



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 10 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

KHATAR GEHOW ADEN alias INGE.....ACCUSED

JUDGEMENT

1. The accused stands charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 4th April 2013 at Garissa County in the Republic of Kenya jointly with others not before court murdered Abdimajid Mohamed Hassan.

2. He has denied the charge. In support of their case, the prosecution called several witnesses.

3. PW1 was Superintendent Lawrence Nthiwa of CID Firearms Laboratory in Nairobi, a firearm examiner. He received an exhibit memo from Corporal Samson Muhindi. The exhibits were two spent cartridges. He was asked to examine caliber of the firearm used and whether they could be fired. Together with others he carried microscopic examination. He concluded that the cartridges had been used in a firearm reported in case OB 55/16/11/2012 reported in Garissa. The case was No. 13 of 2013. He also stated that the ejector marking were consistent with a Tokalev Pistol. He therefore concluded that the two cartridges were fired from the same pistol of which they were yet to recover the revolver. He made a report and signed the same which he produced as an exhibit.

4. In cross-examination he stated that they had not received the firearm used to discharge the cartridges. He could not tell whether it was him who examined the cartridges in a related matter. He stated that he did not know the person who fired the pistol.

5. PW2 was Mary Ngoku Kieti of Madogo. She stated that on 4th April 2013 she sold vegetables at Bula Iftin in a kiosk near the administration police station. On the 4th April 2013 at 7 pm she heard an explosion and noted that Gitonga had been shot in the limbs a metre away from her. According to her there was electricity light outside the shop. As she went to check for her child in a hotel about 7 metres from the scene she was shot at from behind and saw a person following her. The person shot again and hit her right hand and then there were many gunshots and she fell down. She saw the man who shot her. He was a person known to her for long that is 4 years. The man did not tell her anything. The man was in a group of 6 people who passed her and went away. She also said that there was electricity light in another kiosk and a hotel nearby. She said she identified the attacker before she fell down.

6. According to her, Gitonga allowed her to sell vegetables outside his shop though they were not related. She knew the attacker as "Janja" or "J3" whom she had seen at Gitonga's shop at 2 pm when he came to buy miraa on credit and when Gitonga refused the man bit his finger and told Gitonga he would ensure he would move away from Garissa.

7. After the attackers left, she crawled on her knees to a house of a Somali man who initially told her to go out but later both him and his wife carried her outside. She then crawled on her knees to Stella's house 50 metres away where she was assisted. She was put on a mattress and carried to the police station and then Garissa Provincial General Hospital and admitted for 13 days. She attended clinics upto June 2013. One day when she went to pick drugs in June 2013 she spotted the person who had shot her and informed the police. This was at 12 noon. She stated that she used to see the man before the incident but after the incident this was the first time to see him. She said that when she called the police specifically a police officer called Kimathi she saw the man go to a place where he arranged miraa to sell and that is where he was arrested wearing a green cap. She said also that Nyamu was injured in the attack and a Somali man was shot dead. She later recorded her statement. On 6th June 2013 police called her for an identification parade where she pointed at the accused from a line. She identified the accused in court.

8. In cross-examination she stated that she knew the accused for 4 years but she did not know his job nor whether he had a family. She said she knew the accused as a student at Bura East Secondary School. She said she did not see the attacker coming but maintained that she saw the accused in the electricity light. She said that Gitonga was standing outside his shop and that a grenade had been thrown towards the hotel. She maintained that the accused threw the grenade and said that he was dressed in a brown T-shirt and a black trouser but did not wear anything on the head. According to her two other attackers wore hats. Four of the attackers wore Somali attire or kanzus two of them had

hats. The accused wore a brown T-shirt and a black trouser. She said that “Janja” was the accused and a frequent customer of Gitonga for miraa. She maintained that the accused and Gitonga disagreed that day. According to her of the attackers, she only recognized the accused. She denied buying milk and miraa but said that on 18th April 2014 she saw him buying milk and miraa and boarding a taxi. She could not remember when she made a report to Garissa police station. She stated that she made a report after a month. She said police came to see her in hospital but she did not give them her phone number.

9. In re-examination, she stated that at 6 pm there were many customers and maintained that the attackers were 6 and she saw them. She said that she told the police that she knew the physical appearance of the accused.

10. PW3 was Erupe Kelvin a police officer attached to Iftin Patrol Base. On 4th April 2013 at 7.30 pm he was watching news at his house when he heard gunshots and went out. He rushed for his gun and then rushed to the gate and lay down and fired two shots in the air. His boss joined him and told him to go towards the shops 50 metres away where he found one person at a door of a shop and three others outside. That person was dead with a gun injury on the head. There was electricity light at the shop. Police and ATPU came and collected the injured to hospital. As they left, they were told about a grenade that had not exploded. They went and guarded the grenade until morning.

11. In cross-examination he said he had not seen the accused. He said one man died and a woman was injured. He did not see spent cartridges at the scene. He did not see signs of a grenade blast but saw an unexploded grenade behind the hotel.

12. PW4 was Anthony Mutuku Nyamu who lived at Bulla Iftin from 2002 operating a kiosk which dealt in charcoal. On 4th April 2013 a Thursday he went to collect charcoal and when he came back he sold miraa to a customer who went to the hotel to watch news. There was light from the electricity lamp and he also went to watch news. At 7.30 pm he heard an explosion while seated outside the hotel. Everybody kept silent and shortly thereafter people started running and he joined them. They passed through a gap and saw Mary running. He could still hear gunshots and lay down. After sometime he decided to stand and ran but lifting the head and he felt something hit him. He looked and saw somebody standing behind him wearing jeans trousers and blue stripped shirt. He did not see his features and after about 30 seconds threw something which hit the roof. He then heard people talking on the road specifically Gitonga who said “*iko kwa tumbo.*” They went to an electronic shop where police rescued them. He was taken to Provincial Hospital Garissa and later to Kenyatta National Hospital. At Garissa Provincial Hospital he saw Mary brought to hospital and learnt that a Somali man had been shot dead.

13. In cross-examination he stated that he did not see the accused. He said he was hit by a bullet on the shoulder. When he first saw Mary running he had not been injured. He said the front door or the hotel had been closed and the back door was open. He did not see the person who threw the grenade. He did not know where Mary, Gitonga and others were injured.

14. PW5 Alfred Mutua Musili who worked in a butchery at Bulla Iftin. On the 4th April 2013 at 7.30 pm he was at his hotel which is called “Ngaeka Mwaka” selling food. He had customers over 20 people and two workers Mwendwa Kimanzi and Mwendwa. He heard Mwendwa say somebody had thrown something towards the customers. They ignored that statement but before the lapse of 30 seconds they heard gunshots and they lay on the ground. There were many shots and a grenade was also thrown. He lay in the kitchen and other two young men came to hide in the kitchen. They then heard a loud explosion and one of the young men pushed the iron sheets by hand creating space which they used to escape towards the back. They escaped on their bellies to the home of a neighbour where they stopped till morning. By the time they reached the neighbour’s house the shooting had stopped. The following morning he went to Iftin Patrol Base. He went to the hotel after the police finished the investigations. He also gave the police a bucket with soil on their request but he did not know the purpose.

15. In cross-examination he said that he knew Mary Ngoki. He stated that he did not know the accused before. He was not called to a parade to identify him. He said he was not told to go back to the hotel. He said his hotel had been destroyed because of gunshots which hit the cooking pots, jugs and the TV could not work.

16. PW6 was Ag. Inspector John Misoi currently of Garissa Police Station. On 4th April 2013 he was incharge of Bulla Iftin Patrol Base and as he watched news he heard a loud explosion followed by gunshots. He rushed out and joined officers on duty who opened fire. According to him these were PC Mureru and PC Mwenda. He instructed Cpl. Leyarane to guard the post. Before reaching the scene they found two victims in an electronic shop who asked for help. He called for a police vehicle which came and took the injured to hospital. They also found the dead body of a Somali man facing the entrance of a shop which was partly inside a shop. There was electricity light. He reported the incident to his seniors and they went to see the sign of a grenade explosion but they did not see any. According to him the dead person had a student card and they took the body to hospital. While at the scene Mary Kieti was brought with injuries on the hip and right leg. She was taken to hospital.

17. In the morning they got information that an object suspected to be a grenade was near the hotel. They went there and found a grenade at the back of the hotel with no safety pin. They secured the scene and the ATPU came and took away the grenade for detonation. When they went round the hotel they found a small hole at the entrance from which they formed an opinion was what witnesses called an explosion.

18. In cross-examination he said he was not an investigation officer and that he had been at Bulla Iftin for 6 months. He stated that they found two male victims and Mary. He said it was not safe for them to remain at the scene overnight and they left the scene at 10 pm. He said that photographs of the scene were taken but he did not know the person who took the photographs. He was neither the investigating officer nor the arresting officer.

19. PW7 was Dr. Ahmed Mohamed Abdalla of Garissa Provincial General Hospital who conducted a postmortem examination of Abdulmajid Mohamed Hassan on 5th April 2013 at 10.30 am. The clothes were blood stained and the deceased was in his early 20s. Death had occurred less than 25 hrs earlier. He saw one wound on the left side eye and another wound on the right side of the body. There was massive hemorrhage in the skull. He did not open the body. He stated that the injuries caused the death as vital organs were affected. He produced the postmortem form which he had filled and signed.

20. In cross-examination he stated that cause of death was bullet wounds.

21. PW8 was Benard Gitonga Mwaniki who used to operate a shop at Bulla Iftin in Garissa. According to him on 4th February 2013 at around 6 pm he was at the shop which belonged to his brother. There was electricity light and a woman sold vegetables outside the shop. He was seated when he heard gunshots. He decided to hide but the attacker told him not to attempt to run. He saw two people but could not identify them. Those people told him in Kiswahili “*usijaribu kukimbia*”. He found that he was shot on the abdomen and the right hand and he fell down. He later sought help from someone after seeing a watch repairer. The watch repairer assisted him. The police later arrived and he saw them at the hospital. He lost consciousness and was transferred to Kenyatta Hospital where he was admitted for 21 days. He was later taken to Kijabe Hospital where he stayed for 2 months and got better. He met Mary Kieti the woman who sold vegetables outside his brother’s shop at the hospital. He also met another man in the hospital by the name Anthony Nyamu.

22. In cross-examination he said that he came from Meru and knew neighbours at Bulla Iftin but he had never seen the accused person. He said he did not see the accused that day. According to him the attackers were about 3 metres away. He was inside the shop and could not tell where the shots came from. He did not go out of the shop. He stated that he was not called for an identification parade. He said that morning he disagreed with Khalif who was not the accused person on the dock. He said also that Saraji was not the accused person.

23. In re-examination he said that he had lived at Bulla Iftin for about 1 year and did not find Mary Kieti there.

24. PW9 was Cpl. Newton Bingi of Anti-Terror Police Unit. On the 5th of June 2013 at midday he was with colleague performing inquiries in Garissa when they received information from one of the Iftin shooting victims of 4th of April 2013 that she had seen a suspect whom she could positively identify. They proceeded to Co-operative Bank area and saw the suspect selling miraa wearing a green cap. They arrested him and went to his residence at Bula Skedi and conducted a search but did not recover anything. On 6th June 2013 an identification parade was conducted by C.I Wachira and the accused was positively identified by the witness who had previously visited the police station. The accused did not resist arrest. He identified the suspect they arrested in court.

25. In cross examination he stated that the person who identified the suspect had been injured in the incident. He did not know if the accused wore a cap during the incident. He said he was present during the identification parade and the woman informer was the only identifying witness.

26. PW10 was PC Anthony Ngugi Kuria. He was attached to ATPU in Garissa and on 4th April 2013 at 7 pm he was at Government Guest House having supper with Cpl. Mwiti when they received a telephone call from PC William Nduna informing them of gunshots at Bulla Iftin Centre. He informed Cpl. Mwiti about the incident and proceeded to Garissa Police Station and found C.I. Nicholas Kimanzi who assembled police officers and a Land Cruiser vehicle on which they put civilian plate number. They proceeded to the scene and found a shop on a road leading to a mosque where a body of a young man in a kneeling position was leaning on a door of a shop in a pool of blood. He appeared to be of a Somali origin and was shot on the head. Outside the shop there was a kiosk and a woman in a makeshift stretcher writhing in pain. The place was well light with electricity light. They found other police officers already at the scene and took the woman to Garissa Provincial Hospital where she was admitted. At the junction, was a shop and iron sheet structures which he came to learn was a butchery kitchen and a hotel. He found out that the hotel had been attacked. He drew a sketch plan of the scene and they returned there the following morning when they found an unexploded grenade which they collected.

27. In cross-examination he said the woman who was in pain could not talk and that he saw the accused person at Garissa police station several weeks later. He was not present when he was arrested.

28. At this point, the Hon. Judge Mutuku was transferred and I took over the case.

29. PW11 was Simon Nandi Singuti a government analyst from Nairobi. On the 19th June 2013, he received two exhibits from police officer Samson Mulendi. These were two samples labelled “BF03, and BF04 which were accompanied by an exhibit memo form. He was asked to ascertain whether the samples contained any explosive materials and what type of explosive materials, and thirdly to provide any other information which might assist investigations. He found that soil sample BF03 contained material which could be used in the manufacture of explosives. Sample BF04 contained a fertilizer ingredient which could be used in the manufacture of the explosives. He made his findings and prepared a report which he signed. He produced the exhibit memo and the report as an exhibits.

30. In cross-examination he said that the two exhibit memos had alterations on the dates. He said that the samples were received by his colleague that is Maryann Chege but that he handled the exhibits afterwards. He could not tell if the exhibits were collected from the scene or whether there was a mix-up of the items.

31. In re-examination he stated that the exhibit memo was not done in the government analyst office. He also said that alterations on the memo could not prevent him from conducting the analysis. He said that he was the Laboratory Manager at that time.

32. PW12 was Ag. IP Joseph Okoth. It was his evidence that on 5th June 2013 while at the office in Garissa he received instructions from his incharge C.I Kimathi to proceed and arrest a suspect in front of Co-operative Bank Garissa. He was given the description of the suspect. He proceeded there with 5 officers and took the suspect to the police station. C.I Kimathi also instructed him to go to the house of the suspect at Bula Mzuri at Garissa town where they conducted a search but did not find any evidence. They found that the accused lived with his mother in a room with two beds. They were however surprised that his bed had a lot of dust which gave the impression that he did not sleep there for two weeks. He identified the accused as the person they arrested.

33. In cross-examination he stated that his senior gave him the description of the suspect. He stated that he found the suspect with several other people selling miraa slightly after midday. He relied on C.I Kimathi who said the person they arrested was the correct suspect.

34. In re-examination he stated that the ATPU had duties to conduct investigations and recommend arrest.

35. PW13 was C.I Michael currently of Modogashe Police Station. It was his evidence that in 2013 he was the OCS Garissa Police Station. He stated that on 6th June 2013 at around 3 pm, he conducted an identification parade for Khatar and there was only one witness Mary Kieti to identify the suspect. He paraded the suspect together with 8 other Somali members and the witness identified him by touching the suspect on the chest. The suspect did not say anything after being identified. He signed the parade form and produced it as an exhibit.

36. In cross-examination he said that the suspect had been arrested the previous day. He was not aware that the Anti-Terror police officers had sworn an affidavit. He said that members of the parade were suspects from the cells. He denied a suggestion that members of the parade were not from the cells but agreed that they did not enter the parade in the OB report though they entered the report made by Mary Kieti in the OB. He stated that other than touching the suspect on the chest, Mary Kieti did not give any description of the suspect.

37. In re-examination he stated that his work was only to conduct the identification parade. According to him the identification parade or entries did not require to include details of height and colour of the participants in the parade.

38. PW14 was C.I Nicholas Kimathi the OCS Anti-Terrorist Police Unit Garissa and one of the investigating officers together with Cpl. Paul Macharia.

39. On 4th April 2013 7.30 pm when he was about to sign off from duty he received a communication on police radio about a grenade explosion at a hotel within Iftin Market in Garissa town on Ijara-Lamu road. He was with OCS Wachira and they drove together to the scene and he mobilized other officers who drove there in a different vehicle. On arrival they found DCIO Muteti and the officer incharge of Iftin police station IP Misoi. They were informed that the attackers had thrown two hand grenades in succession at a food kiosk belonging to Mutua and that though one of the grenades hit the back of the hotel it did not explode. The grenade that landed on front of the hotel exploded and occasioned injuries to Mary Kieti and Anthony Nyamu. There was also another victim called Bernard Kitonga. From the information the attackers then fired randomly at customers and in the process a young man called Abdimajid Mohamed Hassan was shot dead as he sought refuge at Gitonga's shop. They found the body in a pool of blood at Gitonga's shop. Mary was lying on a mattress but Nyamu and Gitonga had already been taken to hospital. They searched the body of the dead person and found a student identify card in his trouser pocket which showed that he was a Form IV student at County High School Garissa. They searched the area and found two bullet cartridges at the veranda of Gitonga's shop. They rushed Mary to the Provincial Hospital and took the body of the dead person to the mortuary. In the morning they made another visit to the scene and collected the unexploded grenade and sent samples of soil from the place where the grenade had exploded to the Government Analyst for forensic examination and received the report. They used an exhibit memo to forward the exhibits. He stated that he took photographs in the morning and visited the victims in the hospital. Bernard Gitonga, Anthony Nyamu was that morning taken to Kenyatta Hospital but Mary Kieti was left at Garissa Provincial Hospital. They confirmed from the Deputy Principal of County High School Garissa that the deceased was their student. They recovered unexploded grenade which was intonated by a police bomb expert. After discharge, Mary Kieti said that she clearly saw the person who had attacked her and that she knew him for some years as he operated some business in Bura and was also a student in Bura School. Nyamu on the other hand merely talked of a slim tall man. Gitonga talked of a person with whom they had disagreed hours prior to the attack. According to him the man wanted to be given miraa on credit and when Gitonga refused he threatened to eject him from Iftin market.

40. On 5th June 2013 Mary reported having spotted the man selling miraa at Co-operative Bank boda boda stage Kismayu road Garissa and police proceeded and arrested him. An identification parade was then conducted by C.I Michael Wachira and Mary identified the suspect. He stated that the veranda of the shop of Gitonga was well lit with electricity lights. The hotel and the corridor leading to the hotel was also well lit.

41. In cross-examination, he stated that he heard about the incident through a police radio. He stated that Mary Kieti and other witnesses mentioned the accused in their evidence and statements. He said Mary Kieti said that she knew the accused while he schooled at Bura. He said that they confirmed from the accused that he schooled at Bura but did not go to Bura to confirm the story. According to him Mary Kieti did not know what the accused did at Bura iftin. He stated that when they searched the home of the accused they found nothing. He said that he got description of only one person and not the other 5 suspects. According to him Mary Kieti and Anthony Gitonga described the person who fired and Gitonga also talked of a person with whom they had a disagreement. He said it was not appropriate to show Gitonga the accused because he was charged before Gitonga was discharged from hospital. He could not confirm if Mary Kieti was present during arrest. He said there was no high possibility that they picked the wrong person. He said he did not see the reason of asking the traders at the place where he was arrested about the accused person. He said that the name "Scorpion" came from the accused after arrest. He also said that Mary only knew the first name Khatar and they relied on the information of Mary. He said that the accused denied committing the offence.

42. In re-examination he stated that they were given information about accused schooling at Bura by Mary. He said he did not know the accused before and confirmed that they took some items to the Government Analyst Nairobi. He said he did not know the accused before arrest.

43. PW15 was Cpl. Paul Wachira of the Anti-Terrorist Police Unit Garissa who was part of the investigating team initially assisting the investigating officer but later becoming the chief investigating officer. He initially assisted C. I. Kimathi.

44. On 4th April 2013 at 7.30 pm he left work and boarded a matatu to Bulla Iftin Garissa when he heard a commotion and saw vehicles rushing from Bula Iftin to Garissa township with some people saying "risasi Bulla Iftin".

45. The vehicle stopped and he alighted and heard gunshots from Bulla Iftin direction. He did not go to the scene that night but followed the incident from police radio communication from which he got information that one person had been killed and others injured. Other investigators visited the scene that night. As for himself, he visited the scene the next day and with the chief investigating officer, cordoned the scene and recovered a grenade at a Makeshift Hotel. They also found that a young Somali man had been shot dead whom they later learnt was a student from County High School Garissa by the name Abdulmajid Mohamed Hassan. Those injured were Mary Kieti, Anthony Nyamu and Bernard Gitonga who operated the shop where the student was killed. They collected two spent cartridges at the door of the shop. They also recovered an unexploded grenade. He joined a team of GSU experts from Dadaab and they intonated the grenade in Madogo area. According to him the nearby restaurant was operated by Alfred Musili who was not injured while Mary was discharged from Garissa

Provincial Hospital Gitonga and Nyamu were referred for special treatment at Kenyatta National Hospital. He prepared an exhibit memo to send the spent cartridges together with soil samples from the scene of explosion of the grenade to the government analyst with an exhibit memo and they later received the report. He produced the items as exhibits including the exhibit memo. He stated that they sent the grenade lever to the bomb unit to establish the type of grenade as well as the manufacture. He confirmed that they received the report which he produced as exhibit No. 6. He also produced the report on the soil sample as exhibit No. 8. He stated that it was clear from the report that it was a grenade explosion.

46. They started recording statements on 5th April 2013. After discharge from hospital Mary Kieti recorded the statement that she could identify the attacker whom she said she knew before and had seen him the afternoon before the attack. The victims who were transferred to Kenyatta National Hospital, among them Gitonga said that the man was slender and he could identify him on sight.

47. On 5th June 2013 Mary Kieti informed the police that she had seen the attacker in Garissa township and that was how the accused was arrested. Next day an identification parade was conducted and the accused was identified. He said that the spent cartridges were forwarded to the ballistic expert for a report.

48. As for the deceased person, they received a postmortem report which indicated the cause of death. He identified the accused person in the dock.

49. In cross examination he stated that he did not know the accused before the arrest and that the accused was in court because he was identified by Mary Kieti in an identification parade. He agreed that he did not have any other evidence on the identity of the accused. He was however one of the arresting officers but did not go to the accused's house. He was not aware of any police officer who went to the accused's house. He maintained he did not go to the accused's house.

50. He stated that on 4th April he did not go to the scene but went there on 5th together with other police officers. He maintained that he collected two spent cartridges. The dead body was outside at the corridor of Gitonga's shop. He stated that Mary Kieti said that the accused was armed with a gun. He stated that the identity card of the accused was taken by the lead investigating officer. He said that the accused said that on 4th April 2013 he was at home and that they did not investigate to find whether he was at home. He did not know if he lived with another. He denied that Mary Kieti connected the accused with the offence because he had an argument with someone else.

51. With regard to the exhibit memo forms, he said the signature on the top side was to approve the changes. He said that exhibit memo forms were prepared by Cpl. Samson Mukundi. He felt that there was no need to countersign. He was not present during postmortem examination. He did not participate in the arrest.

52. In re-examination he stated that eye witnesses were Mary Kieti, Gitonga and Anthony Nyamu who identified accused in court.

53. That was the end of the prosecution evidence.

54. When put on his defence, the accused elected to give unsworn statement.

55. The accused in his unsworn defence statement said that he came from Bula Skedi where he had lived since childhood. In 2013 he was a businessman selling miraa near Garissa Doctors' Plaza near former Co-operative Bank. He attended Nassir Primary School and then Bura Boys Boarding School. He stated that on 4th April 2013 at 6 pm he closed his business and at 7 pm he went home. He did business that day with Mahmoud Mohamed who still sold miraa. He denied knowing Bernard Gitonga who lived at Bulla Iftin and denied visiting his shop. He knew Mary Kieti as a hotel proprietor near Bura Secondary School in the North Eastern Province. He met her there just as an acquaintance but did not see her at Garissa. He denied going to the alleged scene of the incident.

56. With regard to identification parade, he said that Mary Kieti must have confused him for somebody else. He denied possessing a gun or a grenade. With regard to the police coming to their home, he stated that they did so but they did not find anything in the home. He denied using the name "Janja" and said he is called "Inge" which means "Scorpion" which was a childhood football name. He said that he would call two witnesses.

57. DW2 was Zainab Adan who lived at Bula Skedi. She was the mother of the accused. According to her he sold miraa as his occupation. She said that on 4th April 2013 he came back home at 6 pm and they were together at home. She cooked for him and prepared his bed and he slept. She denied that they lived at Bula Iftin. She said that the police also went to the house and searched but they did not ask her anything.

58. In cross-examination she said that Khatar was not married and that they slept in the same room. She said that her hearing was not good but she could hear if somebody left the house.

59. DW3 was Halima Abdi of Bula Skedi. She knew the family of Zainab Adan DW2. They were related. She knew the accused Khatar who lived at Bula Skedi and sold miraa. She knew him for more than 10 years.

60. She said that she heard that Khatar had been charged in court but she had no information that Khatar was involved in the killing of somebody.

61. That was the end of the defence case.

62. After the closure of the defence evidence, counsel for the accused and the prosecuting counsel made closing remarks, which I have considered. This is a murder case. The prosecution is required to prove their case beyond any reasonable doubt. The accused does not have a

burden to prove his innocence. He can only raise doubts in the prosecution case. See the case of **Leonard Aniseth vs Republic [1963] EA 206**.

63. The prosecution has the burden of proving all the elements of murder beyond reasonable doubt. First the prosecution is required to prove that indeed the deceased died. Secondly, the prosecution is required to prove if the accused caused the death of the deceased. Thirdly, the prosecution is required to prove that the death was unlawful. Fourthly, if or the above are proved, then the prosecution is required to prove that the death was caused with malice aforethought.

64. Did the deceased die? The evidence of the prosecution and the defence on this is not in dispute. There was a shooting incident at Bulla Ifiin in Garissa township in the early hours of the night on 4th April 2013. A number of people were injured, and the deceased a young man of around 20 years attending secondary school was found dead outside the shop of one Gitonga. He had bullet wounds on the head. The body was taken to Garissa Provincial General Hospital and postmortem examination was conducted to establish the cause of the death. The death was caused by bullet wounds. I find that the prosecution proved beyond any reasonable doubt that deceased died and that he died of bullet wounds.

65. Was the death unlawful? From the evidence on record, there is no justification given for the death of the deceased. No proposition or suggestion has been made of any lawful reason why the deceased should die or be killed in the way he died. I find and hold that the death of the deceased was unlawful.

66. Did the accused cause the death of the deceased? The incident occurred at night in the early hours about 7.30 pm. From the evidence on record, there was sufficient electricity light outside the buildings in that area. It was a business area with shops, a small hotel or restaurant and a woman Mary Kieti (PW2) selling vegetable outside a shop which was lighted on the outside. There was a shooting incident and everybody tried to take cover. A number of people were injured including the woman Mary and the deceased died. From the police evidence, Bernard Gitonga (PW8) and Mary Kieti (PW2) said they could identify one of the attackers. However Bernard Gitonga stated in evidence that he was not able to identify any of the attackers. About two months afterwards, Mary Kieti described a person whom she saw selling miraa near former Co-operative Bank as one of the attackers. It was the accused and he was arrested by the police. The next day an identification parade was conducted and Mary Kieti identified him by touching him.

67. The evidence of identification by a single witness has to be considered with a greatest care before it can be relied upon to found a conviction. This is especially so when the circumstances for identification are not favourable. There was adequate light at the scene which is not disputed. First explosion appeared to have been like a grenade and thereafter shootings started. Everybody tried to take cover and Mary Kieti ran towards the small iron sheets restaurant because her son was there in an attempt to save him. She hid in a narrow walk way where she was ultimately shot and injured. Though the lighting was adequate the scare created by the explosion and the bullets in my view created unfavourable circumstances for identification. Everybody must have been trying to save their own lives rather than trying to find out who the attackers were.

68. That aside, Mary Kieti was admitted in hospital for a short while and was discharged and recorded a statement with the police. It is not doubted that she told the police that she could identify an attacker. In her evidence she said that she knew the attacker as a student in a high school at Bura of North Eastern area. The accused also said that he knew her from Bura. There is however no evidence that Mary Kieti told the police from the word go that this person whom she had identified from the scene was a person whom she had known from a school at Bura. It only looks as if on finding him selling miraa and knowing that she had seen him before, she thought that, this might have been the person. In my view, if she knew that this person was a student in a particular school she could have told the police so and given some additional description of him. It is worth to note that the description the police had of the suspect was merely that of his appearance and dress at the place where he was selling miraa on the day he was arrested. In my view, there is high probability of mistaken identity.

69. The other mistake in the investigations is the conducting of the identification parade for a person who was previously known to the identifying witnesses and who infact was arrested on the description given by the witness who physically saw him that day of arrest. That was a mistake because one cannot identify in a parade someone he or she knew before. In this particular case, accused was actually arrested because on that day the witness said that is the person. The effect of the above situation is that the evidence of the identification parade does not have any probative value or add weight to the prosecution case. It is worthless evidence. If Gitonga, for example, came and identified him and said that he was the person, the identification might have had some probative value but not in the present case.

70. The police also went to his house, which he shares with the mother, and did not find anything that could connect him to the offence. The allegation that his bed was dusty cannot be evidence to prove that he was out on the 4th April 2013 at Bulla Ifiin to commit a murder.

71. I find that the prosecution did not prove beyond any reasonable doubt that the accused caused the death of the deceased.

72. With regard to malice aforethought, having found that the accused was not proved to have killed the deceased, I also find that the prosecution did not establish malice aforethought by him in the killing of the deceased.

73. I find that the prosecution did not prove the offence of murder against the accused and I acquit him under section 215 of the Criminal Procedure Code (Cap. 75).

Dated and delivered at Garissa this 17th day of December, 2018.

George Dulu

JUDGE