REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL CASE NO 2 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

NGORIA TAMAN NJORU.....ACCUSED

JUDGEMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of which were that on the 10th day of May 2018 at kaptilo irrigation scheme, kainuk location in Turkana South Sub- County within Turkana County, murdered **SAMUEL HAGGAI.**

2. He pleaded not guilty to the said charges and on 4th December 2018 his trial commenced before me, at the close of which I recorded the evidence of eight (8) prosecution witnesses to prove its case. When put on his defence, the accused tendered in unsworn statement in defence without calling any witness.

PROSECUTION CASE

3. The prosecution case was that on 10th May 2018, the deceased was together with PW1, PW2 and PW3 at their farms watering their crops in the afternoon as was their practise. It was their practice and custom to travel together as a group, back to the village at the close of the day's business.

4. It was **PW1 JOHNSON LOROT's** evidence that while he was still waiting for others, he heard a gunshot sound from the plot of the deceased, whom he heard saying that he had been killed. He then saw someone with a gun crossing over the river. He then went to the deceased plot and found that he had a gunshot wound. They carried him out of the farm and on the way they met the OCS and police officers who had responded to the gun shots.

5. It was his evidence that he did not know the accused, but knew him as a pokot since he was moving towards the pokot area. In cross examination, he stated that he did not see him shoot the deceased but only saw him cross the river and was later on arrested on the pokot side.

6. **PW2 THOMAS ENEKI** testified that when he heard the gun shot, he ran a way toward his home and met PW1 and 3, who informed him that the deceased had been shot. It was his evidence that he had at 5.00 pm saw the accused with an AK47 rifle cocked and ready and had informed his colleagues.

7. In cross-examination, he stated that it was the first time to see the accused, whom he talked to for about twenty minutes and that when he heard the gunshot, he ran away and only returned back to the scene later. He stated that the accused was later on arrested in kapenguria and that there was no identification pared conducted when he was brought to the scene.

8. **PW3 KACHALE EMEKWI** stated that he was at his farm, when the accused appeared from the other side of the river with a gun, which he started to cock. They requested him not to do so in the midst of the people, for their safety, only for the accused to aim the gun at him and for his safety he fell down onto a tree to escape. He thereafter heard a gunshot and the deceased saying that he had been killed. The accused then escaped from the scene and crossed over the river towards the pokot side.

9. It was his evidence that he had earlier on seen the accused with the AK47 rifle when he came to where he was together with the deceased, who was his brother and that when the accused aimed the gun at him, he turned and the bullet hit the deceased. It was his evidence that he had earlier warned the accused that it was not safe to open the gun where people were and this did not go well with the accused, who aimed the gun at him.

10. In cross examination, he stated that he was a KPR officer and knew how to handle guns. He had been with the accused for about ten minutes after he came through the forest and stood next to him. He testified that it was him the accused wanted to kill since he had aimed the

gun at him.

11. **PW4 SIMON EMEKWE** a KPR Officer went to the hospital were the deceased had been taken and confirmed that he had a gunshot wound on the chest and he told him that the accused had crossed the river to where he was, cocked his gun and when he was asked why, he turned the gun and shot him, he was later on informed of the death of the deceased.

12. It was his further evidence that that since there had been a peace treaty between the Pokot and the Turkanas, the accused community arrested him and handed him over to the police.

13. **PW5 PC MESHACK MUIA PETER**, witnessed the post mortem examination conducted by Dr. Karuri and produced the post mortem report as an exhibit in the case, while **PW6 PC IBRAHIM OMAR** re-arrested the accused from the members of the public, who had arrested him from the Pokot side. He interrogated him and put him in custody.

14. **PW7 CORP. PAUL SUM BUSIO** testified that he went to the scene of the shooting and found the deceased on the ground, they took him to the hospital where he died while undergoing treatment. He interviewed witnesses and recorded their statements, in which he confirmed that the accused had earlier been seen hiding in the nearby bush where they had killed an antelope.

15. It was his evidence that he managed to get the address of the accused and called his area chief, who informed him that he had gone missing from his area. The accused was later on arrested and charged with the offense of murder.

16. In cross examination, he stated that they did not recover any cartage or firearm from the scene and that the accused was arrested by NPR in the company of members of the public and that no identification parade was conducted upon his arrest because of the hostility at Kainuk area where the offense had been committed.

DEFENCE CASE

17. When put on his defence, the accused stated that on 5/2/2018 he was at his farm until 5.30 pm when he returned home, where his wife was brewing alcohol, and was arrested during the raid, he was held for two days before being charged with the present offence, which he knew nothing about. He denied having gone to the scene where the deceased was allegedly killed.

SUBMISSIONS

18. At the close of the defence case, the accused tendered in written submission, in which it was submitted that the death of the deceased was not disputed. It was submitted that the prosecution failed to prove that the accused had mensrea to commit the offence, as the evidence of PW2 confirmed that there was no grudge between him and the deceased. It was further submitted that the accused was not properly identified, since he was not arrested at the scene and that no identification parade was conducted. In support of the submissions reference was made to the case of **REPUBLIC v TURNBULL 1976 63 CR.APP.R 132**

19. The prosecution did not make any final submission and relied on the evidence on record.

DETERMINATION

20. To sustain a conviction on the charge of murder, the prosecution has the burden to prove beyond any reasonable doubt the following elements of the offense;

a) The fact and cause of death

b) That the said death was caused by unlawful act of omission and or commission on the part of the accused person.

c) That the accused had malice aforethought

21. The fact and the cause of death of the deceased, as submitted by the defence was not disputed. All the prosecution witnessed confirmed that same dead at the hospital where he had been referred to for treatment, having been shot at his farm in the presence of PW3 his brother. The cause of death was further confirmed through the post mortem report produced by **PW7:- CPL PAUL SUM BUSIO** having been prepared by Dr. Karuri, to be non-reversible shock from severe hypovolemia due to unsurvvivable liver gunshot injury and vascular injury. I therefore find and hold that the fact and cause of death was proved beyond reasonable doubt.

22. On whether the said injuries were caused by the act of omission on the part of the accused, there is the evidence on record by PW3 that the accused, who was not known to him, had earlier been seen in the area, he was with the accused for a period of ten minutes and that the same had aimed the gun at him. It was his evidence that he had spoken to the accused and advised him not to open the gun in the presence of people, and that the accused then threatened him by aiming the gun at him.

23. The only issue in dispute is whether the accused was positively identified by the prosecution witnesses and whether failure to conduct identification parade upon his arrest was fatal to the prosecution case?

24. The jurisprudence on identification in Kenya was stated in the case of **WAMUYU v REPUBLIC (1989) KLR** as follows:

"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 favorable and free from possibility of error before it can safely make it the basis of a conviction."

25. In the case of **DONALD ATEMI SIPENDI v REPUBLIC [2019] eKLR** the court had this to say on the issue of identification:

"30. Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. It is an established principle that there is a special need for caution before accepting identification evidence. In Charles O. Maitanyi vs Republic,[10] it was held inter alia that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.

31. Evidence from eyewitnesses is often the starting point for police investigations and it is estimated that it plays an important role in all contested cases. However, the memory is a fragile and malleable instrument which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in miscarriages of justice.

32. In Kariuki Njiru & 7 others vs Republic,[11] the court held inter alia that the "law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

33. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

34. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before."

26. From the evidence on record I am satisfied that the accused person was positively identified by PW3 who put him at the scene, this evidence was corroborated through the evidence of PW1 and PW2 both who saw the accused immediately after the gunshot crossing the river to the Pokot side. This evidence when weighed against the evidence of PW6 and PW7 on how the accused was arrested to the effect that since there was no peace treaty between the Pokot and the Turkana, the accused having broken the said treaty, they notified his area chief who mobilised for his arrest in terms of the said treaty. **PW6 PC IBRAHIM OMAR ABDI** re-arrested the accused having been arrested by KPR officers from the POKOT Area. I am therefore satisfied that the accused was positively identified and his identification through circumstantial evidence tendered in court was free from error.

27. On failure to conduct identification parade upon the arrest of the accused, PW7 the investigating officer's evidence was that the accused was well known to his Pokot neighbours as the one who had been hunting of wild animals between the Pokot and the Turkana Area and that upon his arrest because of the hostility between the two communities, it was not possible to conduct an identification parade since the accused for his safety had to be transported to Lokichogio. The prosecution witnesses PW1, PW2 and PW3 who should have identified him had seen him and therefore identification parade would have served no purpose. I have evaluated the evidence of the prosecution witnesses which I find believable and therefore hold that failure to conduct identification parade was not fatal to the prosecution case.

28. I have looked at the accused defence on how he was arrested which I find to be unbelievable in view of the prosecution evidence, and find that the prosecution proved beyond any reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused person.

29. On whether the accused had malice aforethought, Section 206 of the Penal Code defines malice aforethought as follows:

a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted or not

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually netted 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 not be caused.

(c) An intent to commit a felony

(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony".

30. In the case of **REP v. TUBERE s/o OCHEN 1945 EACA 63** the court had this to say on what to consider as establishing malice aforethought:-

> ***"To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident".***

31. In this case whereas the evidence on record is that the accused had aimed his gun at the deceased's brother PW3, it is not disputed that his action lead to the death of the deceased, it therefore does not matter whether or not, he intended to cause the death of the deceased or not, as the logical consequence of his action lead to the death of the deceased.

32. The accused acted with malice aforethought of aiming his gun to the deceased brother PW (3) but ending with the death of the deceased further with the doctrine of transferred malice as was stated in the case of **PETER KIAMBI MURIUKI v REPUBLIC [2013] eKLR** where the Court of Appeal stated the doctrine in the following terms: -

> ***"18. The learned Judge also referred to transferred malice and stated that the deceased was a victim of transferred malice because of intervening in a fight between the appellant and Mutegi. What is the law on transferred malice? Where a person intends to commit a particular crime and brings about the elements which constitute that crime, he may be convicted notwithstanding that the crime takes effect in a manner which was unintended or unforeseen. The intent and the act must coincide. Under the doctrine of transferred malice, where a defendant fires a gun intending to kill X, but misses and instead kills Y, he will not be able to escape liability for the murder of Y simply because it was his intention to kill X. The defendant has still committed the actus reus that he intended, namely to cause the death of a human being. It is then said that the malice against X can be transferred to Y. The basis for this is the principle in R – v- Latimer (1886) 17 QBD 359 in which the defendant struck a blow with his belt at Horace Chapple which glanced off him, severely injuring an innocent bystander, Ellen Rolston. The defendant was convicted of maliciously wounding the woman and appealed on the ground that it had never been his intention to hurt her. The court affirmed the conviction stating that the defendant committed the actus reus of the offence with the necessary mens rea i.e he had acted maliciously. In R –v – Pembliton (1874) LR 2 CCR 119, the defendant threw a stone at another person during an argument. The stone missed the intended victim, but instead broke a nearby window. He was charged with malicious damage to property and the court, in quashing the conviction held that the doctrine of transferred malice is inapplicable where the defendant's intention had not been to cause the type of harm that actually materialized; his intention to assault another person could not be used as the mens rea for the damage that he had caused to the window."***

33. I am therefore satisfied and hold that malice aforethought was established beyond any reasonable doubt and that the prosecution established its case against the accused on the charge of murder beyond reasonable doubt and accordingly find the accused guilty as charged and convict the same of murder of **SAMUEL HAGGAI** on the 10th day of May, 2018 contrary to Section 203 of the Penal Code.

34. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5th DAY OF MAY, 2021.

…….

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Tanui for the State

Mr. Pukha for the accused

Accused present

Court Assistant – Potishoi

Pokot Interpreter – Elias Parkiyan