

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 5 OF 2020

REPUBLIC.....

PROSECUTOR

VERSUS

SAHAL ALI SHEIKH

.....1ST ACCUSED

IBRAHIM AHMED DAGANE.....2ND

ACCUSED

JUDGMENT

1. The accused persons herein are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on 28.03.2020 at around 1945hrs at Dertu - Borosis road junction, Daadab Sub County within Garissa County, they unlawfully murdered Dekow Diese Hirsi.
2. They pleaded not guilty to the charge. Consequently, prosecution called 10 witnesses in a bid to prove its case.
3. PW1, Bashir Abdirahman Mohamed, a miraa driver from Meru County stated that his employer was one Habibi Abdi. According to him, he had been driving motor vehicle registration number KCN 969F for a period of three years. That on the material day, he was directed to travel to Dadaab together with Edwin Mutembei and a clerk by the name of Deko Deisi Hirsi. It was his evidence that they left Maua at 12 noon and reached Dertu at

6.30 p.m. Desirous of getting to Dadaab, they pressed on with the journey to Borosis where they reached at 6.45 p.m.

4. It was his evidence that their speed was hindered by the fact that it was not only dark but also heavily raining. That it wasn't long before they heard a gunshot and upon checking, he saw four men on the side of the road. He testified that the men continued to shoot and in attempt to control the vehicle, it slipped off the road.
5. He stated that he applied emergency brakes as the shooting continued thereby making him more confused. He recalled that the men shot at the cabin seat and not the driver's seat and in an attempt to further control the car, the same overturned.
6. At that point, he called Dekow but there was no response and therefore, Erick and him got out of the said vehicle. It was at that point that they realized Dekow's face was covered with blood. According to him, Dekow had been shot and the right side of his skull was open. He called the area chief from where Dekow comes from and informed him of the incident.
7. That police officers arrived at the scene and took the body of the deceased to the mortuary. While under the watch of some officers, they stayed at the scene till the following day when they were taken to Dertu Police station. He recalled that at the time that he was getting out of the vehicle, he heard a voice say that 'we got them today'.
8. At the police station, they recorded statements and thereafter, they were taken to Dadaab for purposes of attending an

identification parade where he was to identify the assailants. That he identified the 1st accused person and on a second parade, identified the 2nd accused person. He stated that on the third parade, in as much as he identified a person, the said person was not before the court. He further stated that he informed the OCS that the 1st accused person was responsible for releasing the shot.

9. On cross examination, he stated that at the time when the incident happened, it was somehow dark but his head lights were on and that he was not driving at a high speed as it was raining and the road was slippery. That the shot that penetrated the car was released by the people who were in front.
10. PW2, Eric Mutembe testified that he comes from Meru and was working as a turn boy in a miraa vehicle. That on 28.03.2020, he left with Bashir and Dekow for Dadaab. That they arrived at 6.00 p.m. at Borosis where they met seven people. Of the seven, four were at the corner while three straight ahead on the road. That he heard a gunshot and upon checking well, he saw the three men shooting at the vehicle. He told the court that the vehicle overturned on one side thus prompting him and the driver to get out of the MV.
11. To his surprise, Dekow did not make it out as he had been shot on the forehead. At that point, they decided to call Dertu Chief whom they informed of the incident. The said chief arrived in company of police officers who took the body of the deceased away while they were left with two officers at the scene.

12. In the morning, the DCIO Dadaab arrived at the scene and took pictures of the scene and further combed the area for more evidence. The vehicle was towed to the police station and consequently, they recorded their statements at Dertu before being transferred to Dadaab where they participated in the identification parade. On cross examination, he stated that they were shot at by the persons who were in front and that at no particular point did the officers direct them to stop and they declined.
13. PW4, Abdirizak Abdullahi Hassan, a police reservist stated that on the material day, he was at the patrol base at Borasis together with Sahal Ali Sheikh, Ibrahim Ahmed Dagane, Yussuf Isaack Bashir, Idris Osman and Osman Abdullahi Ali. That as reservists, they are allowed to be armed and that at that particular time, he was in charge of the group at the scene.
14. He recalled seeing a vehicle approaching them at a high speed from East of Dertu to Borosis. He stated that he managed to see the registration number of the vehicle and further tried to stop it in vain. That all over a sudden, he heard a gunshot emanating from his three colleagues as Sahal (accused 1) shot the said vehicle causing the driver to lose control and overturned.
15. It was his evidence that at that time, he saw blood spill as the driver and the turn boy moved out of the vehicle. He recalled telling the said people to remove the injured person from the

vehicle as he called the OCS who later arrived and took away the body as some of his colleagues ran away.

16. On cross examination, he stated that the security at Dertu was wanting as there were incidences of terrorism and stock theft. That it was normal for all the vehicles to be checked and in this case, the vehicle was not only over speeding but also had its lights off. He stated that the incident happened at 8p.m. and noting that the vehicle had passed the first group who had shot in the air, it proceeded at a high speed while the lights were switched off on to the second group. That the police acted within the law as the scenario created at that time was one of impending danger hence the need for them to defend themselves.
17. PW5, Idris Osman Nadhir, a Kenya Defence Reservist testified that on the material day, he was on patrol at Borasis. That they were in two groups and were standing at different places when a vehicle approached from the direction of Dertu towards Dadaab. He recalled that initially, the lights of the vehicle were on but subsequently, they were switched off. It was his evidence that in as much as he was in uniform, he tried to stop the said vehicle in vain. That at some point, he heard gunshots come from the front direction of the car. He said that one Sahal (accused 1) was blamed for the gun shot
18. That the vehicle overturned and upon moving closer, he saw a dead person lying down. On cross examination, he stated that there were cases of insecurity in the area as people were worried

of stock theft and presence of illegal firearms. That having around a speedy vehicle with no lights on, the same made them get worried. On re-exam, he stated that the shot was fired by Ibrahim.

19. PW6, Isaack Yussuf Bashir, a police reservist, Force Number 10008 R testified that on the material day, he was at Borosis working together with Abdullah Abdi, Sahal Sheikh, Ibrahim Warsame, Idriss, Hassan Gedi, and Osman Abdullahi. That they were in groups of three or four persons and during the time in question, he had gone to relieve himself when he heard the sound of a vehicle but with no lights.
20. According to him, he ran back to his colleagues to try help stop the vehicle. That he heard a gun-shot but the same did not deter the driver of the said vehicle from continuing with the journey. He testified that he thereafter saw a person in the middle of the road and that that person shot at the vehicle prompting it to overturn. He stated that he did not know who fired the shot.
21. PW7, Osman Abdullahi, a KDR in Dertu stated that on the material day, together with his colleagues, they were on patrol at Borosis when they saw a vehicle with no head lamps. That as it approached them, he heard a gunshot. That his group ran away to hide but upon coming out of his hideout, he saw that the vehicle had overturned and one of the occupants had died.
22. PW8, No. 235225 CIP Kennedy Chomba attached to the ballistic section at the DCIO's office in Nairobi stated that his duties encompass forensic examination of firearms, ammunition and

their components. That on 03.04.2020, they received the following in their ballistic laboratory; 3 AK 47 rifles marked N, P and J. with serial numbers 5531827, KP 5524348 and KP 5524988 respectively; empty magazine marked as M, K and Q; ammunitions marked as N1 - N12, J(i) - J(xvi) and P(i) - P(xvii) and cartridges marked as S1 - S6.

23. It was desired of him to ascertain the type and make of exhibit marked N, P and Q; calibre of exhibits N1 - N12, J(i) - J(xvi) and P(i) - P(xvii); compatibility of exhibits marked N, P and J with exhibits marked M, K and Q; whether exhibits marked S1-S6 were fired by exhibits N, P or Q; the calibre of exhibits marked N1 - N12, J(i) - J(xvi) and P(i) - P(xvii) and any other information regarding exhibit marked A1 which could assist in the investigations.
24. He testified that on 03.04.2020, he examined the said exhibits and came up with the following report. Exhibit N, P and J are 3 AK 47 rifles in calibre 7.62 mm. Each is designed to chamber rounds of ammunition calibre 7.62 x39mm such as in exhibits N1 - N12, J (i) - J(xvi) and P (i) - P(xvii). Each firearm was in good physical and mechanical condition complete with their component parts (magazines). Each of the exhibit rifles was successfully test fired using 3 rounds of ammunition from N1-N12, J(i) to J (xvi) and P (i) to P(xvii). That they spent 9 test bullets and cartridges. The rounds of ammunition exhibit N1-N12, J(i) to J(xvi) and P(i) to P9 xvii) which were 45 rounds of ammunition in calibre 7.62mm x39mm were suitable to use in appropriate firearm as they were successfully test fired.

25. From the above, he formed the opinion that exhibit N, P, J (MFI 2A, 3C), N1-N12 (MFI 4A), J (i) J(xvi) (MFI 4B) and P1 to P(xvii) (MFI 4C) are all capable of being fired and that they are firearms as defined under the Firearms Act Cap 114 Laws of Kenya. Exhibit S1-S6 (MFI 5) were six fired cartridge cases and which were formerly rounds of ammunition in calibre 7.62mm.
26. Comparative microscopic examination of S1-S6 (MFI 6) in comparison with each other revealed that exhibit S1-S6 were fired by 2 different firearms. That is to say exhibit S1, S2, S3 and exhibit 4 were fired from the first firearm (MFI 5A). Secondly exhibit S5 and S6 were fired from the 2nd firearm (MFI 5B). Further comparative microscopic examination of exhibit S1-S6 (MFI 5) in comparison with each cartridge cases fired in exhibit N, P, J (MFI 2A-2C) revealed that exhibit S1,2,3 and 4 (MFI 5A) were fired in the AK 47 rifle S/No 5531827 (MFI A) while exhibit S5 and 6 (MFI 5B) were fired from AK 47 assault rifle S/No 5524348 which is (MFI 2B). That sufficient matching breech face marking, firing pin markings and ejector markings formed the basis of the finding. On cross examination, he stated that the six fired cartridges were fired from the firearms before the court. S1-S4 were from the first exhibit and S5-S6 from 2nd rifle.
27. PW9, No. 78360 Cpl. David Loisenger recalled that on the fateful day, he was called by DCI Mr. Rioba stating that there was a shooting incident which had occurred at Bura Sisi Dertu. That noting that it had rained heavily, they could not easily access the place and therefore, on the following day, with DCI Mr. Rioba and

CIP Kisoii they left for the station. On arrival at Bora Sisi, they found motor vehicle registration No. KCN 969F having overturned on the side of the road. According to them, the motor vehicle was loaded with miraa. The vehicle was shattered on the fore screen and the rear screen. Inside the motor vehicle, blood splashed all over. He stated that they found the driver of the motor vehicle and the turn boy and another person who had died.

28. He stated that the DCIO instructed him to have post mortem done before the release of the body and therefore, the same was carried out before him at Garissa Hospital. He thus arrested three suspects (Hassan Gedi, Salat Sheikh, Ibrahim Ahmed Dagane) as he continued with his investigations and further collected cartridges which were kept in the armory. On 02.04.2020, he prepared an exhibit memo in relation to the firearms and sent them to the ballistic experts in Nairobi for examination.
29. From the 6 spent cartridges, he sought from the Ballistic Expert if any had been fired from N, P and J and if they were compatible. From the opinion of the Ballistic Expert, exhibit No. N, P and J and exhibit N1-N12, J1-J16 and P1-P12 were compatible. Also S1-S6 were fired from two different firearms. That S1, S2, S3 and S4 were fired from the same firearm. The spent cartridge S-1, S-2, S-3 and S-4 were fired from the same firearm and S-5 and S-6 were also fired from a different firearm. According to the report, S-1 to S-4 were fired from AK 47 rifle S/No. 5531827 (Exhibit N) and in further reference to the rifle

movement register, the riffle in question was issued to Sahal Abdi Sheikh, the 1st accused person herein on 13.12.2019.

30. Exhibit S-5 and S-6 were fired from the riffle S/No 5524348 (exhibit P) and in further reference to the riffle movement register, the said riffle was issued on 13.12.2019 to Ibrahim Ahmed Dagane, the 2nd accused person herein. The 3rd riffle (J) did not have any compatible spent cartridge and the same was issued to Hassan Head National Police Reservist, who was not charged.
31. On cross examination, he stated that from magazine marked N, 18 rounds were spent; from the exhibit marked P, 13 rounds were spent and riffle J, 14 rounds were spent. The 1st accused person with riffle No. N said they had an operation at Rakalal while S-5 and S-6 were fired from riffle P. That he verified that the motive of the shooting was to immobile the motor vehicle as it had failed to stop.
32. PW 10, Dr. Abdi Sheikh stated that he conducted post mortem on the body of the deceased and that from the general observation, there was complete destruction of the skull with brain mater lying on the right side of the scalp with entry point being on the left side. That the injury was caused by a gunshot and therefore, the cause of death was traumatic brain destruction consistent with gunshot injury.
33. DW1, Sahal Ali Sheikh, a police reservist in his sworn evidence denied committing the offence by urging that together with his colleagues, they were on duty. That it was raining and noting

that the said area had security problems, they came across a motor vehicle that was being driven without headlights on. He stated that in as much as they tried to stop it, the vehicle sped off thus prompting him to shoot in the air twice. Police officers on the other side of the road also fired in the air twice but by bad luck, a person died.

34. According to him, he was under the impression that it was an al shabaab attack as the group had no information in regards to the said vehicle noting that it was during corona time. He conceded to having a gun of S/No K5531827 and that he shot two bullets. On re-exam, he stated that he shot in the air hence not towards the vehicle.
35. DW2, Ibrahim Ahmed Dagane in his sworn statement stated that prior to this case, he was a police reservist and that he had possessed a riffle for a period of one year. That on the day in question, he was at work in as much as it was raining. While there, they saw a motor vehicle approaching them at a high speed with head lamps on and so, they tried to stop the vehicle in vain. They scampered for safety as they were scared and that Idris ran after the vehicle together with Hassan Gedi as they shot in the air. On cross examination, he stated that they did not have any signal over that motor vehicle. On re-examination, he stated that they were not on duty on that material day.
36. The defence closed their case. Whereas the prosecution failed to file their final submissions, the defence filed written submissions dated 15.05.2025. It was urged that the prosecution bears the

burden of proving the guilt of an accused person in any criminal case. Counsel relied on the Court of Appeal holding in the case of **Lubutse vs Republic Criminal Case Appeal No. 231 of 2018 [2024] KECA 384 (KLR)**, where the court stated that for the offence of murder to be proved, it was incumbent upon the prosecution to prove that death occurred, the death was caused by an unlawful act or omission on the part of the accused person and thirdly, that the accused person had malice aforethought in causing the act or omission.

37. That the evidence as adduced by the prosecution was not only weak but also inconsistent as the same did not clearly point to the person who killed the deceased. That it was also not proved that the accused persons had intention to kill the deceased. To that end, this court was urged that the circumstances herein taken cumulatively, points towards the innocence of the accused persons. This court was therefore urged to set free the accused persons herein.
38. I have considered the evidence adduced by the prosecution witnesses and the defense proffered by the accused persons. In my view, the main issue for determination is whether the prosecution has proved beyond reasonable doubt that the accused murdered the deceased and that the attack was actuated with malice aforethought.
39. Section 203 of the Penal Code provides that: *“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”*

40. In the instant case, this Court is to establish whether the prosecution's evidence as a whole proved beyond reasonable doubt the following elements of murder: that there was the death of the deceased and the cause of the said death, the death was caused by unlawful acts or omission, that the accused committed the unlawful act which caused the death of the deceased and that the accused had malice afore thought.
41. On the first element regarding proof of death, this is conclusively established through the testimony of multiple prosecution witnesses and further supported by the evidence of PW10 who conducted post mortem on the body of the deceased herein.
42. On whether the death was unlawfully caused, it is a presumption in law that any crime of homicide is unlawful unless that presumption is rebuttable by an accused person by providing sufficient evidence that the homicide so committed and complained of was excusable or justified. See **R vs Gusambizi S/o Wesonga [1948] (15 EAC 65)**.
43. In the same breadth, art. 26(3) of the Constitution, provides as follows:“(3)A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.” The evidence before this court points to an unlawful act that led to the death of the deceased as it was established that the cause of death was traumatic brain destruction consistent with gunshot injury which act was unlawfully caused.

44. On whether the prosecution proved beyond reasonable doubt that it was the accused persons who committed the unlawful act which caused the death of the deceased, it is clear that the deceased died as a result of gunshot wound. But the question that needs an answer is who between the two accused persons was responsible for the same?
45. PW8 stated that a comparative microscopic examination of exhibit S1-S6 (MFI 5) in comparison with each cartridge cases fired in exhibit N, P, J (MFI 2A-2C) revealed that exhibit S1,2,3 and 4 (MFI 5A) were fired from the AK 47 rifle S/No 5531827 while exhibit S5 and 6 (MFI 5B) were fired from AK 47 assault rifle S/No 5524348 which is (MFI 2B). PW9 on the other hand stated that from the opinion of the Ballistic Expert, exhibit No. N, P and J and exhibit N1-N12, J1-J16 and P1-P12 were compatible. Also S1-S6 were fired from two different firearms and in the same breadth, S1, S2, S3 and S4 were fired from the same firearm. The spent cartridge S-1, S-2, S-3 and S-4 were fired from the same firearm and S-5 and S-6 were also fired from a different firearm. According to the report, S-1 to S-4 were fired from AK 47 rifle S/No. 5531827 (Exhibit N) and in further reference to the rifle movement register, the rifle in question was issued to Salal Abdi Sheikh, the 1st accused person herein on 13.12.2019.
46. Having perused the movement register, I find that indeed, rifle of S/No 5524348 (exhibit P) and in further reference to the rifle movement register, the said rifle was issued on 13.12.2019 to Ibrahim Ahmed Dagane, the 2nd accused person herein; while

5531827 was issued to Sahal Abdi Sheikh, the 1st accused person.

47. It was stated that the shot that penetrated the scalp thus killing the deceased was fired by the officers who were in front of the vehicle. From the evidence herein, it is clear that the officers were in groups of 4 and 3. PW5, Abdirizak Abdullahi Hassan stated that he was in the group of 4 together with Sahal, Issack, Yusuf and Osman and that he was in charge of the group. He further stated that when the vehicle did not stop, Sahal stopped on the road and shot the vehicle and the same overturned.
48. PW6, stated that he was in the group of 4 of Ibrahim Ahmed, Osman Abdullahi and Hassan Gedi. That when they saw the motor vehicle come from Dertu towards Dadaab, the lights were on and then the same was thereafter switched off. That he attempted to stop it but it sped off. From the information herein, I note that Ibrahim Ahmed, the 2nd accused person herein was in the first group that failed to stop the vehicle prompting the front group to act. It is not in doubt that the 1st accused person, Sahal Ali, being in the second group, that was in front of the vehicle, was responsible for firing straight in to the vehicle's front mirror thus killing the deceased.
49. In my view, the 1st accused person was responsible for the shot that killed the deceased. This evidence was further corroborated by the testimony of pw4 and pw5. I have no doubt that the person who shot directly at motor vehicle was accused 1. There is no evidence connecting accused two with direct shooting at

the subject motor vehicle. The fact that accused two released a gunshot, it was meant to scare the driver so a stop which was normal in such a scenario but with no intention to harm.

50. On the critical element of malice aforethought, Section 206 of the Penal Code provides that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

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

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

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

51. The manifestation of malice aforethought was articulated in the case of **R vs Tubere S/o Ochen [1945] 1 E.A.C.A. 63**, where Justice Sir Sheridan established that the court must consider: “The weapon used i.e. whether it was a lethal weapon or not;

The part of the body that was targeted i.e. whether it is a vulnerable part or not; The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and The conduct of the accused before, during and after the incident."

52. In the instant case, could it be authoritatively be stated that the 1st accused person was possessed with malice aforethought? A scenario created in the case herein in my view was that of uncertainty. It appears that the officers were caught unawares by the presence of the vehicle at the time noting that the same was during the corona time. The theory of uncertainty was well corroborated by the investigating officer who stated that the officers fired several shots to immobile the motor vehicle as the motor vehicle had failed to stop. The same was further mirrored when the driver of the vehicle continued to move despite being flagged to stop at the first barrier.

53. Sections 179 of the Criminal Procedure Code stipulates:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence,

he may be convicted of the minor offence although he was not charged with it.”

[See Republic v Irene Kageni [2022] eKLR].

54. From the circumstances of this case, it is my considered view that substituting the charge against the 1st accused from murder contrary to Section 203 as read with Section 204 of the Penal Code to manslaughter contrary to Section 202 of the Penal Code would serve the interests of justice.
55. I therefore find the 1st accused person guilty of the substituted charge and convict him accordingly. On the other hand, the 2nd accused person is hereby set at liberty unless lawfully held.

Dated, signed and delivered in open court this 26th February 2026

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J.N.ONYIEGO
JUDGE