



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL CASE NO. 2 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

CYRUS OCHIENG OLWAL.....ACCUSED

JUDGEMENT

Procedural history

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya in respect of the deceased, Shadrack Kiplimo Kigen.

The accused pleaded not guilty.

The prosecution called fifteen (15) witnesses in support of the charge.

The accused testified on oath and called his wife as the only defence witness.

All the 15 prosecution witnesses testified before Sitati, J.

Only the accused and his wife testified before me.

The defence filed their final written submissions.

The prosecution did not file their final written submissions as they do not have a right to do so; since the prosecution was not personally conducted by the Director of Public Prosecutions as set out in section 310 as read with section 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The case for the prosecution

The prosecution called No. 253463 APC Fredrick Malalo Muendo (Pw 1). Pw 1 testified as follows. On 15/12/2017 at 5.00 pm he returned to his house from Tartar junction in Kapenguria town, where he had joined the traffic base commander in calming the situation following a road accident at that place.

Pw 1 went to look for supper at around 9.00 pm and on his way back to his house he heard gun shots from the residence of police commissioner Ndiema. Pw 1 was in the company of PC Malalo. They proceeded to the scene of shooting. It was a dark night. As they approached the area crawling, they called the accused. They heard the accused shouting from the garden that they should not approach the area since the people who were there were armed. APC Malala entered through the fence and came out with the accused. They then called for reinforcement.

As a result, Pw 1 was joined by reinforcement consisting of Snr Sgt Cheruiyot and Sgt Mutui. They were further joined by armed police among whom were APC Kioko, APC Angura and Apc Gedion Mutai.

Pw 1 continued to testify that the accused was armed with an AK 47 rifle, S/N 59013240, which subsequently was produced as exhibit Pexh 1. Pw 1 identified exhibit Pexh 1. Pw 1 also testified that the accused was wearing a green jungle rain coat, which was torn at the front part. The green jungle rain coat was subsequently produced as exhibit Pexh 2. Pw 1 identified exhibit 2.

Pw 1 further testified that they divided themselves into three groups. One group remained outside. Another group entered the compound and stationed itself in front of the house. The third group went to the rear of the house.

While at the rear door Sgt Matui (Pw 3) ordered them to fire towards the door which was open. They fired 2 – 3 shots. There was no response.

They then approached the door with the help of the light from the AP police land cruise which lit the compound.

At the rear door, they saw a body lying down and bleeding profusely. Sgt Matui then rang Cpl Noor from the police station, who joined them with his colleagues. They then threw tear gas into the room. There was no response.

Cpl Noor took the body to the mortuary.

On that material day the accused was attached to the house of the SRM, which was about 50 metres from the house of police commissioner Ndiema. There was no one guarding the house of police commissioner Ndiema on that material night.

At the scene of crime, there was miss Ambani, who was a wife to Ronald Ambani (Pw 2).

After the gun shots Pw 1 found the accused at the house of police commissioner Ndiema.

After Pw 1 entered the rear door of Ndiema's house, he saw that the door was broken. He then saw pieces of wood, which he identified in court and were subsequently produced as exhibit Pexh. 4. He also saw a crow bar, which he identified and was later produced as exhibit Pexh 5 and a metal bar which he also identified and was produced as exhibit Pexch. 6.

The prosecution also called No. 2011317190 APC Ronald Likhakangi Ambani (2). Pw 2 testified that he was on official duty in Nairobi on 15/12/2017; when at about 9.00 pm he received a telephone call from his wife (not called as a witness). She was living in the unhut in the compound of the police commissioner Ndiema (now deceased). She had a 9 month old baby. She told him that she heard a loud bang from the house of Ndiema. A few minutes later, she called again telling him that she heard gun shots. After the gun shots she heard footsteps of people running away from the compound towards the fence. Pw 2 then phoned the accused, whose house was 150 metres away.

Pw 2 was again told by his wife that shortly police arrived and told her they that they had come to assist her. She was then moved to a neighbour's house.

In addition to the foregoing the police called No. 2013060816 APC Philip Ngemu Malalo (Pw 3). Pw 3 testified that on 15/12/2017 at 9.00 pm, he was in his house. He then heard the sound of a gun shot. He then rang the accused asking him about the gun shot. The line of the accused was busy. As a result he rang APC Ambani (Pw 2). Pw 2 told him that there was break -in of the house of Ndiema.

Furthermore, Pw 3 testified that he accompanied other officers to the house of Ndiema. Upon arrival they called the accused. The accused did not respond. Thereafter, the accused shouted that he was at Ndiema's compound and that the people at Ndiema's house appeared to be armed. Pw 2 then rang Sgt Cheruiyot and explained him and he asked for reinforcement; since Pw 2 and APC Muendo were not armed. As a result they rushed to the armoury and were issued with G3 rifles. They returned back to the scene and cordoned the area from outside. There was a police a vehicle which lit the area. The police then threw tear gas into the house. Later they entered the house and saw a dead body in jeans, a jumper and sports shoes. That body was at the door. That door was broken. The body was taken to the mortuary. Some police officers fired their firearms.

The prosecution also called No. 1996061719 Sgt Kipsang Sumukwo Matui (Pw 4). The evidence of Pw 4 supports that of Pw 3; except that he added the following. When he arrived at the scene the accused told him that thieves had broken and entered the house of Ndiema and since he was in charge, he rushed into Ndiema's house and shot into the house. He also added that they recovered items for breaking into the house from that scene of crime.

Furthermore, the prosecution also called No. 2011319087 APC Arnold Mangovya Ombati (Pw 5). Pw 5 lived in the compound of Ndiema but was on leave at the material time. The evidence of Pw 5 supports that of Pw 4. He got a call from Pw 2 that there was a break-in at Ndiema's house. Pw 5 then rang the accused. He also testified that there had been many incidents of theft at the magistrate's house and also at Ambani's house (Pw 2).

No. 2015087553 Gideon Mutai (Pw 8) was also called by the prosecution. The evidence of Pw 8 supports that of Pw 3, except that he added the following. He went to the scene of shooting while armed with a G3 rifle. He then shot five times towards the window of the house to find out if there was any response from that house. There was no response. He also testified that the accused was assigned to guard the magistrate's house. He further testified that as an officer he is supposed to use a gun when his life is in danger. He further testified that the reason for having two officers together is to enable them assist each other. He also testified that the National Police Service Act lays down conditions when an officer is allowed to use his firearm. Those conditions include when the officer is saving the lives of other officers or other persons and in defence of life or property. He also testified that he did not know whether the accused identified himself before he used his firearm.

The prosecution also called Snr Sgt Hatun Kiptoo Cheruiyot (Pw 9), the armourer in charge of the sub-county armoury in West Pokot. Pw 9 testified that on 15/12/2017 he issued firearms to officers going on duty. His other duties included receiving firearms from officers returning the same to the armoury. He also testified that he knew the accused. Pw 9 further testified that he issued to the accused an AK 47 rifle registration No. 59013240, which he identified and was subsequently produced as exhibit 1 (a). He also issued to the accused thirty (30) rounds of ammunition, 24 of which were returned to him by the accused; which he identified and were subsequently put in evidence as

exhibit 1 (b). Additionally, he issued the accused with a magazine which he identified in court and was subsequently produced as exhibit 1(c).

Pw 8 further testified that when he issued the accused with the foregoing exhibits, he signed for them in the daily arms issue book, which he identified and was subsequently produced as exhibit 9. He further testified that he used to issue rifles according to the duty roster which was for the period of 10th – 16th December 2017. According to that roster the accused was assigned to guard the judges's residence.

Pw 9 continued to testify that he rang the accused, but his line was busy. He then rang Philip Malalo (Pw 3). Pw 3 told him that it was the homestead of Ndiema that had been attacked and the accused had responded.

Pw 9 testified that he issued officers (nine of them) under the command of IP Shitanda with firearms, which they later returned to the armoury on 16/12/2017.

He further testified that he received from the accused the rifle and ammunition less six (6) of them. The accused told him he had used the 6 rounds to fight the intruders in Ndiema's compound. Pw 9 handed the rifle issued to the accused to the OCS Kapenguria police station; since it had to undergo ballistic examination.

Pw 9 further testified as regards the procedure in respect of the usage of firearms. He testified that when acting in an emergency the officer concerned must inform the boss first. When an officer sees the thief he has to warn him first and then identify himself. The officer will then ask the identity of the thief. If the thieves are armed, he has to order them to disarm by asking them to surrender up to three times. If they refuse, he shoots in the legs for example.

Pw 9 further testified that the accused appeared to have been assigned with a prison officer at the magistrate's house. He also testified that the officers who went for reinforcement shot in the air as follows: APC Thomas one round, Frederick Mwenda 2 rounds, APC Mutai Gideon 5 rounds. He also testified that if the scene is dark, the officer must issue a warning and then fire as a way of finding out if the attackers are armed.

Pw 9 also testified that the accused was assigned to guard the judge's residence, although the accused and the prison officer were staying at the magistrate's house.

The prosecution called Kimaiyo Kigen Cherop (Pw 10), an hotelier business man at Kapenguria. He testified that the deceased was a manager at his hotel. Pw 10 learned from Cheruiyot that the deceased had been fatally shot. He identified the body of the deceased to the doctor who performed a postmortem examination on the body of the deceased on 19/12/2017. The deceased was his nephew.

No. 222598 IP Oduor Kennedy Wanjala (PW 11), responded by going to the shooting scene. He testified that he fired tear gas into the house of Ndiema to flush out any person if there was any in the house. No one came out. He checked Ndiema's house and found that the door was broken. He saw the body of the deceased at the door a half of which was lying in the house and the other half was outside the house. Beside the body there was a metal rod.

Pw 11 testified that he collected four (4) spent cartridges at the scene, which were 20 metres from the body of the deceased; which were subsequently produced as exhibit 10. Pw 11 testified that they recovered the spent cartridges from where PC Ochieng was when he shot the deceased. He then handed over the said cartridges to Cpl Noor (Pw 12). At the scene they were using security lights from the police vehicle.

Pw 11 also testified that it is the situation on the ground that determines when to shoot; but that an officer can shoot when his life is in danger, when rescuing other people, or when rescuing a VIP or when the officer knows that the attackers are dangerous.

Pw 11 then testified in relation to the clothes of the deceased namely a yellow apron exhibit 8, a pair of long trousers exhibit 3 and a jacket exhibit 7; which he identified.

Pw 11 testified that he did not know whether the accused identified himself before shooting. He also testified that in darkness an officer can fire without identifying himself. He further testified that the door of Ndiema's house was broken and that is where the body of the deceased was. At that scene also were the items for house breaking.

No. 93144 Cpl Mohamed Noor (Pw 12) was called and testified as follows. He was attached to crime investigations at Kapenguria police station. He rushed to the scene of crime after arming himself. At the scene he saw a broken door. There were gun shots at the wall, one outside and three outside.

Furthermore, he saw two crow bars, one of which was produced as exhibit 5. The body of the deceased had injuries on the stomach, both legs behind the knees and chest.

Pw 12 received from IP Wanjala an AK 47 rifle and four spent cartridges. He also recovered the clothes of the accused.

Pw 12 also testified that it was a dark night during that date; and if the incident occurred next door where the officer (accused) was, he was entitled to use his firearm.

As regards the scene, Pw 12 testified that he saw gun shot edges at the door from outside and some gun shots on the wall. There was another gun shot on the ground where the body of the deceased was lying. In his view, the deceased was shot as he was exiting from the house. The exit wound was from the chest to shoulder and from stomach to the back. He only found a crow bar at the scene, which was heavy and could

not be thrown at someone who was 30 metres away.

Pw 12 also testified that according to the gun shots on the floor, it appeared that the shooting on the legs and the stomach was from close range and while the deceased was lying down. The gun shot on the leg seemed to have been fired when he was standing and it exited from one leg to another. Apart from the crow bar the burglars were not armed. And that if the burglars were not armed the force used was excessive.

Furthermore, Pw 12 testified that Ambani rang the accused and requested him to go and check what was happening since his wife was alone in the house during that dark night. Ambani lived in the house that was in the same compound of Ndiema.

Doctor Jotham Mukhola (Pw 13) put in evidence the pathologist report as exhibit 12 that was prepared by Dr. Thuo. Dr Thuo had proceeded for further studies in the University of Dar es salaam, Tanzania.

According to the said report the deceased died due to haemathorax (bleeding in the chest cavity) in the platal spaces caused by direct injury to both lungs with perforation of the same. Additionally, bleeding from the left haemoral vessels contributed to the cause of death with the source suspected to be a sharp object of high velocity. He further testified that a sharp object of high velocity can be a bullet.

The doctor further testified that the wounds on shoulders could match the description caused by a bullet. He further testified that in some circumstances one could tell entry and exit point with the exit being larger than entries. He testified that the entrance was at the shoulder region.

Pw 13 testified that if the deceased had been given first aid immediately, he could have survived. The deceased was aged about 23 years old.

No 231165 SP Alex Mudindi Mwandawiro (Pw 14), a ballistic a firearms examiner was called by the prosecution. He testified that he had 18 years experience as a firearms examiner.

Pw 14 received the following exhibits for examination.

- 1) a rifle bearing S/NO. 59013240 exhibit 1.
- 2) A magazine exhibit 8 (C).
- 3) 24 rounds of ammunition EXHIBIT 10 (b).
- 4) spent or expended cartridges exhibit 10 (a).
- 5) a fired bullet exhibit 10 (c).

After examining them Pw 13 made the following findings.

The rifle bearing S/NO. 59013240 exhibit 1, is a Chinese rifle copied from the Russian AK 47 designed to use the 24 rounds of ammunition exhibit 10 (b).

The general and mechanical condition of the AK 47 was good and was capable of being fired.

Pw 13 proceeded to test fire the live bullets (exhibit 10 (b)) and found that the 3 rounds of ammunition that he randomly picked were test-fired from the AK 47 rifle.

After doing his comparison analysis, Pw 13 concluded that the AK 47 rifle was used to fire the spent cartridges exhibit 10 (a).

Pw 13 then produced his report as exhibit 13B.

No 230390 SSP James Lelia (Pw 15), who was attached to CID office West Pokot County testified that he was the investigating officer in this case; following instructions from his boss (Michael Mugo, DCIO) to investigate the shooting incident that occurred on 15/12/2017 at Government quarters in Kapenguria. Pw 15 went to the scene in company of Cpl Mohamed Noor and Cpl Simiyu. The scene was at the dwelling house of Mr. Ndiema, who was the commissioner of police in charge of peace building.

Pw 15 continued to testify that upon arrival at the scene, he was shown the rear door of the house where a break in had occurred in the night of 15/12/2017. The shooting involved Kiplimo Kigen, who was fatally shot. Pw 15 was informed that the accused shot in response to a distress call. The accused told Pw 15 that he met people who were running away from the scene, hence the fatal shooting.

Pw 15 further testified: *“There was no other shooting after the accused shot. The only spent cartridges were from the firearm of accused.”*

Furthermore, Pw 15 received from Cpl Noor some exhibits including the following. A metal rod exhibit 5. Pieces of broken door exhibit 4. He was also given the AK 47 rifle exhibit 1. Four spent cartridges exhibit 10 (b). 24 rounds of ammunition exhibit 10 (a). He then subjected the firearm to a ballistic examination by preparing an exhibit memo exhibit 13 (a) in respect of which he got a ballistic examination report exhibit 13 (b).

Pw 15 also called IP Were of scenes of crime Kitale, who took 42 photos exhibit 14 (b) and he prepared a report dated 9/2/2018 exhibit 14 (a).

The photos show a general view of the house and the body of the deceased.

Furthermore, Pw 15 produced the AK 47 rifle as exhibit 1, which bore serial no S/N 59013240. He produced its magazine as exhibit 8 (c). Additionally, he produced 4 spent cartridges as exhibit 10 (b). He also produced a spent bullet head found at the scene as exhibit 10 (c).

In addition to the foregoing Pw 15 also produced the green khaki of the accused as exhibit 2.

Pw 15 also produced the clothes of the deceased as exhibits as follows. Brown trouser exhibit 3. Brown stained jacket exhibit 7. Yello apron exhibit 8.

Pw 15 also collected the duty roster for the period 14th -15th /12/2017 exhibit 9 which showed accused was issued with the AK 47 rifle and was assigned to guard the judge's residence during that night.

Pw 15 also obtained from the in charge of the AP a weekly duty roster exhibit 11 for the week 10th-16th December 2017 which also shows that accused was assigned to guard the judge's residence.

The accused told Pw 15 that he was on duty when he responded to a distress call.

In respect of when an officer is entitled to use a firearm, Pw 15 testified that an officer may use his firearm when his life is in danger or when the life of another is endangered.

Pw 15 then drew a sketch plan of the scene which he produced as exhibit 151, which showed the accused fired from a distance of 24 metres. Pw 15 also testified that: "He told me he fired into the direction of the fleeing robbers from the rear door."

The accused told Pw 15 that he fired because his life was in danger. Pw 15 testified that Ndiema was not in his house that night and a police officer's wife was in the unihut that was next to Ndiema's house. He also testified that the accused was the first person to respond to the SOS and that there was a history of house breaking in that area. Pw 15 was also informed of another house breaking that had taken place earlier in December 2017.

Pw 15 also testified that the only spent cartridges were from the firearm of the accused.

The submission of the prosecution

The prosecution did not make any submissions since they have no right to make a submission; since the prosecution was not personally conducted by the Director of Public Prosecutions as set out in section 310 as read with section 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The defence case.

The rights of the accused under section 200 (3) of the Criminal Procedure Code as read with section 201 (2) of the same code were explained to him; since I was the second succeeding trial judge.

Following the said explanation, the accused elected to proceed from where the trial had reached. He did not elect to have any prosecution witnesses recalled; which right of making the application is conferred upon the accused by said provisions of the Criminal Procedure Code.

He elected to testify on oath and called his wife as the only witness.

The accused as Dw 1 testified as follows. He is an administration police officer of force No. 2015087255 stationed at Chepareria Ap Camp. He was stationed at Kapenguria AP HQS in Kapenguria on 15/12/2017. On 15/12/2017 he was assigned guard duties at the residential houses of the magistrate, of the judge and of the commissioner of police (Mr. Ndiema).

Dw 1 also testified that his duties included protection of lives and property. Dw 1 referred to the prosecution exhibit Pexh 11, being the duty roster to show that he was assigned to the judge's residence. He was issued with an AK 47 rifle for his guard duties in respect of those three houses which are 50 metres apart.

On 15/12/2017 Dw 1 reported on duty at 6.00 pm and reported off duty the next day at 6.00 am. Dw 1 went to the magistrate's residence. At 9.50 pm APC Ambani rang him. He told Dw 1 that thieves had broken into Ndiema's house. APC Ambani told him to go and check what was happening there. APC Ambani also told him that he had rang APC IP Wanjala.

Upon arrival at the gate, DW 1 heard noises in the house of Ndiema. While outside Dw 1 identified himself that he was a police officer while he was 30 metres away from Ndiema's house. No one came out. It was dark.

Dw 1 then fired once into the air. Dw 1 then heard foot steps of those in the house running away. After that armed police arrived in a land cruiser. After entry into the house one police officer fired using his gun. Another officer fired using tear gas. Apc Mutai fired 6 rounds of

ammunition. The land cruiser put on its light and directed it towards the door.

Dw 1 continued to testify that when the police arrived he was 30 metres away from that house. At the time the police were firing Dw1 was with APC Malalo and PC Muendo. The residence of Ndiema was lit. When the land cruiser put on its head lights, Dw 1 saw the broken door, and a body of a person lying down face upwards at the door with a lot of blood. Next to the body there were two iron bars. Those iron bars that were put in evidence as prosecution exhibits Pexh 5 and 6 and were lying next to that body. The door had been broken and was painted blue. The pieces of timber were put in evidence as prosecution exhibit Pexh. 4.

The deceased was not living in the house of police commissioner Ndiema. The said iron bars were used to break the door of Ndiema. The only person who was living in the house of Ndiema was the wife of Ambani. The wife of Ambani had a two months baby. The deceased was not residing in the compound of Ndiema.

Dw 1 testified that he is allowed to use a gun to protect the property of the citizen. Dw 1 further testified that he responded to a call that the house of Ndiema had been broken into by thieves and the wife of Ambani was there.

Dw 1 further testified while at the house of Ndiema he fired four times because the thieves were many and it was a dark night. Dw 1 testified that he also fired to rescue the wife of Ambani and her child. Dw 1 also testified that he did not know whether the thieves were armed or not. And while he was outside the house of Ndiema, Dw 1 heard the noise of iron bars clashing.

Furthermore, Dw 1 testified that he managed to rescue the wife of APC Ambani.

In cross examination Dw 1 testified that he was trained on how and when to use a firearm. Dw 1 also testified that he was trained to use a firearm for self defence, defence of citizenry property and rescue of the citizenry. Dw 1 continued to testify that his life was in danger although he was 30 metres away from the house of Ndiema. He also testified that when he arrived at that house it was dark and the thieves were many and armed.

Dw 1 also testified that he only used four bullets. He further testified that: *“I only used four bullets. When one fires and shot with an AK 47, the first bullet is as result of me firing, the second shot went off automatically. I fired the third bullet myself into the air also. I fired the fourth bullet into the window of that house. By the time I was firing the fourth shot, the thieves had escaped. I fired the fourth shot because I was not sure that all the thieves had escaped.”*

Furthermore, Dw 1 testified that when he fired the fourth shot, the wife of Ambani and her child were in another house of Ndiema

Dw 1 further testified that he had been issued with 30 bullets from the armoury; but when he returned the gun, he returned 26 bullets. Dw 1 also testified that in November 2017 the thieves had broken and stolen from that house. They stole two sacks of maize in November 2017. They also came to steal for a second time from that house; but Dw 1 and APC Ambani repulsed them.

Quinter Akoth Ochieng (Dw 2), is the only defence witness called by the accused. Dw 2 is his wife. Dw 2 testified that she is a business woman selling clothes popularly known as “mitumba”. She testified that they lived in the magistrate’s house in Kapenguria.

She further testified that while in their house, a person rang the accused. After they finished talking she asked him as to who had rang him. The accused told him that he was talking to Ambani. The accused further told her that Ambani had told him that thieves had broken into the house of Ndiema.

Dw 2 continued to testify that the accused left for Ndiema’s house. She then heard gun shots from Ndiema’s house. She then heard people running speedily from Ndiema’s house. As she was standing at her door step she saw a land cruiser entering Ndiema’s compound with police. She then heard gun shots. At 12.00 mid-night the accused returned to the house. The accused then told her what had happened.

The following morning she went to Ndiema’s house. There she saw blood on the floor and a broken door. She also testified that Ambani was a police officer who lived in Ndiema’s compound.

Furthermore, the accused told her that the police fired shots in Ndiema’s compound.

The submissions of the accused.

Ms Chebet, counsel for the accused submitted that the prosecution had to prove the following constituent elements of the offence of murder beyond reasonable doubt. First, the deceased is dead. Second, the cause of death has to be established. Third, there has to be proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person. Fourth, there has to be proof that the unlawful act or omission was committed with malice aforethought.

Based on the foregoing ingredients of murder and the evidence of both the prosecution and the defence, counsel submitted that the accused was at the scene in exercise of his statutory duties as a police officer; for he had gone there to rescue the wife of Ambani (Pw 2). The wife of Pw 2 and her baby were living in the unihut within the compound of Ndiema. Counsel has submitted that what was committed that night was an attempted robbery. Counsel therefore concluded that the accused had no mens rea, that is, the intention to murder the deceased.

Based on section 17 of the Penal Code, counsel submitted that the accused acted in self defence; in view of the evidence of the uncle of the deceased (PW 10) that the accused had good relationship with the deceased. Counsel cited *Republic v Esmail Hussein Ibrahim (2018) e-KLR*, in which the court observed that the prosecution must discharge the burden that the unlawful act of the accused was done with the sole intention to kill the deceased or to inflict grievous harm.

Counsel further submitted that the prosecution witnesses namely Pw 4, Pw 3, Pw 2, Pw 1, Pw 8, Pw 11, and Pw 12 were not eye witnesses. These witnesses responded to the shooting and gave a narration of what the accused told them. Counsel submitted that what the accused told them is inadmissible hearsay.

Counsel further submitted that the prosecution failed to call a crucial witness namely the wife of APC Ambani (Pw 2); who was at the scene.

Counsel submitted that the evidence of the defence is credible. The evidence of the accused was that he identified himself as a police officer before he fired four times using his firearm. It was dark and therefore the accused could not identify the people who ran out of the house of Ndiema. The accused also testified that there were rampant instances of robbery within the area and that in one instance the accused while responding to a distress call was injured; while in another instance he managed to escape.

In those circumstances, the accused proceeded to the scene with caution and his life was in danger since the robbers were armed and dangerous. Counsel submitted that prosecution witness Pw 11 confirmed that there are circumstances in which a police officer may use his firearm. In the instant case it was dark and therefore it was not necessary for the accused to identify himself before shooting.

Counsel has therefore urged the court to acquit the accused since the prosecution has failed to prove the case beyond reasonable doubt.

Issues for the determination.

I have considered the entire evidence of the prosecution and that of the defence. I have also considered the submissions of counsel for the accused. As a result, I find the following are the issues for determination.

- 1) Whether it is the accused who fired the fatal shot.
- 2) Whether the evidence discloses murder or manslaughter.

Issue 1

It is not contested that the accused responded to a distress call from APC Ambani (Pw 2), who resided unihut in Ndiema's compound, but who was not there on 15/12/2017. It is also not contested that the wife of APC Ambani lived in the unihut in the compound of Ndiema. Ndiema was a police commissioner in charge peace building. Ndiema was not in his house on 15/12/2017.

It is also not contested that in response to the distress call the accused fired gun shots while in Ndiema's compound.

What is contested is whether it is the accused who fired the fatal shots that killed the deceased. In order to resolve this issue, it is important to determine the weight and /or the admissibility of the evidentiary responses of the accused to various police officers. In doing so, I have borne in mind that I am not sitting as an appeal court in respect of the evidence that was admitted into hearing by my predecessor (Sitati,J). This is the challenge that arises when a trial is conducted by two judges. However, I am guided by the principle pronounced by the Court of Appeal in *Oketch Okale & Others v Republic (1965) EA 555*, which is that a trial court must consider the entire evidence on record and then proceed to make findings of fact based on that evidence and not on speculations.

1. In this regard, I find that the evidence of No. 222598 IP Oduor Kennedy Wanjala (PW 11), that they recovered the four spent cartridges 20 metres from where PC Ochieng was when he shot the deceased, is inadmissible. It is in essence a confession which was obtained in violation of section 25 of the Evidence Act (Cap 80) Laws of Kenya. Pw 11 should have subjected the accused to rules that govern the taking of confessions as stipulated in section 25A of the Evidence Act; because the accused appeared to have initially admitted shooting the deceased. This amounted to a confession within the meaning of section 25 of the Evidence Act; whose provisions read as follows: “

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

His admission is a confession; which was not admissible against him and should not have been proved against him for it was not taken by an authorized police officer as required by law. The provisions of section 25A of the Evidence Act, reads as follows:

“25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.”

It is clear that No. 222598 IP Oduor Kennedy Wanjala (PW 11) was not by law authorized to take a confession from a suspect; since he was one of the investigating officers in the initial stages of this case.

Furthermore, No. 222598 IP Oduor Kennedy Wanjala (PW 11), took an oral confession from the accused in breach of Rule 4 (3) of the rules

governing the making of a confession in all instances where the confession is not made in court. That rule requires the recording police officer to ask the accused person to nominate a third party to be present during the making of a confession. The rule also requires the particulars of the third party and the relationship to the accused to be recorded. Additionally, it is equally clear that the police officer who takes the confession must reduce it into writing and it must also be in the presence of a third party nominee of the suspect.

In the premises, I find that the oral confession made by the accused is inadmissible and I therefore reject it. Similarly, the oral confession made by the accused to No 230390 SSP James Lelia (Pw 15), is also inadmissible for the same reasons.

Pw 11 and Pw 15 ought to have taken the accused to a judge, or a magistrate, or a police officer not below the rank of inspector to take a statement under charge and caution, if the accused was desirous of making a confession. The accused had to be accompanied by a third party. It is also important to remind ourselves that the enactment of the law and the rules governing the taking of confessions was a reaction to our troubled recent past when police officers unfairly took confessional statements from suspects. It is therefore incumbent upon those charged with the administration of criminal justice namely the police, prosecutors, advocates, magistrates and judges to make sure that they are strictly enforced in order to promote fair trials. This will also enhance confidence in the administration of the criminal justice.

Lessons should also be learned from the history of England in respect of the secret and inquisitorial practices of the 17th century English court of Star Chamber, which obtained confessions through torture and imposed harsh penalties upon those it convicted. It is the experience of that court that strengthened the rule that trials should be conducted in open court which found its way to Kenya by virtue of the reception clause in respect of English law in section 3 of the Judicature Act (Cap 8) Laws of Kenya.

Furthermore, I find as incredible the evidence of SSP James Lelia (Pw 15) that *“There was no other shooting after the accused shot. The only spent cartridges were from the firearm of accused.”* This evidence runs contrary to the ample evidence of Snr Sgt Haron Kiptoo Cheruiyot (Pw 9), the armourer that the officers who went to the scene shot in the air. Those officers were APC Thomas who fired one round of ammunition, Frederick Mwenda who fired two rounds of ammunition and APC Mutai Gideon who fired five rounds of ammunition. The issue raised by this evidence is the whereabouts of the spent cartridges from the fired shots by these officers.

Furthermore, the foregoing evidence of Pw 15 is also materially contradicted by the evidence of Frederick Mulalo Muendo (Pw 1), who testified that while at the rear door Sgt Matui (Pw 3) ordered them to fire towards the door which was open. They fired 2 – 3 shots. There was no response. Furthermore, Pw 3 also testified that after going to the scene of shooting as part of the reinforcement team some officers fired firearms. The evidence of Sgt Kipsang Sumukwo Matui (Pw 4) also materially contradicts that of Pw 15. Pw 4 testified that after reinforcing those on the ground and before removing the body of the deceased; there was shooting into the house of Ndiema from outside by police. Pw 4 also testified that tear gas was also thrown into the house flush out any burglar in the subject house of Ndiema.

In view of the foregoing ample material contradictions in the prosecution evidence, I find that the prosecution has failed to explain the absence of the other spent cartridges at the scene which were as a result of firing from the G3 rifles that were fired by the other police officers.

I further find that there is ample evidence that the four spent cartridges were fired from the AK 47 which was issued to the accused.

The picture that is painted by the prosecution that there were no other cartridges at the scene is incredible.

Furthermore, the prosecution failed to call a key witness namely the wife of APC Pland Likhangi Ambani (Pw 2); who lived in the unihut in the compound of Ndiema. Pw 2 was told by his wife that she heard a loud bang from the house of Ndiema and that a few minutes later, she called again him. She told him that she also heard gun shots. After the gun shots she heard of footsteps of people running away from the compound towards the fence. Pw 2 then phoned the accused, whose house was 150 metres away. This potential key witness might have shed light as to the time interval of the shots fired by the accused and those fired by the police officers. She might also have shed light on how she was rescued and the conversation between her and the police officers including the accused.

I am therefore entitled to draw an adverse inference that had the prosecution called the wife of APC Pland Likhangi Ambani (Pw 2); she might have given favourable evidence to the accused. I am guided by the decision of the Court of Appeal in *Bukenya & others v Uganda (1972) EA 549* in finding that the prosecution is under an obligation to make available all witnesses necessary to establish the truth even if their evidence is inconsistent to the prosecution case. The reason is that the public prosecutor is an agent of justice, whose duty is to ensure that the guilty are punished and the innocent are acquitted. It is better to acquit a guilty person than to convict an innocent person.

In the premises I find that the chain of circumstantial evidence does not exclusively point to the accused as the person who fired the fatal shot that killed the deceased. The gap left by the potential evidence of APC Ambani's wife has broken the chain of circumstantial evidence that might have exclusively pointed to the accused as the person who fired the fatal shot. This is the legal position in view of the fact that there is no eye witness who saw the deceased shoot the deceased.

Furthermore, the unexplained absence of the spent cartridges of the G3 rifles of the other police officers at the scene of crime casts doubt on the credibility of the evidence of SSP James Lelia that the only spent cartridges were from the firearm of the accused. The evidence of Pw 15 that he recommended to the DPP that an inquest be held in this matter was inadmissible opinion evidence.

It therefore follows that the prosecution has failed to prove that the fatal shot was fired by the accused person.

In the circumstances, I find as moot or academic the issues as to whether the evidence discloses murder or manslaughter and whether the accused acted in self defence or in defence of APC Ambani's wife and child or to protect the property of Ndiema with the result that the accused is hereby acquitted under section 322 (1) of the Criminal Procedure Code.

He is therefore discharged from his bail obligations. The sureties of the accused are also hereby discharged from their obligations and their securities including cash money (if any was deposited) are hereby ordered released to them.

Judgement signed, dated and delivered in open court at Kapenguria this 21st day of July, 2021 in the presence of Mr. Okoth for the Republic and Ms. Chebet for the accused.

J M BWONWONG'A

JUDGE