REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 28 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WILLIAM KIPKORIR CHIRCHIR.....1ST ACCUSED

GODFREY KIPNG'ETICH KIRUI.....2ND ACCUSSED

JUDGMENT

The charge

William Kipkorir Chirchir, 1st Accused, and Godfrey Kipng'etich Kirui, 2nd Accused, are jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of this offence are that on the 20th day of May, 2018 at about 10.30hrs at City Park, Parklands in Westlands Sub-County within Nairobi County they jointly murdered Janet Wangui Waiyaki. When this charge was read to both accused persons, each denied committing this offence. They are represented by Mr. Onyango learned counsel. Mr. Solomon Naulikha and Ms Ongweno, prosecution counsel, led the prosecution while Mr. Mbanya, learned counsel, appeared for the family of the deceased.

Prosecution case

The events culminating in this charge occurred on 20th May 2018. These events revolve around the actions of Bernard Gathima Chege, (Bernard) and Janet Wangui Waiyaki, the deceased, (Janet), on the one hand and an operation mounted by the police in Nairobi County during the time of this offence to counter terrorism threats within Nairobi County on the other hand. Twenty two (22) witnesses have testified for the prosecution and two (2) witnesses, the accused persons, have testified for the defence. The narration of what happened on the night of 19th and morning of 20th May 2018 is clear from the evidence presented in court.

On the evening of 19th May 2018, a Saturday, Bernard Gathima Chege, PW3 (Bernard) picked the deceased Janet Wangui Waiyaki (Janet) from her home at Greenspan in Donholm Nairobi. They had planned to go out that night. Janet was the second wife of George Kirubi Gathima, PW1, (George) and an aunt to Bernard. George had two homes, one at Pangani and the other one at Greenspan Donholm. He shared the Donholm home with Janet and their three children. On that Saturday George had travelled from Nairobi to Muranga to attend a burial of a firiend. On returning to Nairobi that evening, he chose to spend the night at his Pangani home. On 20th May 2018 at about 9.00am George went to his home in Donholm. He did not find Janet at home. He was informed that Janet had left. He stayed at Donholm. While there he received a telephone call from his cousin, one Joseph Kuria (not a witness) about Janet. He received other telephone calls from other relatives. From those calls he learned that Janet has been shot and had been pronounced dead on arrival in hospital.

The evidence of what happened from the time Bernard picked Janet to the time the shooting occurred was adduced by Bernard. He testified that after picking Janet they went to Pangani shopping centre where they parked the car they were using, KBX 615H, a Toyota Fielder black in colour. They stayed inside the car chewing miraa (khat) until the following morning on 20th May 2018. At around 6.00am or 7.00am on 20th May 2021 they left Pangani shopping centre and travelled to View Point along Naivasha Road in Limuru intending to view sunrise. Bernard told the court that they arrived at View Point but were unable to enjoy the sunrise because it was cloudy that morning. They posed for photographs at View Point and decided to return to Nairobi intending to take Janet home. Somewhere along the way, at Westlands in Nairobi, Janet changed her mind about going home and suggested that they go to City Park. They arrived at City Park at 9.00am according to Bernard. They parked the car near the cemetery. Janet moved to the back seat and Bernard was left in front on the driver's seat.

Bernard told the court further that after 30 minutes while parked at City Park, he dozed off. He was woken by bangs on the car. He was scared when he saw guns on his side of the car. He was in shock and the first instinct was to flee. He switched on the engine and drove off. About 5-10 metres from the place he had parked the car he heard shooting. He was hit on the right hand side at the ribs. He braked and the car stopped. He opened the door and screamed for help. He was later assisted to Avenue Hospital where he was admitted for treatment. He

told the court that Janet was left in the car. He later learned that Janet had died.

At this time when Bernard and Janet decided to go out to enjoy themselves, security agencies in Nairobi were operating on high alert. Intelligence about heightened possible terror attacks had been received. It was during the period of Ramadhan. This information was circulated through a signal (Ex. 4) to all Police Divisions in Nairobi. The alert was to the effect that terrorist groups including Al Shabab, Al Qaeda and ISIS had called upon their followers to intensify attacks targeting Government Institutions Military and Security Installations, Diplomatic Missions, Churches, Entertainment places, Shopping Malls, Railway Termini, Airports and Learning Institutions among other places with huge public gatherings. To combat this threat an operation was mounted in Nairobi County made up of Kenya Police and Administration Police. Each Police Station was required to nominate 10 police officers by Division including Administration Police Camps. For Gigiri Police Division under whose jurisdiction City Park the scene of the shooting falls, SP David Maina Kabuthia (PW11), Deputy Sub-County Police Commander of Gigiri Police Division, and other officers were in charge of receiving officers nominated for this operation for deployment.

On 20th May 2018 in the morning, SP Maina received day shift officers from Makadara, Embakasi and Kayole Police Divisions and Administration Police officers from Makadara and Mathare Divisions. The total number of officers nominated was 50 but five officers failed to turn up. Forty five (45) police officers reported. They assembled at Nairobi Area Police Headquarters. They were ferried to Parklands Police Station for deployment. At Parklands Police Station the officers were briefed on the operation and how to participate in it as well as handling of firearms. The officers were then formed into groups of five officers under the command of a Police Corporal. The groups were sent on patrol duties to various locations. A group of five officers was assigned to man City Park area of Westlands. This group was made up of CPL Bramwell Adala (PW7) from Embakasi Police Station. He was in charge of the group. There was PC Kenneth Kirui (PW9) also from Embakasi Police Station, APC Christine Manga (PW8) from Kaloleni AP Post, APC Willliam Kipkorir Chirchir, 1st Accused, from Lungalunga AP Post and PC Godfrey Kipng'etich Kirui, 2nd accused, from Industrial Area Police Station.

These five officers were new to Parklands Police Station and City Park area. They were taken to their location and left to patrol the area. They received information from Eustance Mureithi (PW4) a security officer with Nairobi City County attached to Westlands Sub-County about a motor vehicle parked at City Park from early hours of that morning. According to Eustance, the vehicle had caused them some concern and they decided to alert the police. The group of five police officers under the command of CPL Adala went to the place where this vehicle was parked. This court learned that the vehicle had been parked inside City Park near Murumbi grave.

The vehicle identified as KBX 615H Toyota Fielder black in colour was described by all the witnesses including Bernard as having all its windows tinted making it impossible to see inside. Muigai Kandia (PW19), the Motor Vehicle Inspector attached to NTSA described the vehicle as having high density tint film on all windows, fixed glasses and both windscreens with the interior of the motor vehicle not visible due to heavy tint and black interior. This is the scenario confronting CPL Adala and his group of officers. They could not see inside the vehicle. They all testified that they were not able to tell whether the vehicle had occupants. They approached it cautiously given the circumstances of terror threats under which they were operating. CPL Adala went closer and using his swagger stick he knocked on the vehicle several times calling on the occupants, if any, to open the vehicle or to lower the windows. There was no response. CPL Adala went to the front of the vehicle and realised he could not see through the windscreen due to the tint. CPL Adala and his group of officers contemplated calling Parklands Police Station for a breakdown to tow the vehicle to Parklands Police Station. He knocked on the bonnet calling that the occupants lower the windows. Immediately, the vehicle was ignited and driven off almost knocking CPL Adala down had he not quickly jumped out of the way.

Further evidence from the five police officers is that when the motor vehicle took off in speed, they shouted for the driver to stop without success. The two accused persons started shooting at the vehicle with the aim of deflating the tyres in order to make the vehicle stop. After several shots the vehicle stopped some metres from its original parking place. The five officers went to the vehicle and realized that the driver, Bernard, had been shot. They also realised there was a woman passenger at the back seat who had also been shot. They reported the incident at Parklands Police Station. They were joined at the scene by CIP Moses Shikuku (PW12) OCS Parklands Police Station, SP David Maina (PW11), CPL Geoffrey Cheleget (PW17) and IP Mary Ndiritu (PW18). Bernard was taken to hospital. Janet was found unresponsive and pronounced dead on arrival at the hospital.

Among the five police officers involved in the incident, it was only CPL Adala that was not armed. The other four officers had firearms. The 1st accused had been issued with an AK 47 rifle Serial No. 59010679 (Ex. 24) and 25 rounds of ammunition; the 2nd accused had been issued with an AK 47 rifle Serial No. 60034428 (Ex. 6) and 30 rounds of ammunition; APC Christine Manga had been issued with an AK 47 rifle Serial No. 4848073 (Ex. 2) and 20 rounds of ammunition; PC Kenneth Kipng'eno Kirui had been issued with Scorpion Sub-machine gun Serial No. 499941 (Ex. 3(b)) and 25 rounds of 9mm calibre ammunition. These firearms were confiscated at Parklands Police Station after the shooting incident. They were not returned to the Police Stations/AP Posts after the operation as regulations required. They were held for investigations.

After investigations were concluded, the two accused persons were arrested and charged with this offence. The Firearm Movement Registers from the police stations/AP Posts where the four police officers came were produced in court as exhibits as follows: from Kaloleni AP Post Ex. 1; from Embakasi Police Station Ex. 3(a); from Industrial Area Police Station Ex. 6 and from Lungalunga AP Post Ex. 26. All these Firearm Movement Registers confirm that the firearms in issue were not returned to the respective Police Stations/AP Posts. The firearms and assorted ammunitions were produced in evidence as exhibits as shown above. The prosecution is holding the two accused persons liable for shooting and killing the deceased person.

Defence case

After considering the evidence of the prosecution witnesses this court made a determination that each of the two accused persons has a case to answer and placed them on their defence. Each gave a sworn defence. They did not call any witnesses. In his defence the 1st accused confirmed that he was nominated from Lungalunga AP Post to participate in the counter-terrorism alert operation within Nairobi County on 20th May 2018. He confirmed that he was issued with an AK 47 rifle Serial No. 59010679 with 20 rounds of ammunition for the operation and that he was one of the group of five police officers under the command of CPL Adala. He confirmed that they were deployed to patrol

City Park Area and that he did not know the 2nd accused until he met him that morning at Parklands Police Station. He confirmed that they were informed of a suspicious car parked within City Park. He confirmed that the group went to the scene and saw the vehicle KBX 615H black in colour with tints that made it impossible to see inside. He said that they could not tell whether there were occupants inside the car because of the tint and the fact that all the windows were closed. He said there was no movement in the car to make them aware of any occupants. His evidence agrees with that of the prosecution that CPL Adala approached the vehicle and knocked on it several times all the time asking the occupants to open the vehicle but there was no response. He testified that CPL Adala contemplated calling for a breakdown to tow the vehicle to Parklands Police Station and that when CPL Adala knocked at the front of the car the vehicle was started and driven away at high speed almost knocking CPL Adala down.

He further testified that the operation they were involved in was for National Security and they were on high alert and that they could not operate as if they were on normal police work. He testified that when the vehicle took off, they fired into the air to make the driver stop. When he failed to stop they shot at the tyres intending to deflate them and stop the vehicle. He said their intention was not to kill the occupants but to stop the vehicle and that it was only after the vehicle stopped that they realized there was the driver and a female passenger at the back seat of the car both of whom had been injured. He said he regretted the death of the female passenger and the injuries on the driver and reiterated that it was not their intention to shoot to injure or kill any of them. He testified that due to the terror threats at the time allowing the vehicle to leave the scene was not an option. He said that they stopped shooting when the vehicle stopped after deflating one of the tyres. He confirmed that his gun was confiscated after the shooting and that he was told that he has used four rounds of ammunition.

The 2nd accused likewise agreed with the evidence of the other police officers in the group as well as the defence of the 1st accused. He confirmed that he was deployed on duty that day from Industrial Area Police Station. He confirmed that he was issued with an AK 47 rifle Serial No. 60034428 with 30 rounds of ammunition. He confirmed having been one of the five police officers deployed to patrol City Park area. He confirmed that the motor vehicle in question was black in colour and was tinted to an extend that they could not see inside or tell whether it had occupants. He confirmed the action taken by the police leading to the shooting of the vehicle and realization upon the vehicle stopping that it had two occupants, the driver and the deceased who was at the back seat.

He testified that they did not open fire immediately but after efforts to have the occupants open the vehicle and after it drove off in high speed, he shouted "stop" and then fired at the tyres to deflate them. He said he could not remember the number of ammunition he used. He said the vehicle stopped after he deflated the tyre. On cross examination he stated that both he and the 1st accused fired in the air first then aimed at the rear tyres. He said he was not instructed to shoot but that he made the decision to shoot.

Submissions

After the conclusion of the defence case parties sought to file submissions in support of their respective case. This court allowed parties time to file submissions with the deadline being 19th February 2021. At the time of writing this judgment only Mr. Mbanya for the family of the deceased and the prosecution had filed their submissions. I have not seen submissions by the defence.

I have read the submissions by the prosecution. In summary the prosecution submitted that there is concrete evidence to prove that the deceased was murdered on 20th May 2018 and that the cause of death has been confirmed by Dr. Oduor Johansen (PW14) who testified that the cause of death was multiple gunshot wounds from high velocity firearm. The prosecution further submitted that there is ample evidence to prove that on 20th May 2018 there were police officers including the two accused persons who were armed and on patrol at the scene and that it is the two accused persons who shot at the vehicle where the deceased had been causing gun-shot wounds to which the deceased succumbed. It was submitted that the two accused persons were not justified in their shooting and that they failed to use non-violent means of force. It was submitted that the accused persons were under a duty to protect lives and property and that the officers were not excepted from consulting with their superiors the moment the driver sped off and that there was no danger in letting the vehicle go as they explored other options of managing the situation. The prosecution cited **Titus Ngamau Musila Katitu Vs. Republic (2020) eKLR** to support their position that the accused persons did not use their firearms as the law and regulations dictate. It was submitted that the prosecution has proved the case against the accused persons beyond reasonable doubt. The prosecution asked the court to find the accused persons guilty as charged.

Mr. Mbanya for the family of the deceased submitted that the main issue for determination by this Court is whether the prosecution has proved its case beyond reasonable doubt to warrant the conviction of the accused persons for the charge of murder of Janet Wangui Waiyaki, the deceased. He identified the elements of the offence of murder as stated in **Anthony Ndegwa Ngari vs Republic [2014] eKLR**, as follows: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

On the cause of death Mr. Mbanya submitted that there is evidence that the deceased died from the shooting that occurred at City Park a fact that had been proved through the evidence of witnesses and confirmed by Dr. Oduor Johansen (PW14), a pathologist, and a fact not denied by the accused persons. On the cause of death Mr. Mbanya submitted that there is ample evidence to show that the deceased was shot dead inside the car. He submitted that the pathologist confirmed cause of death as gun-shot wounds from high velocity firearm which he classified as a G3 or an AK 47 rifles. He submitted that this fact of the cause of death is not in doubt.

Mr. Mbanya submitted that the act that led to the death of the deceased was an unlawful act. That there is evidence that both the accused persons had been issued with AK 47 rifles and 20 rounds of ammunition for 1st accused and 30 rounds for 2nd accused and that they both admitted to shooting at the vehicle several times. He submitted that the officers acted unlawfully given that there was no danger posed to them. He cited Part A of the Sixth Schedule of the National Police Service Act No. 11A of 2011 provides that;

1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.

2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence and the resistance of the person against whom it is used and only to the extent necessary while adhering to the provisions of the law and standing orders.

3. When the use of force results in injuries: - a) The police officers present shall provide medical assistance immediately and unless there are good reasons to do so failing to do so shall be a criminal offence; and (b)shall notify relatives or close friends of the injured or affected persons.

It was submitted that the officers, both accused herein, used extremely violent means which was uncalled for and that although they stated that their intention was to stop the motor vehicle, they ought to have known that expending eleven (11) rounds of ammunition between them was excessive force. It was submitted that the accused persons were required to use proportional force to the objective to be achieved of stopping a motor vehicle as they claim. To support the submissions that the accused persons used excessive force under the circumstances, Mr. Mbanya relied on the case of **I.P. Veronica Gitahi & Another v. Republic [2017] eKLR**

On *mens rea* it was submitted that the accused persons are criminally culpable for cutting short the life of deceased and that they were fully aware that their actions would cause the death or do grievous harm to the occupants of the motor vehicle KBX 615H. It was submitted that Section 206 of the Penal Code defines 'malice aforethought to include "*An intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not*"; that both accused persons have denied that they intended to kill the occupants of the motor vehicle KBX 615H putting forward a theory they did not have a motive or intent to kill. It was submitted that the law does not require proof of motive in a murder trial.

Mr. Mbanya cited **Republic v Benjamin Wanyiri Maina (2014) eKLAR** on the issue of motive in murder trials. In this case the court in dealing with the element of *mens rea*, differentiated motive and *mens rea* in holding that *"There is no requirement in law that motive be proved. The establishment of motive may assist to explain the reason for an act of murder, but the absence of motive does not in law negate a charge of murder. All that the law requires is proof of malice aforethought as defined in section 206 of the Penal code."* He submitted there is overwhelming evidence that the two officers who are trained on the use of firearms disregarded their training and acted contrary to the very laws and rules that govern their use of firearms. They must have known that in doing so, this would result in death or in the very least grievous harm. Mr. Mbanya asked the court to find that the prosecution has proved this case beyond reasonable doubt, dismiss the defence of the accused persons and find that they have violated the law and are guilty of murder as charged.

Analysis and Determination

The offence of murder is committed when any person with malice aforethought causes death of another person by an unlawful act or omission. From this definition of the offence of murder, it is clear, and this court agrees with Mr. Mbanya in his submissions, that the duty falls squarely on the prosecution to prove that death of Janet Wangui Waiyaki occurred; that the death was caused by the two accused persons intentionally through an unlawful act or omission and that in causing that death the accused persons were acting or omitted to act with malice aforethought. The standard of proof required is proof beyond reasonable doubt.

In determining this matter, it is the duty of this court to thoroughly examine all the evidence both from the prosecution and the defence and make a finding whether that evidence proves beyond reasonable doubt that the two accused persons, with malice aforethought caused the death of the deceased by an unlawful act or omission. If there is any evidence, either from the prosecution or from the defence, causing some reasonable doubt in the mind of this court, then the law dictates that the accused persons must be acquitted.

(a) The element of death

There is evidence on record, uncontested by the defence, that the deceased in this case was pronounced dead on arrival at the hospital. There is evidence from the relatives of the deceased including her husband George Kirubi that the deceased died on 20th May 2018. Christopher Waiyaki (PW5) a brother of the deceased and Patrick Maina Wanjau (PW6) were among the relatives who identified the body of the deceased on 22nd May 2018 at City Mortuary for purposes of post mortem examination. The examination of the body was done by Dr Oduor Johansen (PW14) at the City Mortuary on 22nd May 2018 in the presence of Dr Mung'ania representing the family. The doctor made the following findings:

(i) The body was very pale indicating loss of significant amount of blood.

(ii) There were gun-shot wounds on the body.

(iii) There was an entry wound on the left upper arm on the outer side 1cm in diameter. The doctor retrieved bullet fragments from this wound.

(iv) There was a graze on the left shoulder.

(v) There was an entry wound on left side of back between 10th and 11th ribs 6cm from midline 5cm by 3cm with no exit wound.

(vi) The left lung lower side was lacerated. A bullet was retrieved from the place.

(vii) There was bullet laceration on left atrium on the aorta with bleeding into the abdominal cavity.

(viii) There was laceration on right side of liver.

After the examination of the body, Dr Oduor formed the opinion that the deceased died as a result of multiple gun-shot wounds caused by high velocity firearm. He classified high velocity firearm to include an AK 47 and a G3 rifles. Upon cross-examination Dr Oduor told the court that the bullet fragments retrieved from the wound on the upper arm were found under the skin and could not have caused fatal injuries. He said that the bullet head found in the chest cavity was fatal.

This evidence in my considered view satisfies the requirements of the law that the death of the deceased has been proved beyond reasonable doubt. I harbour no doubt in my mind in concluding that the death of Janet Wangui Waiyaki occurred as a result of gun-shot wounds on her body. The element of death has been proved beyond reasonable doubt.

The next issue for determination is the identity of the person(s) that fired the shots that caused the death of the deceased. Evidence as narrated by witnesses, both from the prosecution and defence sides, is that the deceased and her nephew Bernard were inside the vehicle KBX 615H in the morning of 20th May 2018. They had parked this car at City Party after a night of merry-making. Bernard told the court that they spent the night inside this car chewing miraa. This vehicle belonged to Bernard's mother Faith Wangechi (PW2). Bernard used to drive his mother around in this vehicle and run errands for their business. Evidence seems to suggest that Bernard and his aunt the deceased were engaged in an 'unhealthy' relationship for an aunt and her nephew a suggestion that Bernard vehemently denied. Evidence also shows that Bernard was found only dressed in a trouser and the deceased, who was lying in the back seat of the car, was found completely naked in a compromising situation (legs wide open). The situation was described by one of the police officers as pathetic. Bernard denied that this was the case. He denied that he was engaged in sexual activity with his aunt. He told the court that theirs was a normal nephew/aunt relationship.

It is not for this court to judge what the two were doing the whole night and morning before the police found their car at City Park. Their relationship is not particularly of interest to this court in determining the offence under consideration much as their conduct seems suspicious. It is not their moral character that is under trial although their behaviour that morning might explain why Bernard may have panicked and driven off from the police.

All evidence from prosecution and defence agree that police on patrol at City Park area, comprising of five (5) police officers including the two accused persons, under the command of CPL Adala, were informed of a suspicious vehicle parked at City Park for a long period that morning of 20th May 2018. This court was told that the vehicle caused suspicion because of having been parked for long that morning. Evidence also shows that the motor vehicle was heavily tinted and no one could see inside. No one seemed to know if there were occupants inside that vehicle. In normal circumstances, a vehicle parked at a park within Nairobi on a Sunday should not have raised any suspicions. I doubt if the members of public who reported presence of this vehicle to the police knew about the police operation and the terrorist threat. However this was in the morning. The vehicle was parked near the cemetery and it had taken a while in the parking. It was tinted and no one could see occupants if any. All these factors may have contributed to the suspicions the vehicle raised.

Evidence is not contested that the five police officers approached the vehicle. They told the court that they were cautious in their approach. Court learned from the accused persons that CPL Adala was leading them as they approached the vehicle with the two accused persons behind him and APC Christine Manga and PC Kenneth Kipng'eno Kirui behind the accused persons. Evidence is uncontested that CPL Adala, who was not armed, used his swagger stick to knock on the vehicle calling for the occupants, if any, to open the vehicle. His repeated efforts elicited no response from the vehicle. After this failed attempt to get any response and unable to confirm whether there were occupants inside the vehicle, CPL Adala and his team contemplated calling for a breakdown vehicle to tow this vehicle to Parklands Police Station. CPL Adala went in front of the vehicle. He could not see inside through the windscreen due to heavy tint. He used his swagger stick to knock the bonnet. This is when the vehicle ignited and drove off at high speed.

The two accused persons opened fire. They told the court that they shot in the air first but the vehicle continued driving away. They started shooting at the tyres with the aim of deflating them to stop the vehicle. The two accused persons are the only officers in the group that shot at the vehicle as evidence shows. Evidence is clear that PW20 SGT George Mathu issued the 1st accused with AK 47 rifle S. No. 59010679 (Ex. 24) with 25 rounds of ammunition. Evidence further shows that CPL Stephen Kiogora from Industrial Area Police Station issued the 2nd accused with AK 47 rifle S. No. 60034428 (Ex. 6) with 30 rounds of ammunition. However in the evidence of SGT Alex Chirchir (PW16) the firearm examiner there seems to be a mix-up in identification and numbering of the ammunition. SGT Chirchir told the court that he received the firearms and ammunition and marked them as shown in the table below:

Item	Firearm	Officer Assigned	Given No.	Magazine	Ammunition
1.	AK 47 S. No. 60034428	PC Godfrey Kirui	A1	A2	A3i-xvi
2.	AK 47 S. No. 4848073	APC Christine Manga	B1	B2	B3i-xx
3.	AK 47 S. No. 59010679	PC William Chirchir	C1	C2	C3i-xxiii
4.	Sub-Machine Gun S. No. KP B499941	PC Kenneth Kirui	D1	D2	D3i-xxv

From this table it is clear to me that evidence does not agree. CPL Stephen Kiogora told the court that he issued the 2nd accused with an AK 47 rifle S. No. 60034428 with 30 rounds of ammunition. This evidenced is confirmed in the Arms Movement Register from Industrial Area Police Station marked Ex. 3(a). Evidence further shows that out these 30 rounds of ammunition 23 rounds were recovered, the officer having expended seven (7) rounds in the shooting. From the evidence of the Firearm Examiner which is the basis of the table I have prepared above,

the 2nd accused is shown to have had a balance of sixteen (16) rounds of ammunition after the shooting. Secondly from the evidence SGT George Mathu he has issued the 1st accused with AK 47 rifle S. No. 59010679 with 25 rounds of ammunition. However the Arms Movement Register from Lunga Lunga AP Post shows that the 1st accused was issued with 20 rounds of ammunition out of which he expended four (4) rounds of ammunition in the shooting. The table above shows that the 1st accused had a balance of twenty three (23) rounds of ammunition after the shooting. Obviously the Investigating Officer may have mixed up his exhibit memos. This error assigned the firearms in question interchangeably between the two accused persons.

Further evidence shows that the exhibit marked F1 in Memo Form Ex. 8 is a bullet head fragment removed from Bernard Chege . The Firearm Examiner re-marked it as F1(a) and F1(b). F1 (a) is a bullet steel core weighing approximately 3.44 grammes and F1(b) is a copper jacketing with three visible land engraved areas. He received exhibit F2 bullet head fragments recovered from the body of the deceased. He renamed them as F2(a) and F2(b). F2(a) is a bullet steel core weighing approximately 3.52 grammes and F2 (b) is a copper jacketing fragment weighing approximately 0.4 grammes. His findings are that Exhibit F1(a), F2(a) and F2(b) have no distinctive markings and therefore they could not be analysed. He also received Ex. G a fragment recovered from the motor vehicle KBX 615H. He found that Ex. F1(b) and G were suitable for microscopic examination,

The officer also examined Ex. Ei - Evi six fired cartridges recovered from the scene. His findings are that Ex. Ei and Evi were fired from Ex. C1 AK 47 S. No. 59010679 being handled by the 1st accused and that Ex. Eii, Eiii, Evi, Ev, G and F1(b) were fired from Ex. A1 AK 47 S. No. 60034428 being handled by the 2nd accused. What this evidence confirms is that both the firearms being handled by the 1st accused AK 47 rifle S. No. 59010679 and that of the 2nd accused being S. No. 60034428 were fired at the scene of the shooting. While none of the bullet fragments found in the body of the deceased was capable of microscopic examination and therefore it could not be determined who fired the fatal bullet, it is clear to my mind that both accused persons fired their firearms at the scene. They do not deny this in their defence and actually regretted the death of the deceased claiming that in shooting at the motor vehicle they did not intend to kill or injure anyone but to stop the vehicle by deflating the tyres.

The action of the two accused persons brings me to the question of what police officers on duty are required to do in apprehending suspects or preventing commission of offences in order for this court to determine whether the two accused persons acted lawfully or otherwise.

The National Police Service Act (No. 11A of 2011) provides as follows regarding use of firearms:

> *61. Power to use firearms*
>
> *(1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by the Constitution and this Act by use of non-violent means.*
>
> *(2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.*

These rules that govern use of force and firearms by police officers while performing their functions and exercising the power conferred under the law are found in Part A of the Sixth Schedule of the Act. The relevant rules in respect of this case provide as follows:

> *1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.*
>
> *2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.*
>
> *3. When the use of force results in injuries—*
>
> > *(a) the police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and*
> >
> > *(b) shall notify relatives or close friends of the injured or affected persons.*

Chapter 47 of the Service Standing Orders provide as follows on the lawful use of force and firearms:

> *1. (1) Lawful use of force may be applied:*
>
> > *(a) to protect the officer or others from what is reasonably believed to be a threat of death or serious bodily harm;*
> >
> > *(b) to protect life and property;*
> >
> > *(c) to prevent a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody; or*
> >
> > *(d) to suppress or disperse a riotous mob committing or attempting to commit serious offences against life or property.*

(2) Firearms shall not be discharged when it is likely to injure an innocent person.

2. (1) Police officers are restricted on use of force except under the following circumstances:

(a) to destroy an animal that presents a threat to public safety or as a humanitarian measure where the animal is seriously injured, when the officer reasonably believes that force can be used without harm to the officer or others;

(b) as warning shots if a police officer is authorized to use force and only if the officer reasonably believes a warning shot can be fired safely in light of all circumstances of the encounter;

(c) to effect the arrest of a person wanted for a serious crime of violence, when he or she is trying to escape and there are no other means of preventing his or her escape:

Provided that:

(i) the police officer must have seen the wanted person committing a serious crime of violence or have a very good reason to believe that he or she has done so.

(ii) (ii) it would be unlawful to shoot at a person escaping, who has committed a petty offence, the police officer may only shoot if the person is wanted for a serious crime of violence.

(iii) (iii) if a policeman shoots at a person whom he or she truly believes committed a crime of violence, although he or she did not actually see the offence, he or she will probably be required to satisfy the court, and certainly his or her superior officer, that he or she acted properly in firing; or

(d) to immobilize a suspect in order to enable his or her arrest rather than to kill him or her.

(2) In decisions to discharge a firearm at or from a moving vehicle shall be governed by this use-of force policy and are prohibited if they present an unreasonable risk to the officer or others.

(3) A police officer may be compelled to use his or her firearm if he or she cannot, in any way, with the other means available to him, carry out his or her duty of protecting life, suppressing rioters or effecting the arrests preventing the rescue or escape mentioned above. However well a police officer justified, he or she may consider himself or herself to be in firing, the act, whether it results to loss of life or otherwise, must become the subject of legal investigation. He or she must, therefore, be prepared to prove that he or she acted with humanity, caution and prudence, and that he or she was compelled by necessity alone to have recourse to firearms.

3. A police officer shall attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.

4. The force shall be proportional to the objective to be achieved, the seriousness of the offence and the resistance of the person against whom it is used and the extent necessary while adhering to the provisions of the law and the Standing Orders.

All these provisions, from Section 61 of the National Police Service Act to the rules under Part A of the Sixth Schedule in the Act and the Service Standing Orders, lay emphasis on use of non-violent means first before force or firearms can be employed. These provisions are emphatic that force may only be employed when non-violent means are ineffective or when non-violent means are found to be without any promise of achieving the intended result.

The National Police Act provides for use of non-violent means as the first action by police officers in arresting a suspect or in preventing commission of an offence. The Act gives the criteria to be used when it becomes necessary for police officers on duty to use force or use firearms. It provides that use of force must be employed ***only when non-violent means are ineffective or when non-violent means are without any promise of achieving the intended result and that the force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders*** (emphasis added).

This court has considered the requirements of this provision in relation to what happened on 20th May 2018. From the evidence on record, it is clear to me that the police officers including the two accused persons under the command of CPL Adala first approached the vehicle while the same was parked. CPL Adala used his swagger stick to bhang on the vehicle. Evidence also shows he was calling on the occupants if any to open the vehicle. For some time and after persistent hitting the vehicle and calling anyone inside to open the officers contemplated calling for a breakdown vehicle to tow KBX 615H to the station. To me that is use of non-violent means. To that extent the police officers used non-violent means. Then circumstances changed. The vehicle was ignited and took off at high speed. This is when use of firearms was employed. But the question is was that use of firearms in accordance with the law?

It is clear to me that the non-violent means were ineffective and were without any promise of achieving the intended result. The intended result here was to have the occupants open the windows or the doors of the vehicle and identify themselves to the police. This was not achieved. The vehicle drove off. It was said that it almost knocked CPL Adala down. But it did not. CPL Adala was quick on his feet and he jumped off the path of the vehicle. He was not knocked down nor was he injured. There was no danger to life or to injury on CPL Adala or any of the other police officers at the scene. The occupants of the vehicle did not shoot at the police. They did not drive the vehicle towards the police to perhaps run over them. They were fleeing from the scene. The police are trained. They know when they are under attack or

under threat of attack. I am sure when a vehicle flees or when a suspect flees from the police the intention is normally clear to even an untrained persons that the suspect is trying to avoid arrest or shooting by the police and not trying to attack the police officers. In my layperson thinking I doubt that the terror groups including Al Shabab would have reacted the way Bernard did. They would have been armed and the first instinct would have been to shoot or risk being shot at by the police.

The rules further provide that ***the force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders*** (emphasis added). The objective to be achieved here was to stop the vehicle from leaving the scene and perhaps identity the occupants and know the motive of their being where they were found. The two accused persons shot at the vehicle. They told the court that letting the vehicle leave the scene was not an option. This means that they had to use whatever means possible to stop it from leaving the scene. Although they said that they shot in the air to warn the occupants and make them stop it is clear to this court that they also shot at the vehicle. Their evidence is that they were shooting at the tyres aiming to deflate them. The evidence before this court does not agree with that statement.

The photographs produced in court and the testimony of PC Obed Ballesa (PW21) who took photographs of the vehicle at the scene shows that the vehicle has what PC Ballesa called "small openings" on the right side of the vehicle before the handle of the passenger door in photograph numbers 5 and 6. This evidence further shows "small openings" one on the rear side left window and one next to the fuel tank cover on the left. PC Ballesa said that these "small openings" looked like bullet holes.

PW19 Muigai Kandia who inspected KBX 615H was not comfortable talking about the bullet holes. He called them circular holes and said he was not the right person to comment on whether they were bullet holes or not. It is the view of this court that every witness who testifies has a duty to testify as to the true facts as observed or perceived by him/her using the five senses. This witness was guarded and his evidence did not assist the court in determining the state of the vehicle after the shooting. He inspected this motor vehicle as if it had been involved in a road traffic accident. He testified on cross examination that he was asked to determine if the motor vehicle was in good mechanical condition. Because of the slopy manner this motor vehicle was handled by the police, crucial evidence was lost and this court was denied the chance to determine the condition of the vehicle after the shooting.

It is clear to me after considering all the evidence surrounding the shooting that the force used was not proportional to the objective to be achieved here. Firstly, there was no offence involved. None had been committed. There was no threat of any offence being committed especially after the vehicle was driven off in a bid to flee the area. So the seriousness of the offence was not in issue. Bernard and the deceased did not resist the attempts by the police to arrest them. In fact they were fleeing from the police. In any case, even if their fleeing the police can be remotely taken as resisting to be arrested, then the use of firearms to stop them from fleeing would not in my view be deemed as the extent necessary to stop them while adhering to the provisions of the law and he Standing Orders.

Further, the Service Standing Orders under Chapter 47 are clear **that firearms shall not be discharged when it is likely to injure an innocent person and that decisions to discharge a firearm at or from a moving vehicle shall be governed by this use of force policy and are prohibited if they present an unreasonable risk to the officer or others**. (emphasis added). At the time the motor vehicle drove off, the accused persons and the other officers with them had not determined who was in the vehicle yet they shot at it without following the laid down rules.

My careful consideration of the evidence on the manner the accused persons acted in this matter leads me to the conclusion that the two accused persons were not shooting the vehicle with the aim of deflating the tyres. They were furthering their resolve that to let the vehicle leave the scene was not an option on their part. They decided to do whatever it took to stop the vehicle. If indeed they were firing at the tyres, there would be no bullet holes above the tyres. Evidence shows bullet holes on the vehicle even near the fuel tank and near the door handle in the rear. They would not have hit the deceased or Bernard who were seated in the back seat and the driver's seat respectively.

My conclusion on this issue is simple. The accused persons acted recklessly and shot at the vehicle without consideration that their actions might result in injuring or killing an innocent occupant. The shooting took place after the vehicle starting driving away a confirmation that it had occupants. From the time it was switched on to the time it started driving, it was clear to all of them that it had occupants. The driver had acted foolishly perhaps in that panicked mode but he did not run over CL Adala or pose a threat to the other officers. There was no shooting from inside the vehicle. Evidence from the officers present including the accused persons confirmed that no firearms were found in the vehicle. This court takes the view that by using firearms to stop the car, the two accused persons used force that was not proportional to the objective to be achieved which is to stop the vehicle. The photos shows one tyre, on the rear left looking as though it is deflated but this photograph is not clear given that the court did not have the opportunity to view the vehicle.

The accused persons acted contrary to the law. They contravened the Constitution that requires them to preserve life and the National Police Act as well as the Service Standing Orders that give guidelines on use of force or firearms. See **Republic-Vs- Wilfred Mwiti (2016) eKLR.** See also the case of **IP Veronica Gitahi & Another v. Republic [2017] eKLR** where the defence used that they were justified in the use of firearms. The Court of Appeal stated that:

> **"Turning to this appeal, the appellants justify the shooting of the deceased on the grounds that they believed that they were under attack; they were on official duty and duly introduced themselves; the area was notorious for murders; it was a dark and rainy night; a suspect was arrested in the vicinity the same night; previously a female police office had been attacked in the area and dispossessed of her firearm; a male voice in the house threatened them; they heard the sound of a scraping panga; a panga was indeed recovered in the house; and the 2nd appellant's firearm was cut with a panga…. In the end we are not persuaded that the learned judge erred in finding that the use of lethal force by the police in the circumstances of this case was not proportional to the threat that they allegedly faced and that the killing of the deceased was contrary to the National Police Service Act and therefore an unlawful killing justifying conviction for the offence……."**

Having arrived at the conclusion that the accused persons acted contrary to the law and therefore unlawfully, this court has only one other conclusion to make: that the accused persons' actions of discharging their firearms with the result that the deceased was fatally injured,

caused her death by an unlawful act. I find that I am satisfied that this element of the offence of murder has been satisfied. The fact that it was not possible to determine the firearm that discharged the bullet causing fatal injuries notwithstanding, it is my finding that both accused persons discharged their firearms at the scene. One of them hit the deceased killing her. As stated in this judgement there is no dispute that both accused persons were armed and both fired at the moving motor vehicle where the deceased and Bernard were. Both are culpable.

The last issue to determine is that of intention to cause the death of the deceased. **In Republic v Benjamin Wanyiri Maina [2014] eKLR,** the court held that there was no requirement in law that motive of committing in the offence of murder be established. The court was of the view that motive may explain the reason behind a murder but the absence of motive does not negate a charge of murder. The last element to complete the requirements of proof of a murder is malice aforethought or the intention to cause the death. Malice aforethought is defined under Section 206 of the Penal Code to include an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.

The circumstances facing the two accused persons and the other officers on 20th May 2018 required careful thinking and action. They were operating under threat of terrorism and as testified by the officers in that group of five, theirs was not a normal patrol but one that called for extra attention. They were all armed with serious weapons and they were operating in an area not familiar to them. That extra attention also required that the officers act with caution to avoid harming innocent people. The two accused persons have stated that they did not intent to kill the deceased or to injure the driver. However, it is my finding that they acted recklessly given that they were not under any threat after the vehicle drove off in a bid to flee. I believe there were other means of ensuring that the vehicle was intercepted within the jurisdiction the police were patrolling under the terror alert operation.

My careful consideration of this element of murder, I am persuaded to give the accused persons the benefit of doubt that their intention was not to kill the deceased even though this court finds that they acted against the law. This brings me to the conclusion that the offence proved by the evidence before me is that of manslaughter and not murder by dint of absence of the element of malice aforethought or *mens rea.* I will and do hereby invoke Section 179 of the Criminal Procedure Code that gives power to the court to convict an accused person on a minor offence where the major offence charged and the minor offence are cognate. In **Robert Mutungi Muumbi v. Republic, Cr. App. No 5 of 2013**, Court of Appeal considered the circumstances under which section 179 of the Criminal Procedure Code may be invoked and stated thus:

> ***"An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."***

To my mind the circumstances discussed by the Court of Appeal in the above case are applicable here. I therefore find that the offence of manslaughter has been proved against the 1st and the 2nd accused persons beyond reasonable doubt. I therefore find William Kipkorir Chirchir, the 1st accused, and Godfrey Kipng'etich Kirui, the 2nd accused, not guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Instead, I find each of them guilty of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. Consequently, I enter conviction against each one of them for the offence of manslaughter.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MAY 2021.

S. N. MUTUKU

JUDGE