



**Republic v Lukhale (Criminal Case 15 of 2023)
[2026] KEHC 669 (KLR) (27 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 15 OF 2023
JN KAMAU, J
JANUARY 27, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

ISAAC WAFULA LUKHALE ACCUSED

JUDGMENT

1. The Accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the night of 4th May 2013 at Mumbita Village, Mumbita Sub-location of Emuhaya Sub-County within Vihiga County jointly with others not before court murdered Ibrahim Shillo.”
2. The Prosecution’s case was heard on diverse dates between 25th September 2019 and 31st January 2025 when it closed its case. On 27th May 2025, this court found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence. The defence case was heard on 11th June 2025.
3. This matter was partly heard by Njagi and P.J. Otieno JJ. Njagi J took the evidence of Penina Ambasa (hereinafter referred to as “PW 1”) and No 2011335883 PC Christine Nasike Mukongo (hereinafter referred to as “PW 2”). P.J Otieno J took the evidence of Dickson R. Aganga (hereinafter referred to as “PW 3”), No 230245 CP Lawrence Nthiwa (hereinafter referred to as “PW 4”) and No 237278 Charles Emitundo (hereinafter referred to as “PW 5”).
4. This court became seized of this matter on 2nd November 2023 on which day both the Accused person and the Prosecution asked the court to proceed from where it had reached. This court therefore took the evidence of No 62967 Sgt Samuel Kimanga (hereinafter referred to as “PW 6”), Dr Kigweyi Clinton



(hereinafter referred to as “PW 7”), No 230513 Chief Inspector Emmanuel Langat (hereinafter referred to as “PW 8”) and the Accused person.

5. The Prosecution’s Written Submissions were dated 11th July 2025 and filed on 15th July 2025 while those of the Accused person were dated 26th September 2025 and filed on 7th October 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

6. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Ibrahim Shillo (hereinafter referred to as the “deceased”) died?
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased’s death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof Of Death Of The Deceased

8. Both the Accused person and the Prosecution submitted that there was no dispute as to whether the deceased died. As both the Prosecution and Defence witnesses alluded to the deceased’s death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

II. Proof Of Cause Of The Deceased’s Death

9. The cause of the deceased’s death was a pertinent issue. PW 7 tendered a Post-mortem Report dated 4th May 2013 as an exhibit in this matter on behalf of Dr Oluga who carried the post-mortem examination in respect of the deceased herein. Dr Oluga formed an opinion that the cause of the deceased’s death was internal haemorrhage and respiratory failure secondary to pneumohemothorax secondary to multiple thoracic wounds.
10. It was, therefore, clear from his evidence that the deceased’s death was not as a result of natural causes and hence, crucial to establish how the deceased sustained the fatal injuries.

III. Identification Of Perpetrator Of Deceased’s Death

11. The Accused person denied having killed the deceased on the material night of 3rd and 4th May 2013. He submitted that none of the witnesses saw him kill the deceased, none of them placed him at the scene of crime, none of them saw him with the murder rifle/fire arm and that there was no identification parade in which he was identified as the deceased’s assailant on that night. He added that not even a congruence of their telecommunication gadgets or those supposedly found in their possession was established through any truncation.
12. He asserted that the Prosecution relied on strong suspicion and circumstantial evidence in their conclusion that he may have killed the deceased. He argued that it was a cardinal principle of law that suspicion, however, strong could not be basis for conviction as was held in the case of Republic vs Leshan Ole Sapor[2006] KEHC 2839 [KLR].



13. He also placed reliance on the case of Criminal Case No 7 of 2017 Republic vs DWK where the court cited the case of Abanga Alias Onyango vs Republic Criminal Appeal No 32 of 1990 (eKLR citation not given) which set the parameters to be satisfied when the prosecution rested its entire case on circumstantial evidence, which were that the circumstances from which an inference of guilt was sought to be done had to be cogently and firmly established, the said circumstances had to be of a definite tendency unerringly pointing towards the guilt of the accused and that the circumstances taken cumulatively had to form a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.
14. He was emphatic that the Investigating Officer failed to piece together all the salient features of possible involvement by any person in the murder of the deceased. He pointed out that the deceased was last seen alive with PW 2 and that PW 1 attested of her close proximity with and reasonably constant touch with the him. He asserted that no one testified to have last seen the deceased with him even at the house he guarded before his demise. He added that the Prosecution did not establish the activities the deceased undertook throughout that day including the people he interacted with.
15. He added that Peter Maratani from whom the fire arm/rifle was recovered was never called to testify yet he was a crucial witness and he was never charged with the possession of firearms without any licence. He further averred that the Investigating Officer relied on hearsay evidence which was not corroborated the said Peter Maratani and was hence, inadmissible.
16. In this regard, he relied on the case of Republic vs Meme[2024] KEHC 7622 (KLR) where it was held that as the alleged eye witness was not produced as a witness, the investigating officer's evidence was merely hearsay. He argued that the failure to call the said Peter Maratani should be construed that had that witness been called, the testimony would have been adverse to the Prosecution's case.
17. He averred that the firearm was never dusted for finger prints or any evidence given that the prints had been wiped off. He faulted the Investigating Officer for having failed to exhibit any inventory of any recoveries or to exhibit any Arms Movement Register to show which officer was issued with which fire arm or to record any statements and/or present witnesses to the alleged recovery of the murder weapon.
18. He asserted that the said Investigating Officer failed to follow up and ensure that there existed microscopic enlargements of the alleged indentation marks on the exhibits taken to the ballistic expert, he failed to take all available guns on the material night for ballistic examination, he failed to establish the number of the Safaricom line and when was it supposedly registered in the name of PW 3 who asserted that gun shots were heard in August 2013 which was after the deceased was found dead, which he later asserted was on or about April/May 2013.
19. He was categorical that the Prosecution also failed to establish the time of the deceased's death which would have been crucial in piercing the activities of the night and most importantly, to establish who was in his company on the material night. He stated that the deceased's blood was not found on him to link him to the alleged assault.
20. He further contended that although the incident happened at night, the Prosecution did not lead any evidence as to the quality of lighting, if any, at the scene. In this regard, he relied on the case of Joel Saiyanga Ole Mwaniki & Another vs Republic[2007] KECA 245 (KLR) where it was held that a dock identification was worthless and courts should not place much reliance on it unless that had been preceded by a properly conducted identification parade.
21. He was emphatic that he led evidence that was unshaken and the Prosecution having failed to prove that he had any motive in killing the deceased, the parameters set for circumstantial evidence in this case were not met. In this regard, he invoked Section 203 and 206 of the Penal Code and Section 107(1)



- and 109 of the *Evidence Act* and argued that the Prosecution had failed to discharge its burden to prove beyond reasonable doubt that he murdered the deceased. He thus urged the court to acquit him of the charge herein.
22. On its part, the Prosecution submitted the evidence on record clearly showed that it was the Accused person who inflicted the injuries on the deceased, leading to his death. It pointed out that PW 6 testified that the Accused person robbed the deceased of his gun and deserted duty. He stated that the Accused person was tracked and arrested at Chepchoina area in Trans Nzoia County and upon interrogation, he led the officers to the recovery of the firearm that had been issued to the deceased the night he was killed.
 23. It submitted that the Post-mortem Report showed that the deceased suffered serious chest injuries, fractured ribs on the left side and a right ventricular wound which were occasioned by a bullet, therefore, linking the Accused person to his death. It submitted that it relied on circumstantial evidence as the inference of guilt was proper and pointed to the Accused person and that the chain of events was cumulative and clearly showed that he was the perpetrator.
 24. It relied on the case of *Abanga Alias Onyango vs Republic (Supra)* and *Sawe vs Republic*[2003]eKLR where it was held that there were no other co-existing circumstances which could weaken or destroy the inference of guilt.
 25. It placed reliance on the case of *R vs Joseph Chege Njora*[2007]eKLR where it was held that killing of a person could only be justified and excusable where the accused's action was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. It argued that it was, therefore, clear that the unlawfulness of the death of the deceased was not disputed.
 26. The Accused person, who was an Administration Police based at Emuhaya, testified that on the material evening on 3rd May 2013 at about 6.00pm, he was on night duty with his colleagues who included the deceased herein. He stated that he armed himself with a G3 FMP393897 Rifle which had twenty (20) bullets and his name and those of his colleagues, the Rifle numbers and where they were going to be stationed that night was recorded. He also applied for leave from Corporal Titus Kithuka who was one of the Prosecution Witnesses but did not come to testify. He stated that he was not given off duty but was later told that the days would have been approved.
 27. He testified that he left the office and went to the residence of the District Commissioner (DC), which was about five hundred (500) metres from the office, and found his colleague, PW 1, and they worked together. He said that the residence had a stone wall fence with one entry and exit gate.
 28. His evidence was they stayed at the front of the servant quarter and at about 10.00p.m, he moved to about ten (10) meters where he and his colleague could see each other and sat. He stated that at about 3.00 am on 4th May 2013, he received two (2) calls. The first call came from PW 2 who was guarding the District Commissioner's Office with the deceased and she asked him if the deceased had been seen at his guardian place. He said that the second call came from Corporal Titus Kithuka who instructed him to report to the office to accompany other officers to look for the deceased.
 29. He averred that he notified PW 1 and she opened the gate for him and he left. He said that he did not get to the office because he found his colleagues outside the compound, near the cyprus fence. He explained that PW 6 who was the leader instructed them to go to Kima towards Bunyore Girls.
 30. He contended that when they got there at about 5.00a.m, PW 6 looked for the watchman of a hotel called "Mount Stone" because he had called him at night but they were not able to communicate well on phone. His evidence was that when the watchman came, he told PW 6 that at about 1.00 am, he saw the deceased accompanied by two (2) youth namely, Livingstone Juma and Anex Oketch passing



by and that they went to the playground of Bunyore Girls School which was about a hundred (100) metres from Mount Stone Hotel. He further said that the watchman narrated that after few minutes, he heard gunshots whereupon he entered into the hotel and hid there.

31. He further said that PW 6 asked the watchman to accompany them to the playground where they found the deceased dead. They secured the scene and PW 6 asked the watchman to show them where the youth who were with the deceased that night lived. He said that they went to their house where they got three (3) people and took them to PW 6. However, PW 6 told them to release the third person, one Peter Maratani, as he had not been mentioned by the watchman. The other two (2) people were booked in OB 27/4/05/2013. The body was removed and taken to Vihiga District Mortuary at Mbale.
32. It was his further testimony that they went back to the office and that he returned his G3 Rifle. He said that it was in good condition and the twenty (20) bullets that he had been given the previous night were still intact. He said that on 4th May 2013 at 11.00am, the Administration Police from Emuhaya travelled to Wajir for the funeral which was held on 5th May 2013.
33. His further testimony was that they returned to Emuhaya on 6th May 2013 at 5.00pm and on 7th May 2013, his application for short leave was granted. He said that he was given off duty for ten (10) days starting on 8th June 2013 (sic) and was given a marching order signed by Sgt Ernest Tume dated 7th May 2013. He produced the said Marching Order as an exhibit in court. He denied having run away and explained that he had applied for the leave to tend to his wife who was unwell.
34. He stated that on 8th May 2013 at 6.00am, he departed for his home but that at about 12.00 noon, PW 6 called him and told him that the DCI Vihiga required all officers who were on duty the night the deceased died to record their statements. He said that PW 6 told him that he could record his statement after he resumed from his leave.
35. He testified that on 17th May 2013, police officers from Administration from headquarters in Nairobi including Inspector Phanice Emidundo, Mr Peter Maina Mukasia and Inspector Florence Kinyua arrested him on allegations that one Dishon Akanga had mentioned him for having registered a telephone number using his Identification Card and that that number was the last number that the deceased received a call from. He averred that they took him to Vihiga Police Station and locked him up in the cells and booked under OB Number 32/17/5/2013 to date.
36. He asserted that he had never been shown the Safaricom number that he had allegedly registered and the number of the Identification Number he had used. He said that he was never been charged for deserting duty and that when he was taken to the cells, he had no weapon. He denied the allegations that he was arrested near Peter Maratani's home and found with a Rifle that killed the deceased. He added that no dismantled or photos of a dismantled Rifle were ever produced in court as evidence.
37. He was emphatic that he had no reason to kill the deceased. He denied having killed the deceased because he was working in a different station from where he was working on that material night. He testified that Peter Maratani was charged with illegal possession of a firearm in Vihiga Law Courts but he was acquitted in robbery with violence case No 434 of 2013 and was subsequently charged with the murder case. He faulted the Investigating Officer for not calling the said Peter Maratani as a witness in this case.
38. He also faulted the investigations done herein for not producing the inventory showing the recovery of the Rifle produced as evidence in this matter. He questioned why only two (2) rifles were taken for forensic examination when they were many officers on duty on the material night and all had rifles. He was emphatic that from the investigations, his rifle was found to be intact.



39. He was categorical that PW 1 testified that he never left her sight on the material night and never heard of a gunshot. He stated that if an AK 47 or G3 Rifle was fired, the sound of the gunshot could be heard as far as seven (7) kms and that from Bunyore Girls School to where he was, was a distance of two (2) kms but he never heard any gunshot. He opined that it was possible that the deceased may have been shot elsewhere and his body dumped at the playground. He pointed out that it was not normal for a colleague to disappear for three (3) hours and his colleagues fail to report.
40. It was his further testimony that PW 2 stated that she did not see the deceased on the material night and that her rifle was not taken for ballistic examination. He asserted that PW 3 never gave out his Identity Card number and was also not informed of the number that was registered. He added that PW 3 said that he heard the gun shots on 8th May 2013 and not on 3rd May 2013. He stated that the Investigating Officer did not say why he suspected him for having committed the offence yet he did not see any evidence that should lead to his conviction.
41. Notably, PW 1, a Police Officer, testified that on the material night of 3rd May 2013, he was on duty at the residence of the County Commissioner as a night guard together with the Accused person. She picked her gun at the armoury at 5.15pm and arrived at the residence at 6.00pm. She said that the Accused person, found her there. She told the Trial Court that at 10.00 pm she sat outside the servant's quarters area at the residence while the Accused person was guarding from the servants' quarters to the gate and was seated at the gate entry.
42. She stated that at 3.00a.m, the Accused person told her that he had been called by the duty Corporal Titus and informed that the deceased who was on duty at the DC's office could not be traced. She pointed out that from the commissioner's resident to the DC's office was about five hundred (500) meters. She said that he told her that he had been asked to go and reinforce the other officers to look for the deceased. She further testified that the Accused person left her at the gate and went for the assignment of looking for the deceased.
43. She stated that at 6.00 am, the duty Corporal called her and told her that the deceased had been found dead and that no officer would replace her as they were attending to his death.
44. On cross-examination, she stated that she did not hear any gun shots on that night and did not see the Accused person shoot the deceased. She stated that she left the Accused person manning the gate at 10.00 pm and did not see him leave the compound. She was not aware if her gun was taken for ballistic examination.
45. PW 2, a Police Officer, stationed at Emuhaya Sub-County in Vihiga County from year 2013, testified that on the material night of 3rd May 2013, she reported for duty at the DC's office and was with the deceased. She stated that both she and the deceased were issued with G3 rifles. She said that they stayed on duty until midnight when she closed the OB and opened OB for the next day. She pointed out that at that time she was still with the deceased but that ten (10) minutes later, the deceased told her that he wanted to go and drink water at the AP Line which was separated from the DC's residence by a fence. She said that he went but did not come back. She was categorical that by 3.00a.m, the deceased had not come back.
46. She said that she called the Accused person who was guarding the DC's residence to ask him whether he had seen the deceased and the Accused person said he had not seen him. She then called CPL Titus Kitula (sic) and she informed him the deceased had left and had not come back. The said CPL Titus Kitula went and confirmed that indeed the deceased was missing. He booked in the OB and brought APC Titus Oduor who joined her and they worked until morning.



47. It was her further testimony that when she was replaced at 6.00 am in the morning, she joined the unit in looking for the deceased and that they found his body in APC uniform with jungle jacket and covered with a sheet behind Bunyore Girls High School. She said that she arrived at the scene between 7.00 am and 8am. She said that she did not go near the body but averred that she could see blood on the jacket and on the thigh.
48. On cross-examination, she said that she was with the deceased all through and when they parted at around 12.00a.m, she did not hear any gun shots. She was not aware of any ballistic report on her gun.
49. PW 3 testified that he lived in Emuhaya and did manual work. He stated that on 4th May 2013 at about 9.00 am he was at home when the Accused person visited him as he wanted to assist him get land. He said that the Accused person asked for his Identity Card and he recorded the details in a note book. He pointed out that his Identity Number was 12967462. He said that he had known the Accused person for months because he used to clean their compound and deliver water. He added that he later met him in Church but he had no report about the land.
50. It was his further testimony, that sometime in August 2013 he heard a gun shot and the next day he was told that a police officer had been killed. He went at the scene and found the body of the deceased. He said that after about two (2) weeks, he was informed by the DC's office that his phone had been used to call the deceased.
51. He said that he told the police that he did not have a phone but remembered that the Accused person had taken his Identity Card details. He added that by that time he had taken eight (8) months without a phone. He was arrested and remained at Vihiga Police Station until the Accused person was arrested.
52. In his cross-examination, he said that he was not told the telephone number or the serial number of the phone that was registered in his name even after the Accused person was arrested. He further stated that the Accused person only took the details of his Identify Card but not the document or a copy of it. He reiterated that he heard the gunshots about 8th May 2013.
53. PW 4 was the firearm examiner. He was to testify on behalf of the ballistic examiner PW 8. However, the Accused person objected to the same which objection, the court sustained. He was, therefore, released as a witness to allow PW 8 be summoned to tender his evidence.
54. PW 5 was stood down for want of proof of the Safaricom documents that were to prove that the Accused person communicated with the deceased prior to his demise through a phone number that had been allegedly registered by the Accused person using PW 3's identification card details.
55. PW 6 who was the Investigating officer in this case testified that on 4th May 2013, at around 7.00 am, he was called by his In charge, DCIO Chief Inspector Boaz Ombeto, who instructed him to look for two (2) police officers and meet with him at DCIO, Vihiga Police Station. He said that they met him at about 8.00 am. He was with PC Kerich and PC Rono. The said In charge informed them of the incident that had occurred at Emuhaya Sub County. He stated that they visited the scene at Bunyore Girls High School's playground and found the body of the deceased.
56. It was his further testimony that the body had visible bullet wounds and that they recovered two (2) spent cartridges and two (2) live ammunitions. He said that the scene was processed by the Crime Scene Officer and the body was taken to Vihiga County Hospital Morgue. He said that it was established that the deceased was based at Emuhaya DC's office and his G3 Rifle AP920001 with twenty (20) rounds of 6.2mm was missing.



57. He stated that investigations commenced and it was established that the Accused person was behind a robbery with violence of the G3 Rifle KFAP92001. He further stated that the Accused person had deserted duty on 8th May 2013 and had gone into hiding and that they involved the Crimes Scene Unit at Nairobi which started tracking him. He said that he was arrested on 17th May 2013 at Chepchoina area in Bungoma, Trans Nzoia Sub-County. He added that the arresting officers brought the suspect to DCIO Vihiga and handed to him.
58. He further testified that when he interrogated the Accused person, he disclosed that he was the one in possession of the stolen Rifle. He stated that the Accused person took them to Chude within Bungoma County to the house of one Peter Maratani Wafula who handed over the G3 Rifle with fourteen (14) rounds of 6.2mm. He pointed out that they arrested the said Peter Maratani and booked him together with the Accused person for robbery with violence but that after consultations, they later amended the charge sheet to murder.
59. He further stated that they took the spent cartridges and the G3 Rifle to the Ballistic Office at DCI Headquarters for analysis as it was necessary to match the two (2) cartridges with the Rifle. He said that the finding was that the same Rifle was used to fire the two (2) empty cartridges found at the scene. He produced the Exhibit Memo and the G3 Rifle Serial No G3KCAP92001 as exhibits in this case.
60. In his cross-examination, he confirmed that he did not prefer any charge of illegal possession of fire arm against Peter Maratani and did not include him as a witness. He admitted that when the police officers recover exhibits, there was normally an inventory but that in this case, the same was not produced in court. He added that there was no report that the Accused person was on duty that night and that he was issued with a fire arm that night. He also confirmed that he did not have proof of orderly proceedings for desertion of duty on the part of the Accused person. He said that he suspected that it was the Accused person who killed the deceased.
61. PW 7 on being cross-examined by the court, noted that it was unlikely that the injuries sustained by the deceased were self-inflicted because the entry point was on the left scapular region which was on the upper back. He was emphatic that someone could not shoot himself on the upper back as the trajectory was downwards making it impossible for someone to have shot himself or herself.
62. PW 8 was the ballistic expert. He testified that he generated a report on 7th June 2023 regarding exhibits that were submitted to the Ballistic Laboratory from PW 6 on 3rd June 2013. He stated that the exhibits were submitted by an Exhibit Memorandum Forms requiring him to examine the exhibits which were marked A and E and also to examine two (2) G3 Rifle magazines which were marked B and G equally having thirty-six (36) rounds of ammunition marked C1-C16 and F1-F20. He added that there were two (2) cartridge cases marked D1-D2.
63. It was his further testimony that he examined the said exhibits and established that Exhibits A and E were in calibre 7.62mm and their G3 Rifles Serial No AF92001 and F-FMP393897 were in good mechanical condition. He said that he also test-fired the two (2) Rifles using three (3) grounds of ammunition in each which he picked at random from Exhibit C1-C16 and F1-F20. He added that the calibre of C1-C16 and F1-F20 was 7.62 x 51mm and designed to be fired in Exhibits A and E, Exhibits B and C were two (2) G3 Rifle magazines.
64. He further stated that they were in perfect working condition and each had a capacity of twenty (20) rounds of ammunition in calibre 7.62 x 51mm. He said that Exhibit D1 was unfired cartridge case in calibre 7.62 x 51mm and that its bullet and propeller powder were missing and may have dropped off occasioned by a loose bullet. He added that Exhibit D2 was a fired cartridge out a comparative miscopy examination in conjunction with the six (6) spent cartridges which he fired in Exhibit R and E.



65. He pointed out that the examination revealed that Exhibit D2 was fired in Exhibit A -G3 Rifle serial number F92001. He explained that to enable him arrive to the said conclusion, he saw sufficient matching firing pin indentation markings. He added that he also formed the opinion that Exhibit A and E, C1-C16 and F1-F20 were firearms and ammunition as defined in the *Firearms Act* Cap 114 (Laws of Kenya). He produced the Ballistic Examination Report, Exhibit C1-C16, Exhibit D1 and D2 as exhibits in this case.
66. Notably, circumstantial evidence, though indirect, could sustain a conviction if it satisfies certain legal thresholds. This court had due regard to the case of *Sawe vs Republic*(Supra), where it was held that in order to justify a conviction based on circumstantial evidence, the inculpatory facts had to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.
67. Going further, in the case of *Kipkering Arap Koske & Another 16 EACA 135*, it was held that the burden of proving facts that to justify the inference of guilt, to the exclusion of any reasonable hypothesis of innocence, rested on the prosecution and never shifted.
68. From evidence adduced, there appeared to be a missing link from the onset of the Prosecution's case. The Accused person denied PW 6's allegation that he led him to Peter Maratani's house where the weapon was recovered. He questioned why an inventory was not produced before this court to show the recovery of the said weapon. Indeed, in his cross-examination, PW 6 admitted that when police officers recovered exhibits, there was normally an inventory.
69. Going further, the said Peter Maratani was among several crucial witnesses who were not called to testify. He could have been called to explain how the G3 Rifle was found in his house and/or how he came to possess it and thus corroborate PW 6's evidence that it was actually the Accused person who led them to the said Peter Maratani's house. His evidence could have been subjected to cross-examination which could have assisted the court determine if the said evidence connected the Accused person to the said gun which killed the deceased on the material day.
70. Alternatively, he ought to have been charged of illegally being in possession of a firearm if indeed he had been found with the said G3 Rifle. His release raised questions in the mind of this court as there was a missing link that would have explained how the said weapon was found in the house of Peter Maratani, if at all. Left as it was, PW 6's evidence amounted to hearsay that had no probative value.
71. There was also a gap in the Prosecution's evidence of who informed DCIO Chief Inspector Boaz Ombeto of the incident so that he could instruct PW 6 to go and investigate the incident. The Accused person's version was that he was called by Corporal Titus Kithuka to assist his colleagues in looking for the deceased. That gap was substantial as the Accused person had said that a watchman at Mount Stone narrated to the said Corporal Titus Kithuka of what had happened. There were also two (2) boys who the Accused person had alleged had been seen with the deceased on the material night before his demise but they were also not called to testify. The person who notified the police of the incident ought to have been called as he or she was a very crucial witness.
72. This court also noted that there were inconsistencies in the Prosecution's case. Whereas PW 3 stated that he only gave his identification details to the Accused person and not the document itself, PW 6 indicated that PW 3 had given his Identify Card to the Accused person. PW 3 was also not sure when he heard the gunshots, he gave two(2) conflicting dates, 8th May 2013 during cross-examination and the second being 5th May 2013 which was after the deceased had died. Notably, the deceased died on 4th May 2013. PW 3 did not have his facts right raising doubt in the mind of this court if he was a truthful witness.



73. Going further, PW 6 indicated that the Accused person was neither on duty of the material night nor was issued with any firearm. This was contradicting with the evidence of PW 1 and PW 2 who confirmed that the Accused person was on duty on the material night and was assigned to guard the DC's residence.
74. It was also important to note that the Prosecution did not bring out the distance PW 3 was from the scene of the incident so as to demonstrate that the Accused person had an opportunity to have left the District Commissioner's house, kill the deceased and come back without PW 1 having noticed his absence. This information was critical because PW 1 and PW 2 told this court that they did not hear any gunshots. Indeed, it was only PW 3 who seemed to have heard the gunshot.
75. Indeed, PW 1 confirmed that she worked together with the Accused person on the material night at the Commissioner's residence and that at no one point did she see him leave the compound until after 3.00 am when he was called by Corporal Titus Kithuka informing him that the deceased had been reported missing at his work place and that he should join the rest of the unit in looking for him.
76. PW 2 also confirmed that the Accused person was at the DC's residence on the material night as she called him to inquire whether he had seen the deceased who allegedly had gone to the AP Lines which was adjacent to the DC's residence to drink water.
77. Even so, this court was unable to comprehend the connection between the registration of the Safaricom line in the name of PW 3 by the Accused person with the sole intention of robbing the deceased of the G3 Rifle previously and the random act of the deceased of leaving his station to go to the AP Lines to drink water. The Prosecution did not establish that this was the deceased's habit which could have given the Accused person an opportunity to plan the robbery. In addition, the Prosecution did not extrapolate why PW 3 called the Accused person to find out where the deceased was yet she was clear in her evidence that the deceased had gone to the AP Lines to drink water. Ordinarily she ought to have called colleagues in the AP Lines.
78. It was very evident from the testimony of the Prosecution witnesses that none of them placed the Accused person at the scene of crime. The Prosecution failed to produce any evidence linking him to the deceased's murder or showing any communication between him and the deceased as no witness from the telecommunication company was called to testify after PW 5 was stood down. The chain of circumstantial evidence did not extend to the Accused person herein. PW 1 and PW 2 did not point at him as having been the perpetrator of the offence herein.
79. On the other hand, PW 1's evidence corroborated that of the Accused person. The Accused person produced as an exhibit an original marching order dated 7th May 2013 to prove that he was actually away on leave and not that he had run away or deserted duty as alleged, a fact that was not rebutted by the Prosecution. Indeed, PW 6 confirmed that he had no document to prove that the Accused person deserted duty.
80. After carefully analysing the evidence, this court found and held that there was no iota of evidence that showed that the Accused person shot the deceased. No witness pointed at the inference of guilt on his part. On the other hand, the Accused person presented a cogent defence. There was no missing link that insinuated an inference of guilt on his part. The fact that he went on leave and was not on duty right after the deceased died was not sufficient evidence to insinuate that he was the one that caused his death as he was entitled to an annual leave as an employee.
81. As the Accused person's defence was cogent and consistent, this court did not belabour to discuss the ingredient of malice aforethought in causing his death. Weighed against the evidence that was adduced by both the Prosecution witnesses and the Accused person, this court found and held that the



Prosecution did not prove its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the Accused person herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the Penal Code as having been:-

- a. Proof of the deceased's death;
- b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
- c. Proof of malice aforethought in the unlawful actions and/or omissions.

82. The way the Accused person was handled left a lot to be desired. It appeared to this court that the Police Officers who handled this case were punishing the Accused person on mere suspicion because the deceased was their colleague. In a nutshell, he carried the burden of the person who injured the deceased, leading to his death merely because the person who injured the deceased could not be traced. The investigations in this case were shoddy and the Prosecution left many gaps unsealed. It is a pity that the Accused person had been in custody for almost thirteen (13) years.

Disposition

83. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby acquitted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya). It is hereby directed that he be released from custody forthwith unless he be held for any other lawful cause.

84. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF JANUARY 2026

J. KAMAU

JUDGE

