



**Republic v Galgalo & 2 others (Criminal Case 6 of 2019)
[2024] KEHC 13922 (KLR) (4 October 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE 6 OF 2019
JN NJAGI, J
OCTOBER 4, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

GALMA GALGALO 1ST ACCUSED

DIID GALMA GALGALO 2ND ACCUSED

HALKANO DUB SASO 3RD ACCUSED

JUDGMENT

1. The accused herein are facing three counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offences are that on the 24th May 2019 at Manyata Conso Banchalle in Marsabit Central sub county within Marsabit County they murdered Dahabo Hussein Guracha (the deceased in count 1), GRD (the deceased in count 2) and Askuno Roba Diba (the deceased in count 3).
2. The prosecution called 12 witnesses and upon the closure of their case, the court found the accused to have a case to answer in all the three counts and placed them to their defence. The accused offered their defences and called witnesses.

Case for prosecution

3. The case for the prosecution is that on the morning of 24th May 2019, the residents of Konso Banchale village woke up to a hail of bullets after a gang of people invaded the village while armed with guns and started moving from house to house on a killing spree. They entered into the house of Dhahabo Hussein Guracha (the deceased in count 1) and shot her dead. The incident was witnessed by her sons, Abdu Hussein Guracha PW1 and Isaak Hussein PW2 and her daughter, Fatuma Hussein PW7. Abdu Hussein PW1 was shot on the leg while his brother called Galgalo Hussein was shot on the chest.



4. The gang then moved to the house of Askuno Roba (the deceased in count 3) and shot her dead together with her son, GRD, the deceased in count 2. They sprayed her sons CR PW6 and GR PW8 with bullets but the two miraculously survived to tell the story. The gang escaped after the macabre execution.
5. A report of the attack was made at Marsabit police station. Policemen who included Cpl Samuel Gichuki PW11 rushed to the place. They found some of the injured being taken to hospital. They collected the bodies of those who had been killed.
6. Cpl Gichuki investigated the case. It was his evidence that 70 spent cartridges were collected at the scene. He prepared an exhibit memo and sent them to the ballistics expert for examination. They were examined by a firearms examiner PW10 who confirmed them to be ammunition as per the [Firearms Act](#).
7. A clinical officer at Marsabit Referral Hospital PW12 filled the P3 form of Abdi Hussein PW1. He found him to have sustained a fracture of the foot that was caused by a penetrating object.
8. Cpl Gichuki, recorded statements of witnesses. The three accused were mentioned by witnesses – PW1, PW2, PW4, PW6, PW7 and PW8 - to have been among the killers. They were arrested over the murders and charged with the offences. During the hearing the ballistics examiner PW10 produced his report in court as exhibit, P.Exh.2. Cpl Gichuki produced the exhibit memo as exhibit, P.Ex 3. The clinical officer PW12 produced the P3 form for Abdi as exhibit, P.Exh.5(b).

Defence Case

9. In his defence the 1st accused, Galma Galgalo, stated that on the morning of the material day he was at his home which is near Konso Banchalle manyatta. That he heard gun shots and escaped. He denied that he was in the group that attacked the deceased herein. He called two witnesses in the case – Stephen Sora, DW5 and Jillo Adi, DW6. It was the evidence of DW5 that he was on the material day in Nairobi when the 1st accused called him and told him that his village was under attack. The 1st accused asked him to call the police to go and evacuate him.
10. Jillo Adi DW6 testified that she is a neighbour to the 1st accused. That on the morning of the material day at 6 am she was woken up by the 1st accused who informed her that there were gunshots nearby. She woke up and escaped with the 1st accused.
11. The 2nd accused, Diid Galma, stated that he was arrested on 26/5/2019 over matters he had no knowledge about. He called his sister, DW4, as a witness in the case. It was the evidence of the witness that she lives in the same plot with the 2nd accused at Shauri Yako village in Marsabit town. That on the morning of 24/5/2019, she woke up at 6 am. That some people were saying that the village where his father, the 1st accused, lives had been attacked. The 2nd accused's door was locked from inside. She knocked the door and woke him up.
12. The 4th accused, Halkano Dub (the 3rd accused having been acquitted under no case to answer), testified that on the material day at 6 am he was at his home at Malko Lakole village. That his sister went and told him that there were gun shots at Konso Bachale village. He was later arrested on 22/8/2019. He called 2 witnesses, DW8 and DW9. DW8 testified that the 4th accused was his next door neighbour at Malko Lakole village. That on the morning of 24/5/2019 he let out his cattle at 6 am. He then heard gunshots. That the wife to the brother of the 4th accused called Garo Wario went to the house of the 4th accused and woke him up. The 4th accused woke up and escaped with his children. He DW5 did not escape but remained behind with his cattle.



13. Garo Wario DW8 told the court that she is a neighbor to the 4th accused and is married to his brother. That on 24/5/ she woke up at 6 am to prepare her children for school. She then heard gun shots. She woke up her children. She knocked the door of the 4th accused and woke him up. They joined other people who were escaping and they escaped.

Prosecution's submissions

14. The prosecution submitted that the fact and cause of death of the deceased persons was established by the witnesses who saw the deceased being shot at and saw their bodies. That this was confirmed by the doctor PW9 who conducted postmortems on the bodies and made a conclusion that they all died due to penetrating gunshot injuries.
15. It was submitted that the prosecution witnesses, PW1, 2, 4, 6, 7 and 8 variously identified the accused persons to have been among the people who killed the deceased persons. That though there are some inconsistencies in the witness testimonies, the same do not go to the root of the matter as the accused were placed at the scene of the attack by witnesses. The prosecution cited the decision in the case of Philip Nzaka Watu v Republic (2016) eKLR where the Court of Appeal held that:

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elia Nsamba Shapwata & Another V. The Republic*, CR. APP. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

16. It was submitted that the accused were neighbours known to the prosecution witnesses for a number of years. That there was sufficient lighting during the attack and the circumstances were favourable for their identification. That the witnesses positively identified the accused persons.
17. It was submitted that the defences of the accused persons were dislodged by the testimonies of the witnesses who saw them at the scene. That the prosecution has proved beyond reasonable doubt that the accused were responsible for the death of the deceased.
18. The prosecution submitted that the deceased were shot severally as noted by the doctor PW9. That 70 cartridges were collected at the scene showing that the attackers shot indiscriminately. That PW6 and 8 were left with serious and permanent injuries amounting to grievous harm. That it was clear that the attackers had the sole intention of causing grievous harm or death. Therefore, that malice aforethought has been established and the accused are guilty of all the three counts of murder.



Accuseds' submissions.

19. The accused submitted that the doctor who performed the postmortem reports is not a pathologist and therefore does not have the requisite expertise to undertake a conclusive medical examination and make a proper finding of the cause of death.
20. It was submitted that there was no direct evidence placing the accused persons at the scene of the shooting. That the absence of firearms or weapons linking the accused persons to the crime scene weakens the prosecution's claim.
21. It was submitted that the accused persons have provided corroborated alibis supporting their claims of non-involvement. That their witnesses confirmed the whereabouts of the accused during the attack which further challenges the prosecution's case. They submitted that the prosecution had failed to prove the charged beyond reasonable doubt. They urged the court to acquit them.

Analysis and Determination

22. This being a criminal case, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 stated this degree to be as follows:

“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.”

23. The accused are charged with offences of murder contrary to section 203 as read with section 204 of the Penal Code.

Section 203 of the Penal Code defines murder in the following terms:

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

24. The prosecution in order to sustain a conviction for the offence of murder must prove the ingredients of the offence which were stated by the Court of Appeal in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to be that:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

25. In this case the prosecution was obligated to prove beyond reasonable doubt the following elements of murder:
 - a) That there was the death of the deceased and the cause of the said death;
 - b) That the death was caused by unlawful acts or omission;
 - c) That the accused committed the unlawful act which caused the death of the deceased; and



- d) That the accused had malice aforethought.

Death of the deceased persons

26. Dr. Steve Makori PW9 of Marsabit County Referral Hospital conducted postmortems on the bodies of the three deceased persons. He found the body of Dhahabo Hussein with a penetrating wound on the anterior abdomen with no exit wound. He formed the opinion that the cause of death was due to penetrating injury on the abdomen.
27. The doctor found the body of GRD with multiple entry wounds on the chest, head and back. There was an exit wound on the head. The doctor formed the opinion that the cause of death was due to severe head injury and penetrating chest injury due to gunshot wounds.
28. On the body of Askuno Roba Diba, the doctor found it with an entry wound on the left humerus, entry on the left lateral chest with no exit wound and open wound on the head with no visible entry wound. The doctor formed the opinion that the cause of death was due to severe head injury and penetrating chest injury due to gun shot wounds.
29. The prosecution called witnesses who saw the three deceased persons being shot with guns by a gang of people. The doctor PW9 confirmed that the deceased persons died as a result of gunshot wounds. The death and cause of death of the deceased persons was therefore proved. The deceased persons died as a result of an unlawful act caused by gun shots.

Whether the accused committed the unlawful act which caused the death of the deceased

26. The children to Dhahabo Hussein (deceased in count 1) - Abdu Hussein Guracha PW1, Isaak Hussein PW2 and Fatuma Hussein PW7 testified that they witnessed the attack at their home wherein their mother was killed. It was the evidence of Abdu Hussein PW1 that he was at the time inside his parents house with his mother, his sister and a brother. He heard gun shots from his uncle's house about 20 meters away. He hid in some boxes in the bedroom. Some people then went to their house. One of the persons told them to open the door. He recognized the voice as that of Halkano Dub Saso, the 4th accused who was a person well known to him for a period of 5 years. They did not open the door. The attackers then broke the window and opened a fire of bullets into the house. His mother was hit on the head while he was hit on the leg. The people broke the door and entered into the house. He saw Halkano the 4th accused and two others who were not before court. The people said that there was nobody in the house. He heard the 4th accused telling the others they leave. They left.
27. Isaak Hussein PW2 testified that at the time of the attack he was at his uncle's house, a distance away from his parents' house. That the door to the house was locked from outside. He heard gun shots from outside. He hid under the bed. The attackers then broke the window to the house. They left. He then peeped through the window and saw three people dressed in police uniform headed to his parents' house where his mother, brothers and sister were. He recognized the people as his neighbours, the 4th accused and two others not before the court. The people broke the door to his parents' house. He later saw the people leaving the manyatta through the fence. He stayed at his hiding place until when neighbours came out and opened the door for him. He found his mother having been shot dead and his brothers PW1 and Galgalo having been shot and injured.
28. Fatuma Hussein PW7 testified that on the material day at 6 am she had just woken up to prepare for school when she heard gun shots. Her brother Abdi locked the door to their house. Her mother hid in a box in the house. Abdi covered himself with clothes. She heard some people telling them to open the door. She identified the voice as that of Halkano Dub, the 4th Accused. The people started to break the



door. A person entered his hand into the room and started to shoot into the house. She identified the hand as that of Halkano, the 4th accused. The people started to break the door to the house. She rushed into the bedroom and hid among some clothes. She heard the door falling and some people entering into the house. Three people entered into the bedroom through the sitting room. She identified them as her neighbors - Halkano, Doyo Tunu and Buke Diba. Halkano then shot at her mother where she was hiding at the box. Her blood splattered on her. Her brother Abdi was shot on the legs. Her brother Galgalo was shot at and injured. The people did not see her. They went away.

29. On the death of Askuno Roba Diba (the deceased in count 3) and Galgalo Riba Diba (the deceased in count 2), it was the evidence of CR PW6 that he was at material time at 6 am preparing for school when some people broke the door to their house and six people entered into the house. There was electric bulb light on in the room. He knew five of the people who were his neighbours. The three accused were among the five people. The other two were not before the court. The people pointed guns at them. His mother and his brother Galgalo pleaded with them not to kill them. Galma, the 1st accused fired at his mother and she fell on the bed. He then fired at his brother Galgalo and he fell down. He, PW6, was then shot on the right calf, on the back and on the right side of the chest. He fell on a clothes basket. The people went away. He lost consciousness. He came to on the following day and found himself admitted a Kenyatta National Hospital. He later recorded a statement to the police and gave the names of the attackers.
30. A brother to PW6, GR PW8 testified that he was on the material day at 6 am preparing to go to school. He heard gun shots. Some people broke the door to their house and four people entered into their house. They found him, his mother and his brothers CPW6 and Galgalo in the bedroom. There was electricity light on in the room. The people were armed with guns. He recognized the people as their neighbours - Galma, the 1st accused, Diid the 2nd accused, Hakano the 4th accused and Doyo Tune who was not before the court. Galma fired at his mother two times and she fell down dead. They shot his brother Galgalo and killed him. They shot at CPW6. He was then shot on the right eye with the bullet tearing through and hit him on the left hand ring finger. He later found himself at Kenyatta National Hospital.
31. It was the evidence of Adano Salesa PW4 that on the material day he woke up at 6.07 am. He heard voices of people. He came out of his house while armed with a spear. He went behind his house. He heard the 1st accused talking from his house. He then saw 3 people seated outside the gate of Dahabo, the deceased in count 1, with another person standing against them. The four were wearing police uniform and were armed with guns. He thought they were policemen and approached them. He asked them who they were. He identified the one who was standing as Halkano, the 4th accused. The 4th accused beckoned at him by hand and told him "come, come." He went towards them and stopped about two steps away from them. He asked them who they were and what they were doing at that time. The 4th accused indicated to him by hand sign to keep quiet. He suspected the people were not police officers. He jumped over the fence and escaped. The 4th accused fired at him but missed him. He entered a house of a neighbor. The people went towards the house of Mohamed Guracha. He heard gun shots. Later, policemen went to the village. They found the deceased herein having been killed in their houses.
36. From the foregoing evidence, it is the case for the prosecution that the accused persons were identified by witnesses to have been among the people who killed the deceased persons. The accused on their part deny to have participated in the killings.
37. The issue for determination is whether the prosecution witnesses identified the accused persons as among the people who committed the offences. The law on identification of offenders in criminal trials



is well settled. In the case of *Wamunga v. Republic* (1989) KLR 424 at 426, the Court of Appeal had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of

38. In *Maitanyi vs. Republic* 1986 KLR 198 the same court 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...”

39. The prosecution witnesses in this case stated that they knew the accused persons. It is therefore a question of recognition of the accused persons rather than identification of strangers. 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.

39. The killings in this case took place at the home of Dahabo Hussein Guracha, the deceased in count 1 where the said deceased was killed and at the home of Askuno Roba, the deceased in count 3, where the said deceased and her son GRD, the deceased in count 2, were killed. The witnesses who testified that they saw Dahabo being killed were her children, Abdi Hussein PW1, Isaak Hussein PW2 and Fatuma Hussein PW7. It is the duty of this court to interrogate the evidence of the said witnesses and weighing the evidence against the defences of the accused persons and determine whether the offences preferred against the accused persons were proved beyond reasonable doubt.

40. The evidence of Abdi Hussein PW1, is that he recognized the voice of Halkano, the 4th accused when he heard him telling them to open the door. That he recognized the voice of the 1st accused towards the end of the incident while he was in hiding when he heard him telling the others that what they had done was enough and that they should leave. It was his evidence that he had known Halkano, the 4th accused person for a period of 5 years. That he used to visit their manyatta to drink alcohol.

42. In cases of voice identification, it is the duty of the trial court to ensure that the identifying witness was familiar with the voice of the accused and recognized it and that there were conditions in existence favouring safe identification - see *Karani v Republic* (1985) KLR 290. In the case of *Choge vs. Republic* (1985) IKLR 1 the Court of Appeal stated as follows:

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that



the witness was familiar with and it recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”

See also Mbelle vs. Republic (1984 KLR 626).

43. Abdi PW1 told the court that he had not interacted with the 4th accused. He said that after he heard his voice, he saw him entering into their house. He at the same time told the court that he was hiding his head under the chair with his head facing downwards and his legs outside. He hid there for 30 minutes. If then the witness had not interacted with the 4th accused, how did he identify his voice? How did he identify him when he was entering the house when he was lying under the chair with his head facing downwards? How did he identify the voice of the 1st accused when he did not say the exact words that he uttered? In view of these discrepancies, I am not convinced that the witness properly identified the 1st and 4th accused, either by voice or by appearance.
44. Isaak Hussein PW2 on his part said that he hid under the bed when he heard the gun shots. That after the people went away he peeped through the window that the people had broken and he saw them breaking the door of his parents' house. He recognized the 4th accused as one of the people. That while he was in hiding he heard the 1st accused saying “imetosha”. He recognized his voice as he was a person well known to him as he used to visit their manyatta to take alcohol. He said that he did not see the 1st, 2nd and 3rd accused persons during the incident. He said that he was not very familiar with the 4th accused.
45. The witness admitted in cross-examination that he never stated in his statement to the police that he saw the 4th accused breaking the door to his parents' house. I do not think that this is something that could have escaped his mind at the time of recording his statement and come to remember it some more than 9 months later when he testified in court. The witness said that he remained hiding under the bed for 30 minutes as he was scared. In the prevailing circumstances, I doubt that he could have found the guts to rise up and peep through the broken window.
46. Though the witness said that he recognized the voice of the 1st accused when he heard him saying “imetosha”, I do not believe that such a single word forms a strong basis for voice identification. I therefore find no sufficient evidence that PW2 identified the attackers.
47. Fatuma PW7 told the court that she identified the voice of Halkano, the 4th accused when he told them to open the door. That she identified his hand when he entered it into the room and started shooting into the house. That when the people entered into the house she was hiding in a heap of clothes and her head was peeping out. That she recognized the 4th accused when the people entered into the house though she did not look at him properly.
48. The witness however did not tell the court how she managed to identify the mere hand of the 4th accused. She did not tell the court the exact words that the 4th accused uttered for the court to form an opinion as to whether they were sufficient to form a clear basis for voice identification. The witness said that she did not look at the 4th accused properly when the people entered into the house. This creates doubt whether she positively identified the 4th accused as among the people who entered into the house.
49. In view of the foregoing, I do not find sufficient evidence that PW1, PW2 and PW7 identified any of the accused persons to have been among the people who killed their mother.
50. On the death of the deceased persons in count 2 and 3, the witnesses who testified to have identified the accused persons are the 3rd deceased's children, CR PW6 and GR PW8. It was the evidence of



- CPW6 that there was electricity light on in the room when six people entered. He identified the accused persons among the people as they were his neighbours. He said that the 2nd accused is a son to the 1st accused while 4th accused is a nephew to the 1st accused. That the 4 of them were living together at the home of the 1st accused. That Galma, the 1st accused fired at his mother and killed her. He also shot at his elder brother, Galgalo who fell down dead. That Diid, the 2nd accused shot at him on the leg while Halkano the 4th accused shot him on the back. A person called Doyo Tunu shot him on the chest while another called Doyo Buke shot at his younger brother.
51. It was his evidence that he was standing when the people entered into their bedroom. That he identified them as they entered. That he and his younger brother were screaming as they looked for a chance to escape through the door. He however stated in cross-examination that he was not sure who shot him on the back. He said that his family had no differences with the family of the accused persons.
52. It was the evidence of GR PW8 that four people entered into their house after breaking the door. They found them in the bedroom. There was electricity light on in the room. He recognized them as Galma, Diid, Halkano and Doyo Tunu. They were his neighbours. That Galma shot at his mother and his brother Galgalo and killed them. Diid shot at him on the right eye.
53. I have keenly examined the evidence of both CPW6 and GR PW8. Both witnesses said that there was electricity light on in the room when the people entered. C said that 6 people entered into the room while G said that it is 4 people who entered. C said that it is one Doyo Buke who shot at G PW8 but G said that it is Diid who shot him.
54. It is trite law that evidence on identification should be examined with a lot of care for the court to be satisfied that the identification is free from the possibility of error -see *Wamunga v Republic* (supra).
55. In this case I find that the incident occurred early in the morning around 6 am. There was electricity light on in the room where the witnesses PW 6 and PW 8 were. The two witnesses knew the three accused persons very well as they were their neighbours. I have no doubt that they recognized the accused persons as the people who entered their room and shot at them, their mother and brother. I find the circumstances to have been favourable for positive identification. The discrepancies in the evidence of the two witnesses as to the number of people who entered the room do not go to the root of the case and do not affect the credibility of the two witnesses. So is also the issue as to who shot at G PW8. It is clear that the witnesses were screaming as they sought for an escape route when they saw death staring at them in their eyes. In the ensuing commotion they may not have known who exactly shot who. It was however clear that they clearly saw and identified the accused persons as they entered into the room. They saw Galma, the first accused shooting at their mother because she was the first to be executed.
56. There is one aspect of the case I need to consider. CPW6 was aged 12 years when he testified in court. G PW8 did not seem to know how old he was but he gave evidence on oath after the court conducted a voir dire examination on him. He was the younger brother of PW6 and he was therefore below the age of 12 years. Both children were therefore of tender years. The law is that evidence of children of tender years given on oath does not in law require corroboration to support a conviction but the court should warn itself that in practice it should not base a conviction on it without looking for corroboration. In the case of *Kibangeny Arap Kolil v Republic* (1959) EA 92, it was held that:

“But even where the evidence of a child of tender years is sworn (or affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated, without warning itself and the assessors (if any) of the danger of doing so.”



See also Johnson Muiruri v Republic (1983) KLR445

44. The question is whether there is evidence to corroborate the evidence of the children, PW6 and PW8.
45. It was the evidence of Adano PW4 that he saw the 4th accused among the people who were at the gate of Dahabo, deceased before the shooting started. That he had known the 4th accused for a long time as they were brought up together. That it was bright at the time.
46. I am convinced by the evidence of Adano PW4 that he saw and recognized the 4th accused among the people who were at the gate of Dahabo, deceased. The 4th accused was a person well known to him as they were from the same village and they grew up together. There was light at the time he saw the 4th accused. The evidence of PW4 places the 4th accused at the scene of the attack. PW4 saw the 4th accused armed outside the gate of Dahabo who was killed a few minutes later. That evidence corroborates the evidence of PW 6 and PW 8 that the 4th accused was among the people who attacked the manyatta on the material day.
47. I however find no evidence to corroborate the evidence of PW6 and PW8 that the 1st and 2nd accused were among the attackers. I am however convinced that PW6 and 8 clearly saw and recognized the 1st and 2nd accused persons during the incident. I have warned myself of the danger of convicting on the evidence of PW6 and PW8 without corroboration and I find their evidence to be safe and credible.
48. I have considered the defences tendered by the accused persons. The accused raised alibi defences that they were at their respective homes at the time of the attack. The accused however never raised the issues till when they testified in court. It is trite law that the burden of proving the falsity of an accused's alibi lies with the prosecution as held in 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.
62. I find the defences raised by the accused persons to be exculpatory and an afterthought in face of the overwhelming evidence of PW4, PW 6 and PW 8. The three prosecution witnesses were candid and consistent in their evidence and were not shaken by intense cross-examination from the defence. They had no grudge against the accused persons that would have prompted them to lie against them. It is my believe that the witnesses called by the accused persons were out to protect the accused persons. It is clear from the evidence of Adano PW4 that the 1st Accused had already woken up by the time the shooting started as PW 4 heard him shouting in his house. There is no truth that the 4th Accused was woken up by his witness DW8 as PW4 saw him outside the gate of Dahabo before the shooting started. There is no truth that the 2nd accused was at the time sleeping at his house at Shuari Yako estate in Marsabit town. The defences of the accused persons are thereby dismissed.
63. I have warned myself of the danger of convicting the 1st and 2nd accused persons on the basis of uncorroborated evidence of PW6 and PW8 who are children of tender years. I find the evidence of the two children to be safe and credible.



64. There is no doubt from the evidence adduced before the court that the gang which killed the deceased in counts 2 and 3 is the same gang that killed the deceased in count 1 as the deceased were killed at the same manyatta at the same time. The prosecution has proved that the accused persons are the ones who killed the deceased persons herein.

Malice Aforethought

65. 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.
66. 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.....”

67. 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.
68. 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.”
69. In this case, the deceased persons died as a result of a gunshot wounds. 70 cartridges were recovered at the scene. This portrays indiscriminate shooting which can only mean that the shooting was meant to kill and nothing else. The killing was well planned and executed. I find malice aforethought to have been proved.



70. In view of the foregoing, I find that the prosecution has proved beyond all reasonable doubt the charges against the accused persons. Consequently, I enter a verdict of guilty as charged and convict them accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 4TH OCTOBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Halake for Accused

Mr. Ngigi for prosecution

Accused – All present

Court Assistant - Jarso

14 days R/A.

