around 3PM at the time adding that as they approached Wikililye Area, the deceased received another call from the Chief Inspector (CI) Gicheru notifying him that the suspects had relocated to Kitui Town from Kisasi. He stated that they then headed to Majengo Area within Kitui Town where they had been directed but after combing the area, they were unable to see any suspicious character.



15. He testified that they headed to Kunda Kindu Area where the deceased had been informed that the suspects were located. He testified that the deceased parked the motor vehicle besides a bar known as Envy Bar while Chief Inspector James Mwangi parked his motor vehicle 10 metres away from where they had stopped beside Envy Bar. He stated that, together with the deceased he got out of the car and were joined by CI. Mwangi who got out of the other motor vehicle and they went into Envy Bar where they found only 2 waiters with no customers. He stated that they got out and went into Kitmart Bar and Restaurant but did not see any suspicious character. He clarified that all this while, the accused remained in the car that was parked beside Envy Bar. He stated that they searched for about 30 minutes and returned to where the 2 cars were parked and after 15 minutes, Mary (PW1) whose daughter had been kidnapped called Chief Inspector Mwangi informing him that she had seen a suspect in a light blue shirt a metre from where they were standing and that he had a red Airtel Cap and was walking with another man. He testified that when the 2 suspects reached near where they were, Chief Inspector Maina (deceased) crossed over the road and grabbed the man with a red cap and light blue shirt from behind and held his neck as the two fell down. He testified that he crossed over and shouted to the other suspect that they were Police Officers as he grabbed him by the waist and moved about 10 metres away from where the other suspect was arrested. He stated that by then, the deceased was struggling with the other suspect he had grabbed and fallen down together struggling. He testified that the deceased removed his Ceska Pistol and fired one shot as they struggled and that he then fired another shot as the struggle continued. He stated that he saw the accused who had been inside the motor vehicle registration KBT 606T approach accompanied by Chief Inspector Mwangi and that the accused was carrying AK47 rifle and that he immediately heard gunshots coming from the direction of the accused and that the deceased shouted calling him by name informing him that he had been shot. He testified that the deceased fell down in pain and that he saw blood oozing and that the pistol the deceased had, had fallen down from his hand a metre away. He added that the deceased was still holding the suspect who was lying on his belly facing the ground. He testified that CI Maina was telling the accused to shoot the suspect because he thought that the suspect had shot him. He testified that he shouted to the accused telling him not to shoot the suspect because he was not armed. He added that Chief Inspector James Mwangi took the firearm dropped by the deceased and did safety precaution before they took the deceased to Neema Hospital where first aid was administered before they took him to Kitui General Hospital for treatment.
16. He testified that, he then proceeded with the suspects who were in the deceased's motor vehicle to the Central Police Station-Kitui where he booked them in the cells and handed over the firearms to Adan Guyo (PW6). He added that the deceased died shortly thereafter while undergoing treatment at Kitui General Hospital.
17. Senior Superintendent Adan Guyo (PW6) told the court that, he was the Director of Criminal Investigations Office Kitui at the material time. He gave a narration of how he was informed about the alleged kidnapping incident by the deceased. He also stated that he allowed the deceased, the accused and PW5 to proceed and assist in the tracing and rescuing of the kidnapped. The witness stated that he left the station and proceeded to his home but at 5.00pm the same day he heard some gunshots emanating from Kitui Town. That he later received a call from PW5 who informed him that the deceased had been shot. He testified that he proceeded to Neema Hospital where he found the deceased being attended to but the medics advised them to take the deceased to a better equipped hospital. He testified that they decided on Kitui General Hospital and that, while they were on their way, the deceased told him that he had been shot by the accused herein, and that this was the last statement the deceased made. They arrived at Kitui General Hospital where the deceased passed on as he was being attended to. The witness stated that he later gave instructions directing that all weapons be secured at the armory as well as securing the scene. On cross examination, the witness confirmed that the accused



was an officer in his team. He also told the court that the accused and the deceased had worked together in different assignments without any problems.

He added that there was no bad blood between them and that it is the deceased who asked the accused and the other officers to accompany him in the said operation. He added that he also heard the gunshots from the scene at around 5PM and that it took him approximately 10-15 minutes to reach Neema Hospital where he found CPL Nyamondo (PW5) sounding frightened and that the accused stood next to the Premio Car quite shaken and that he later learnt that he was left there guarding the suspects who had been placed in that vehicle.

18. He further testified that the Criminal Investigations Department took over the investigations adding that, the suspected kidnappers were not formally charged.
19. Corporal Livingstone Katui (PW7) a Police Officer told the court that he was attached to Director of Criminal Investigations Kitui Crime Scene Support Services. He stated that he was instructed to take photos of the scene. That upon arrival, he saw blood at the scene as well as 2 spent cartridges. That he suspected one from an AK47 rifle while the other was from a Ceska Pistol. The officer stated that he took sixteen photographs of the scene but an objection was raised by defence counsel before he produced the same as exhibits.
20. He added that, Daniel Ngumo Wanyamu worked as a mechanic while George Sua was a driver at the Kitui Diocese adding that the latter was shot during the incident and he found them at Kitui Police Station with a gunshot wound being prepared to be taken to hospital for treatment.
21. Catherine Mwangangi (PW9) a Clinical Officer who first attended to the deceased, testified that she was at the consultation room when at around 5:30 PM, when a receptionist called her and informed her that there was an emergency. She stated that he rushed to the reception where he found a middle aged man bleeding. She instructed the patient to be taken to dressing room where he examined him. He testified that the patient was able to talk and informed her that he was called Maina and that the thieves had shot him around Kitui Town. She testified that the deceased was bleeding profusely and she could not stop the bleeding. She stated that she tried to stabilize him and advised that the patient be taken to Kitui General Hospital for further management. She tendered the medical chit in respect to first treatment administered to the deceased as P Ex1.
22. Patrick Mwendwa Katuma (PW10) testified that he was a mechanic based at Matinyani, a “Jua Kali” garage within Kitui Town. He stated that on August 3, 2013 at around 5:30PM, a white car went near the garage and stopped. He added that, he saw 2 men disembark from the car before going into a club and came out shortly thereafter as another car with two occupants also parked nearby. He testified that he saw a person who was on the right side of the road stopping the ones on the left side and asking them to identify themselves. He further added that he saw one of the men remove a gun and shot one of the officers and he fell down as the other officers moved in and assisted him. He added that the mechanic was placed in the boot of one of the cars. He stated that the person who shot the other Police Officer whom he knew having previously repaired his car, was the accused person herein.
23. Lloyd Muchiri (PW11) told the court that he was based at Kitui Director of Criminal Investigations Office at the material time. He stated that he was given three firearms as well as spent cartridges for onward transmission to Criminal Investigations Department Headquarters for ballistic expert analysis. The exhibits were marked as follows;
 - i. 16 Ceska Pistol Serial No F 4528
 - ii. “A” AK 47 Rifle serial No 766922



iii. 'D' Ceska Pistol 40 No A4568

iv. M 1, M2, K –spent cartridges.

He testified that the purpose of the analysis was to ascertain the rifle from which the spent cartridges had been fired. The officer stated that he received the exhibits from Corporal Aden Guyo on August 4, 2013 and he delivered them to the Criminal Investigations Department Headquarters on August 5, 2018. The officer produced an exhibit memo dated August 4, 2013 as P Ex. 5.

24. Lawrence Nthiwa (PW12) an officer and ballistic expert attached to Director of Criminal Investigations Firearms stated that he received a memo from PW11 on August 5, 2013 from PW11. He stated that the memo contained instructions directing him to examine rifle Serial No 766992 marked as exhibit 'A', Pistol No F 4528 marked as exhibit 'C' and Pistol No A4568 marked as exhibit 'D'. The exhibits also contained 2 batches of 24 rounds of ammunition which were marked as C1-C10 and D1-D14. 28 rounds of ammunition marked 'A1- A-28'. The officer stated that he tested the ammunition on the rifles and found that spent cartridge marked as 'M1& M2' were fired from rifle marked 'A' (the AK-47). He also found that spent cartridge marked 'K' was fired from Ceska Pistol Serial No F 4528. On cross examination, the officer stated that the part for the examining officer on the exhibit form had not been filled. He also stated that some of the exhibits received were not enumerated in the memo. He also stated that the AK-47 ammunition is 7.62mm. The Officer produced the exhibit report dated August 12, 2013 as PEXH 6.
25. PC David Njogu (PW13) stated that he was stationed at Kitui Police Station at the material time. He indicated that he accompanied his colleagues to Kitui District Hospital Mortuary and was present when the wife of the deceased and the son identified the body of the deceased before the post mortem exercise.
26. Judy Waigumu Muruiki (PW14) the wife of the deceased told the court that she learnt of her husband's shooting from his colleagues and that she identified his body to the pathologist before the post mortem exercise.
27. Anderson Munda Musango(PW15) stated that he worked as a grounds-man at Kitui Catholic Diocese Church and that PW2 and PW3 were his colleagues.
28. Mohamud Ibrahim Aden (PW16) an Officer based at Critical Infrastructure Police Unit in Kiambu but was based at Kitui Central Police Station at the material time testified that he was in the company of Senior Superintendent Adan Guyo (PW6) at the material time when they heard gunshots.
29. He testified that Senior Superintendent Adan Guyo (PW6) was then called by the Officer Commanding Station with information that the deceased had been shot and was at Neema Hospital receiving treatment. He stated that they rushed to the said facility and found the accused holding an AK 47 rifle. He added that they were shortly advised by Medical Personnel at Neema Hospital to take the deceased to Kitui General Hospital adding that the deceased told them on the way, that the accused had shot him.
30. Catherine Kavuo David (PW17) stated that she was a nurse working at Neema Hospital at the material time and that she accompanied the officers as they transferred the deceased from their facility to Kitui General Hospital. It was her testimony that the deceased was unconscious and could not communicate
31. Dr. Juliet Akoth Ouko (PW18) from Kitui General Hospital stated that she conducted a post mortem on the body of the deceased on August 4, 2013 to ascertain the cause of his death. That before the procedure, the body was identified to her by Judy Waigumu Muruiki (PW14), the wife of the deceased and James Muriuki, the son. She stated that the deceased sustained a gunshot wound on the abdomen



- which left an exit wound on the mid region of 4cm in length and 2 cm in width. His left femoral artery was perforated at the level of the external wound and the femoral vein was partially torn. She stated that there was no bullet head found on the body. The pathologist concluded that the cause of death was hemorrhagic shock and that the deceased bled from the left femoral artery and vein. She produced a post mortem report dated August 4, 2013 as P-exh 17.
32. Commissioner of Police, Perminas Muchangi Thiuri (PW19) told the court that he was the County Police Commander Lamu but he was the OCPD Kitui Central at the material time. He stated that he visited the scene on August 4, 2013 and drew a sketch map. The witness proceeded to produce the same as well as a floor plan as P-exh 8 (a) and (b).
 33. Daniel Mwangi Mbugua (PW20) told the court that he accompanied PW1's husband, the father of the alleged kidnapped child to Ruiru Police Station to report the kidnapping. He also stated that he accompanied PW1 and PW2 as they tried to trace the kidnappers from Nairobi to Matuu and eventually to Kitui on the material day. The witness was also in the company of PW1 and Police Officers when the shooting happened in Kitui town. He stated that he was in a vehicle when PW1 called one of the officers stating that she had seen one of the suspects. He also described how the deceased and another officer apprehended the suspects and the struggle that ensued between the deceased and one of the suspects. The witness also told the court that he heard gunshots as PW2 went to assist the deceased in containing the suspect and the other gunshots that followed thereafter. He however stated that he could not tell who or where the shot was fired from.
 34. Senior Superintendent Bernard Gicheru (PW21) a Senior Operations Director with the Direct Criminal Investigations stated that he was called by PW2 on August 3, 2013 and asked him to assist in tracing location of a phone number of a suspected kidnapper. The officer stated that James Mwangi (PW2) told him that his sister's child had been kidnapped and that the kidnappers were using phone 0717758207 to contact the child's parents. The officer added that he stated tracking the number and confirmed that the suspect was heading towards Matuu. He further stated that he received a call from the deceased on the same day at around 3.45 pm, who briefed him about the matter and the officer informed him that the suspect was in fact at Kitui town at Endau road as he received the intel from the criminal investigations unit. He stated that he later learnt that the deceased had been shot and that he had succumbed to the injuries. The officer stated during cross examination that he was not the one who told Mwangi (PW2) to pursue the suspect to Kitui.
 35. CPL Adan Hilow Ibrahim (PW22) told the court that he was working at DCI Kitui Central at the material time and that he was in charge of armory. He stated that his job entailed issuing officers with weapons whenever they went out on duty. The witness explained the process involved in issuing weapons to police which includes recording of the issued firearm in the fire arm register. The record includes the firearm's serial number, the ammunition issued, the calibre and name of the weapon. That on the material day, the accused called the witness and asked for a firearm which he stated that he needed for a rescue operation of a kidnapped child. The witness stated that he gave the accused one AK 47 serial No 766992 and one magazine which contained 30 rounds of ammunition calibre 7.62mm. The deceased was also issued Ceska pistol serial number F4528 and one magazine which contained 14 rounds of ammunition calibre 9mm. Sergeant Peter Odonyo was issued a Ceska pistol serial No 4568 one magazine loaded with 14 rounds of ammunition, calibre 9mm. He added that, a Police Officer named Odonyo gave his firearm to PW5 (Omollo Nyamondo).
 36. The officer stated that the firearms were returned to the station and forwarded to the Criminal Investigation Department Office for forensic analysis. He stated that the magazine for the AK-47 had 25 bullets, adding that the two were fired at the scene and 2 spent cartridges were recovered while three were fired by ballistic experts. He testified that the Ceska Pistol issued to the deceased had 14 bullets.



The witness had 7 bullets in court and 4 spent cartridges. He did not explain where the 7 bullets were fired/spent. The other Ceska Pistol issued to Corporal Omollo (PW5) was loaded with 14 bullets. It was empty at the time it was presented in court, the officer stated that three of its bullets were fired by ballistic experts. The officer stated during cross examination that he could not tell whether the spent cartridges were expended from the scene or by the ballistics. He tendered the exhibits as follows:-

- i. The AK-47 was marked as PEXH 11, its magazine was marked as PEXH 12, life bullets as PEXH 13 (a-y), cartridges as PEXH 14 (a & b) , 3 other spent cartridges PEXH 15 (a, b, & c)
 - ii. Ceska pistol serial No F4528 was marked as PEXH 16, its magazine PEXH 17, 7 life bullets PEXH 18(a-g), 4 spent cartridges PEXH 19 (a-d)
 - iii. Ceska pistol serial No F4568 was marked as PEXH 20, its magazine PEXH 21, 11 rounds of ammunition PEXH 22 (a-k), 3 spent cartridges PEXH 23 (a, b & c).
37. Senior Superintendent Martin Minguto (PW23) a Director at Homicide Unit at Director of Criminal Investigations headquarters testified that after the incident he was instructed by his immediate boss Mohammed Amin to constitute a team from the Director of Criminal Investigations Offices to carry out comprehensive investigations about the shouting incident.
38. The Officer narrated how he accompanied his team to Kitui and the background they were given pertaining the kidnapping incident and the operation carried out as a result. He testified that from the background information, his team was tasked to establish the following: -
- i. Whether there was a kidnapping report at Tigoni police station.
 - ii. How the team from Nairobi arrived at Kitui with parents of the kidnapped child?
 - iii. Whether the Kitui Director of Criminal Investigation Office team left the station officially for the operation to track the alleged kidnappers
 - iv. Whether the people who were shot at the scene were from Nairobi or Kitui.
 - v. The number of riffles that were at the scene.
 - vi. The riffles that were used at the scene.
 - vii. The intervals of the shots at the scene and the person who fired them.
 - viii. The people shot during the incident.
 - ix. What prompted the accused to pull his trigger.
39. The officer established that there was indeed a kidnapping report which was made at Tigoni Police Station on August 2, 2013 at 4.00pm by a lady by the name of Lilian Wanjiku. Another report was made at Ruai Police Station on the same day and time by their neighbour and the parents of the child also made another report at Ruai Police Station at around 7.30pm the same day. The officer gave a narration of the demands that were made by the kidnappers as indicated by the parents of the child as well as the money that the parents sent.
40. The Officer further narrated how the parent of the kidnapped child and the two who had accompanied her, and arrived at Kitui following the leads provided by the Police who were tracking a mobile phone number that the kidnappers were reportedly using to demand ransom. He stated that the mobile phone was tracked from Thika to Matuu and eventually to Kitui.



41. He confirmed that they were able to establish that the Police Officers in Kitui acted properly and officially upon receiving the report about the kidnapping and that the operation conducted within Kitui Town was official.
42. On what transpired on the scene, the witness stated that the deceased and CPL Omollo Bonvix Nyamondo (PW5) were patrolling the town looking for the kidnappers while James Wahome Mwangi (PW2) was in communication with the mother of the child and officers from Nairobi who were tracking the alleged kidnapper's movements using their phone. That the accused was instructed to remain behind in the police vehicle as it was an undercover operation. He stated that, the mother of the child alerted James Wahome Mwangi (PW2) telling him that she had seen two men who she suspected were the kidnappers. The deceased and CPL Omollo Bonvix Nyamondo (PW5) went to arrest them but the suspect who was to be arrested by the deceased resisted and the deceased removed his pistol and shot in the air. That his pistol then fell down in the midst of the struggle and James Wahome Mwangi (PW2) rushed to pick it up. That as he picked the pistol, the accused came out of the police vehicle and started shooting towards them.
43. The Officer further stated that they were able to establish the identity of the suspects arrested during the incident and stated that the two suspects were employed by Catholic Diocese of Kitui and were arrested within Kitui when they were going about their official work.
44. He further testified that they were able to establish the AK 47 given to the accused and Ceska Pistol given to the deceased were the only firearms that were fired during the incident and that one of the suspects arrested by CPL Nyamondo (PW5) was shot with an AK47.
45. The witness also stated that they wanted to establish whether the accused fired his gun by accident and that the accused insisted that he was not the one who fired the shots. He also stated that three people were shot at the scene, the deceased, one of the suspected kidnappers and another person named Amos Murati who was shot on his forefinger. He stated that the police could not establish who shot them. The witness insisted that the accused shot at the deceased and the suspect and not in the air. The officer also stated that the accused had no reason for shooting as he had been instructed to remain in the police vehicle. He however also stated that his investigation found that the accused got out of the vehicle after he heard a gunshot. He also stated that he found out that the deceased asked the accused to shoot at the suspect. In his view, the deceased asked the accused to shoot the suspect because of the pain he felt after being shot. It was his opinion that the accused had the intention of shooting the deceased.
46. The accused person when placed on his sworn defence vehemently denied the charge. He told this court that he was stationed at Kitui at the material time with the Director of Criminal Investigations. The accused explained the relationship he had with the deceased as his boss. He also explained that he was on duty on the material day and how Mary Mumbi Njogu (PW1) and James Wahome Mwangi (PW2) went to the station to report the kidnapping incident. He also narrated of how he was instructed to get a firearm and how the police officers together with Mary Mumbi Njogu (PW1) and James Wahome Mwangi (PW2) proceeded to Kisasi to look for the kidnappers. The accused also narrated of how the journey to Kisasi changed after they received information that the kidnappers were in Kitui town. He also told the court of how he was instructed by the deceased to remain in the police vehicle as the deceased and Nyamondo (PW5) looked for the suspects on foot. He stated that he remained in the vehicle for about 30 minutes before he heard gunshots. That he got out of the vehicle and saw many people running towards the scene. He stated that he shot in the air twice then noticed that his boss, the deceased was down wrestling with a suspect. That the deceased told him the words, 'huyu mtu amenipiga'. That the deceased then asked the accused to shoot the suspect but PW5 shouted and told him not to shoot as the suspect was unarmed. That James Wahome Mwangi (PW2) then went and



- picked the gun which the deceased had and the accused saw that the deceased had been shot on the thigh. That the deceased was then taken to hospital while the suspects were taken away to the station. He narrated of the events that followed following the incident including his transfer and his subsequent interdiction from work.
47. He insisted that he only fired two rounds of ammunition in the air adding that at the scene three people were shot namely the deceased, Daniel Nguma (PW4), the suspect held by Nyamondo (PW5) and a civilian who was in the crowd near the scene.
 48. He pointed out that, the report booked at the OB on the same material date by CPL Nyamondo (PW5) indicated that he had shot in the air to disperse the crowd and tendered the OB extract (D Ex 1) as prove of his case.
 49. In his written submissions done through Learned Counsel M/s M.M. Kimuli and Co. Advocates, the accused submits that the prosecution has failed to discharge its duty to prove the charge of murder against him.
 50. He contends that the twenty-two witnesses called by the prosecution failed to prove all the ingredients of murder (Actually the Prosecution called a total of 23 witnesses not 22 (to set the record straight). He points out that the element of Mens rea was not proved and in his view in the absence of prove of the motive of the murder he should be acquitted.
 51. The defence further submits that none of the witnesses saw the accused shooting at the deceased adding that the ballistic report did not show that the bullet that shot and killed the deceased was fired from the AK 47.
 52. He submits that it was probable that the deceased was shot by the suspect as they wrestled or that the deceased accidentally shot himself as he wrestled with the suspected kidnapper.
 53. He points out at the evidence of a Medical Officer Catherine Mwangangi (PW9) who testified that when the deceased arrived at the 1st Medical Facility (Neema Hospital), he reported to her that he had been shot by thieves.
 54. He cites the celebrated English decisions in *Director of Public Prosecution versus Wolmington* (1935) UKHLI and *Miller versus Ministry of Pensions* [1947] & AU ER 372 to support his position that none of the witnesses called helped the Prosecution in discharging the heavy burden imposed on it by law insisting that there are doubts as to which bullet killed the deceased and who fired it.
 55. He contends that Mary Mumbi (PW1), James Mwangi (PW2) and George Sua (PW3) who were at the scene, did not see the accused shoot the deceased. He casts doubt about the veracity on the evidence of Patrick Katuma (PW10) who testified that he saw the accused shoot the deceased. According to the defence PW10 cannot be believed because he did not elaborate from which point or direction was the accused standing when he shot at the deceased. The accused contends that the medical examination revealed that the bullet that killed the deceased entered from the lower abdomen and exited on the left side. In his view, there is no evidence that places him at the exact point of shooting.
 56. The defence urges this court to treat the evidence of Patrick Mwendwa Katuma (PW10) with caution because he is the only witness at the scene who states that he saw the accused shooting at the deceased. he cites two decisions to wit: -
 - a. Wamunga versus Republic (1989) K.LR and,
 - b. Roria versus Republic [1967] EA 587 to buttress his contention that court should exercise caution in relying on evidence of a single witness in rendering a conviction.



57. He submits that the evidence of PW10 is inconsistent with the evidence of Catherine Mwangangi (PW9) who stated that the deceased told her she had been shot by thieves.
58. On Mens rea, the defence contends that the evidence of Perminas Muchangi Thiuri (PW22) who was the Officer Commanding Police Division Kitui Central at the material time confirmed that the deceased and the accused had a good working relationship.
59. He submits that he did not come out of the car at the scene at first and only came out when gun shots rent the air. He contends that by the time he reached where the deceased was, he had already been shot and that the deceased instructed him to shoot at the suspect but was stopped by CPL Nyamondo (PW5). He contends that he fired 2 shot in the air to calm the situation.
60. He contends that there is no evidence that he held grudge or personal vendetta against the deceased. He submits that the deceased was the one in charge of the operation and he only followed instructions given to him and carried out his assignment as per the instructions given.
He submits that Prosecutions Case is marred by inconsistencies and cannot sustain the charge of murder.
61. This Court has considered the evidence tendered by the Prosecution in this case and the defence presented by the accused.
62. The accused person as stated above is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code.
63. It is now well settled that for a charge of murder to be sustained, the Prosecution must prove the following elements or ingredients beyond doubts namely;
- a. The death of the deceased and the cause.
 - b. That the accused committed the unlawful act which caused the death of the deceased.
 - c. That the act was committed deliberately with malice aforethought (Mens rea).
64. The fact of death and its cause
The evidence tendered in this case regarding the fact of death and the cause are not disputed. The deceased was shot at the scene of an operation to nab some suspected kidnappers. The evidence of CIP James Mwangi (PW2). George Sua (PW3) who was one of the suspected kidnappers and Omollo Nyamondo (PW5), shows that, the deceased sustained a fatal shot during the operation. The accused in his defence also, conceded to this fact.
65. PC Daniel Njogu (PW13) and the wife of the deceased Judy Waigumu Muriuki (PW14) identified the body of the deceased on 4th August, 2013 before the post mortem was done.
66. Dr. Juliet Akoth Ouko (PW18) the doctor who performed the post mortem examination on the body of the deceased verified that the deceased died from injuries sustained from a gunshot wound and that the cause of death was hemorrhagic shock and that the deceased bled from left femoral artery and vein. She tendered the Post Mortem she authored as P Ex 17. The same clearly shows that the deceased died from excessive bleeding as a result of a gunshot. The doctor confirmed that there was no bullet head found in the body of the deceased because it entered the body through gluteal region (Pelvic Region) and exited through Mid Region (abdomen).
67. In view of the evidence tendered, this court finds that the Prosecution's Case proved the first ingredient of fact of death and cause beyond doubt.



68. (ii)

Whether the accused committed the unlawful act that caused the death (Actus reus)

Having proved the fact as well as the cause of the death of the deceased, the prosecution is under a duty to prove whether the death of the deceased was caused by an unlawful act or omission on the part of the accused.

69. As indicated from the background of this case highlighted above, the circumstances leading to the death of the deceased arose from what started as a rescue operation of a child reported to have been kidnapped in Nairobi. It is the deceased that set up a team comprising of the accused, CIP Mwangi (PW2), CPL Nyamondo (PW5). It is clear from the evidence tendered that it was the deceased who asked the accused to be armed with an AK 47 rifle and accompany him in what later turned out to be a botched operation. Mary Njogu (PW1) testified that when the 2 suspects were arrested, it turned out that the suspect she pointed out was not the one she thought she had employed. She had made a fatal mistake in other words but it was too late to reverse what had taken place.
70. The events of the shooting were narrated differently by various witnesses. Chief Inspector of Police James Mwangi (PW2), a Police Officer who accompanied Mary Njogu (PW1) from Nairobi to Kitui stated that after getting communication from Mary Mumbi Njogu (PW1) that she had seen the suspects, he forwarded the information to the deceased who directed the officer on how they were going to carry out the arrest. That the deceased instructed Corporal Omollo (PW5) to arrest one of the suspects while he, the deceased went to arrest the other suspect. That Corporal Omollo (PW5) executed the arrest but when the deceased proceeded with his assignment, the suspect resisted. That the deceased struggled and wrestled the suspect to the ground and the witness heard a gunshot. He stated that he did not know where the gunshot came from and he immediately heard the deceased saying that he had been shot. That members of the public started gathering and that he stated that he reached for the pistol that the deceased was carrying and then he heard two subsequent shots. He stated that he saw the accused with an AK 47 rifle pointing upwards and he could tell whether the shots came from an AK-47 rifle. On cross examination, he stated that he heard the first gunshot as the deceased struggled and fell down with suspect. He stated that the gun was not heisted and that the deceased was lying on it. He also stated that it did not have a safety pin and a bullet could be discharged on application of the slightest pressure.
71. I have considered the evidence given by the accused in his sworn statement and finds it quite consistent with what Corporal Nyamondo (PW5) and CIP James Mwangi (PW2) stated on what transpired at the scene.
72. According to Chief Inspector of Police James Mwangi (PW2), as they were combing the area to locate the suspected kidnappers, Mary Njogu (PW1), the person whose child had been kidnapped and who knew the suspect well, suddenly pointed a person walking by with a blue t-shirt as the culprit and he immediately alerted Corporal Omollo to arrest him. The suspect was walking with another person and so as Corporal Nyamondo arrested one, the deceased caught hold of the other one and according to James Mwangi (PW2), CPL Nyamondo (PW5) arrested the suspect professionally unlike the deceased who is said to have done it from behind leading to the suspect resisting and hence a scuffle that ensued. This is how he described the incident: -

“.....the person resisted and there was a scuffle. All of a sudden, I saw CI Maina (deceased) down on the ground. I ran to assist him. I managed to assist CI. Maina stand and the man struggled with him and CI. Maina (deceased) fell down again. As they struggled I heard CI. Maina say he had been shot. I got scared I turned to check what was happening.....”



73. Chief Inspector of Police James Mwangi (PW2) was candid that he heard two gunshots and he could not tell where the shots emanated from and that after he got hold of the pistol the deceased had, he heard 2 more shots and when he turned he saw the accused with AK47 “pointing upwards”. This is after the first gunshots were heard and after members of the public gathered at the scene and according to PW2, he tried to tell members of the public to move away and give space.

The question lingering therefore is, who shot at the deceased? Did he accidentally shoot himself as they struggled with the suspect who was resisting arrest as advanced by the defence or he was shot by the accused as stated by Patrick Katuma (PW10) who as a Jua Kali Mechanic at the scene at the time?

74. Now let me consider in detail the testimony of CPL Omollo Nyamondo (PW5) about the relevant part about what transpired at the scene.

In my considered view, CPL Nyamondo is a diligent officer who despite the risks involved appeared calm and collected at the material time. The reasons for my conclusion is that apart from the testimony of James Mwangi (PW2) who was impressed by the manner PW5 effected the arrest of one of the suspects. His quick action stopped the accused from shooting the suspect who was struggling with the deceased despite express orders from the deceased ordering him to shoot. CPL Omollo Nyamondo (PW5) had quickly ransacked the suspect he had arrested and realized he was unarmed and that could have made him correctly conclude that that both suspects were unarmed at the time. He had also quickly shouted at the suspect telling him he was a Police Officer and moved him 10 metres away from the other suspects as a precaution. Had he not stopped the accused from shooting it is likely that two lives as opposed to one life could have been lost.

75. Having said this is what CPL Omollo Nyamondo described the shooting incident:

“I grabbed him (suspect) by the waist and moved 10 metres away with him. By then CI Maina (deceased) was struggling with a suspect he had arrested. He removed his firearm, the Ceska Pistol and fired one gunshot as they struggled. He fired a 2nd shot. This is when I saw Police Constable Wendot (accused) who was in the motor vehicle Registration No KBT 606 T. He came accompanied by CI Mwangi, immediately I heard gunshots coming from that direction of PC Wendot (accused) who was carrying an AK 47 rifle. Immediately after the gunshots CI Maina (deceased) shouted at me. He called me by name Nyamondo saying he had been shot. He fell down in pain. I saw blood oozing. CI Maina was still holding the suspect who lay on his belly on the ground CI Maina (deceased) ordered P.C. Wendot to shoot the suspect as he was alleging that he is the one who had shot him. I shouted to PC Wendot not to shoot the suspect as he had not recovered any fireman from him and he had not established if they were the kidnappers.....”

76. The accused person on his part stated that he pointed his gun upwards and shot in the air to disperse the crowd that had gathered which I find quite consistent with the evidence of James Mwangi (PW2) who stated that he saw the accused with his gun pointed upwards.

77. On the other hand, Patrick Mwendwa Katuma (PW10), a Jua Kali mechanic at the scene at the material time was categorical in his evidence that it was the accused who shot at the deceased. This is how he described the incident.

“.....the people who arrived in the full motor vehicle are the ones who told one in KBT to identify themselves. One of the men removed a gun and shot at the person who came in KBT. He fell down. He had a gun that was a bit long. I knew the individuals. Those who were in the saloon car the first one I knew him (sic). I had repaired his motor vehicle. He



was a Police Officer. The person who shot the other was a Police Officer I knew very well. He is the accused in the dock. He shot him and the person fell down. He tried to rise up to take his pistol that he had and a cell phone but he shot him the second time. The one who was shot had a pistol. There was a mechanic who was also shot. The mechanic was near the person who was shot.....”

78. Looking at the description of events as narrated by PW10 visa viz the narratives given by Mary Mumbi Njogu (PW1), James Wahome Mwangi (PW2) and CPL Omollo Bonvix Nyamondo (PW5), one is left doubting if the narratives relate to the same incident because of the apparent inconsistency between the narrative given by Patrick Mwendwa Katuma (PW10), as opposed to the narratives given by the other eye witnesses James Mwangi (PW2), George Kavindu Sua (PW3) and Corporal Omollo (PW5).

79. Given the totality of the evidence tendered and the circumstances surrounding the incident, this court finds that the defence contention that evidence of Patrick Mwendwa Katuma (PW10) was unreliable is well founded.

The reasons for that conclusion are as follows: -

- i. In the 1st Place, the shoot-out did not occur immediately the two cars stopped at the scene. It took time as the officers went about trying to trace the suspects and it was only after PW1 alerted PW2 that she had spotted the suspect that PW5 in conjunction with the deceased swung into action. The shooting did not occur immediately the officers disembarked from their cars as stated by PW10. That clearly shows that he either did not see what happened clearly or gave a misleading narrative. Either way his credibility is suspect.
- ii. Secondly, he also says that the deceased was shot twice by the accused which evidently is not factual given the medical examination on the body of deceased conducted by PW18.
- iii. Thirdly, the witness (PW10) appeared to be mixed up on how the 2 vehicles arrived at the scene and which officers came in which car. He says that the men in the first car told the one in KBT to identify themselves. According to him, officers in the 1st car asked the officers in the second car to identify themselves before the officer who came in KBT was shot.

80. This narrative is evidently misleading given the circumstances surrounding the incident. Both officers in both vehicles were acting in unison and all were interested in nabbing suspects they did not know and who were only known by PW1-the mother of the child victim reportedly kidnapped.

81. I have considered the statement by the accused that he fired 2 shots in the air to disperse the crowd and find that the same is backed by the report booked on the OB (D Ex1) on the material date besides the testimony of James Mwangi (PW2).

82. From the foregoing, this court finds it unsafe to conclude that the element of actus reus has been proved based solely on the evidence of Patrick Mwendwa Katuma (PW10) because I find that his evidence was unreliable for the aforesaid reasons.

83. The Prosecution's Case on the element of actus reus also rested on the evidence of Senior Superintendent of Police Aden Guyo and Mohammed Ibrahim Aden (PW16). These two witnesses told this court that they were away from the scene but when they heard the gunshots they rushed to the scene and later found the deceased at Neema Hospital been attended to by a medical officer. According to them, the deceased told them that the accused had shot him and after saying that he never talked again he later died while undergoing treatment at Kitui General Hospital.



84. The question posed is whether the evidence tendered by Senior Superintendent Adan Guyo (PW6) and Sargent Mohamud Ibrahim Aden (PW16) can be taken as a dying declaration and a basis to render a finding that the element of actus reus has been established.
85. Under section 33(a) of the *Evidence Act*, a statement made by a deceased person relating to his cause of death is admissible in evidence;
- “.....When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”
86. The *Black’s Law Dictionary*, 6th Edition defines a Dying Declaration as;
- “a statement made by a person who believes he is about to die in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them.”
87. Senior Superintendent Adan Guyo (PW6) was not at the scene but his testimony was that the deceased told him that he had been shot by the accused as they took him to Kitui General hospital. He was accompanied by Sargent Mohamud Ibrahim Aden (PW16) whose testimony was that the deceased told them that he had been shot by the accused herein.
88. However, the evidence tendered by Catherine Mwangangi (PW9) the Clinician who was based at Neema Hospital at the time appears to contradict the testimony of Sargent Adan Guyo (PW6) and Sargent Mohamud Ibrahim Aden (PW16) who also saw the deceased at that facility. According to the Clinical Officer, the deceased informed her that thieves had shot him within Kitui Town.
89. Furthermore, Catherine Kavuo David (PW17) another nurse at the same facility testified that he accompanied the deceased from Neema Hospital to Kitui General Hospital and according to her the deceased was not talking. This cast doubts about the testimony of PW6 who stated that the deceased told him on his way to Kitui General Hospital that it is the accused who shot him.
90. The apparent contradictions by the Prosecution Witness cast doubts about what the deceased actually stated before passing on and which declaration was factual. In such contradictory circumstances it is unsafe to base a conviction on one set of a dying declaration as opposed to the other.
91. In *Philip Nzaka Watu versus Republic* [2016] eKLR, the Court of Appeal observed the following on admission and reliance of a dying declaration;
- “Under Section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court



must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

92. The deceased appears to have made, at least if the prosecution witnesses are to be believed, contradictory statements as to who shot him. According to Corporal Omollo Bonvix Nyamondo (PW5), the deceased stated that one of the suspects shot him Catherine Mwangangi (PW9) stated that the deceased said thieves shot him while Senior Superintendent Adan Guyo (PW6) and Sergeant Mohamud Ibrahim Aden (PW16) stated that the deceased told them that it was the accused that had shot him. In view of the apparent contradictions it is not safe to base a conviction on uncertain dying declarations.
93. The only other reliable evidence that could have assisted this court was the forensic analysis that could have shed light on the kind of the bullet that led to the death of the deceased.
94. Evidence from the ballistic analysis in my view could have given a definite answer as to the bullet that caused the death of the deceased. However, the only information I got from the ballistic report was that from the exhibits presented to Criminal Investigations Department, cartridge marked as ‘M1& M2’ were fired from riffle marked ‘A’ (the AK-47) while spent cartridge marked ‘K’ was fired from Ceska Pistol Serial No F 4528. The source of the spent cartridges was not clarified to the court.
95. It is therefore, not certain in view of the above to make a definite conclusion that the bullet that hit and killed the deceased was fired from an AK 47 which rifle was held by the accused at the scene at the material time. It is evident that the accused was in a standing position when he got out of the motor vehicle and even if he was to fire at the deceased or the suspect held by the deceased, the angle of the shot could not have what the doctor found out. Considering that the deceased and the suspect was then on the ground struggling with the accused on a higher elevation, there was no explanation given on how the bullet could hit the deceased on pelvic region and exit on the lower abdomen.
96. In light of the above, this Court finds that the Prosecution has failed to establish prove beyond reasonable doubt the element of actus reus or connect the unlawful act that ended the life of the deceased with the action taken by the accused at the scene.
97. (ii) Mens rea

The evidence tendered by the Prosecution failed to establish the motive, or show that the accused harboured ill motive against his boss the deceased herein. The evidence given by Senior Superintendent Adan Guyo (PW6) who then was the Director of Criminal Investigations Office, shows that, the accused and the deceased worked and related well together. The accused told this court that, prior to the botched operation, he had accompanied his boss the deceased to another operation at Kwa Vonza Area in a robbery incident. It is also not lost that the botched operation was planned on the same material day. There was not prior planning. Furthermore, it is the deceased who was charged with the planning and executing the operation. He is the one who directed that the accused be armed with an AK47 and oversaw the whole operation including directing the accused to remain in the car as they swiftly moved in to arrest the suspects. CPL Omollo Nyamondo (PW5) testified that it is the deceased who ordered the accused person to shoot at the suspect who was still wrestling with him but CPL Omollo Bonvix Nyamondo (PW5) stopped him. The Accused knew CPL Omollo Bonvix Nyamondo (PW5) to be of lower rank than the deceased and so if he harboured ill motive, he had reasons to disobey CPL Omollo Bonvix Nyamondo (PW5) and follow the orders of the deceased who was his boss and fire at both of them (the suspect and the deceased) since after all he did not. It is quite difficult to fathom what went on in the mind of the accused at that particular moment when faced with the dilemma but what is clear from evidence is that he did not shoot at the suspect and this court finds that he harboured no ill motive to harm the deceased or the suspect. Furthermore, the Prosecution’s Case has failed to establish



this crucial element of Mens rea and in the absence of the element actus rea, the element of Mens rea cannot be inferred under Section 206 of the *Penal Code*.

As observed above, this was unfortunate incident of a botched operation to rescue a reported kidnapped child. This Court apart from being informed that the 2 suspects arrested were mistaken, was not given details about the kidnapping in Nairobi and whether the kidnapped child eventually was rescued safe or not. That issue remained a mystery during trial but, what is clear is that, the Prosecution has failed to prove its case against the accused in respect to the death of the deceased.

This court, having found the evidence insufficient to sustain the charge hereby finds the accused not guilty and he is hereby acquitted of murder charge and shall be set free unless lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 8TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

