



REPUBLIC OF KENYA



**Republic v Mbaruk (Criminal Case 29 of 2014)
[2026] KEHC 4647 (KLR) (10 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 4647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE 29 OF 2014
WM MUSYOKA, J
APRIL 10, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

NASOR SULEIMAN MBARUK ACCUSED

JUDGMENT

1. The accused is charged with two counts. The first count is of murder, contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars are that on the night of 11th and 12th day of November 2014, at Koteko area, along Malaba-Bungoma highway, in Teso North District, within Busia County, he murdered No. 83387 Police Constable Benson Moracha Monari, who I shall, hereafter, refer to as the deceased.
2. The second count is on attempted murder, contrary to section 220(a) of the Penal Code. The particulars are that on the night of 11th and 12th day of November 2014, at Koteko area, along Malaba-Bungoma highway, he unlawfully attempted to cause the death of No. 81316 Police Constable Stephen Omondi Malele, by shooting and grievously wounding the said police officer, on the right-hand side shoulder and the right leg calf.
3. The prosecution called 11 witnesses, while the defence called 3.
4. PW1, Stephen Malele, testified that, on 11th November 2014, he was on duty with his colleagues, from Malaba Police Station. They started their patrol in Malaba town, when Corporal Mogasi said he was unwell and went to his house to take medication. He assured them that he would re-join them later. As they approached the Koteko area, they noticed some trucks parked on the left side of the road, as one faces Bungoma. Their driver, the late Police Constable Benson Moracha, continued driving towards the trucks. There were 3 tipper trucks, and a pick-up parked in front of them, facing Bungoma. They parked in front of the pick-up, registration mark and number KCA 666D. There were about seven



people near the tipper. When they asked what they were doing, a short stout bearded man of Asian origin said they were fixing number plates that had been removed by Ugandan revenue officers. The man introduced himself as the owner of the tipper trucks and the pick-up. They checked the number plates, that they were fixing, and noted that they were new. One was for motor vehicle registration mark and number KBB 473A. On looking around, where the people were standing, they saw some insurance stickers.

5. They decided to check the insurance, on the windscreen of the first vehicle from Malaba direction, and noticed that the registration number was different from the number plate they were fixing. On the ground, where the people were standing, there was a number plate of a trailer bearing registration mark and number ZD 2394. PW1 started collecting exhibits, after forming an opinion that a crime had been committed, or was in the process of being committed. As he was taking the exhibits to the patrol car, the 7 men and the late police driver followed him. He noted the discrepancies in his notebook. He told the court that he and the late police driver were armed.
6. He then decided to inspect the motor vehicles, one by one, and, in one of the motor vehicles, he found bunches of number plates tied with sisal ropes. He gave over the first bunch he could reach to the late Police Constable Moracha, who then went across the road, and placed the bunch on the ground for counting. He heard the accused person shout, 'Jameni.' He pulled himself from the driver's cabin, facing where the voice was coming from. He said that it was the accused person. The accused person had a gun in his hand pointing it at him. He shot at him as he came out of the cabin, and the bullet went through his collar bone, and came out at the back. He went down, due to pain, and to avoid being the obvious target. He saw the accused person turn his gun immediately and pointed at the direction of the late Police Constable Moracha, and fired several shots. As that was happening, he stood and went towards a small thicket, on the left side of the road, as one faces Bungoma. While he was running, he felt another piercing pain on his right thigh. The thicket was on the higher side, and he could see what the accused person was doing. He saw the late Police Constable Moracha lying down. From his hideout, he drew his gun and shot twice, at the accused person then his gun blocked, and could not shoot again.
7. He then saw the accused person collect the number plates, and put them in his vehicle. He returned, and searched Police Constable Moracha, and took his wallet, phone and gun. He dragged the late Police Constable Moracha to the middle of the road, and fired shots at the body. He entered his pick-up, and fired two shots in the air, before he made a U-turn and drove towards Malaba. He did not go far, for he made another U-turn, and returned to the scene. He then drove towards Bungoma.
8. PW1 then used his phone to call and inform Police Corporal Mogasi, the duty officer. After a few minutes, a contingent of police officers came to the scene. He went out of his hiding place and he was taken to Bungoma County Hospital. He saw the late Police Constable Moracha lying in a pool of blood. He was referred to Moi Teaching and Referral Hospital, Eldoret, where he was admitted for 6 days, then discharged. He identified the accused as the person who shot the late Police Constable Moracha and him.
9. PW2, Grace Panyako Kisisei, testified that she saw a pistol, when she was going to the market. She called her husband who came and confirmed that. She told the court it had some blood. She remained at the scene, while her husband went to report to the police, who came and picked the pistol.
10. PW3, Police Corporal Raphael Mogari, testified that on 11th November 2014, that he was on duty with PW1 and the deceased. They were patrolling the Malaba-Bungoma highway, until 00.30 AM, when he felt unwell and asked his colleagues to continue. He later got a call from PW1, who reported to him that they had been attacked by a person who was armed with a gun. PW1 told him that the deceased had been fatally shot, and he, PW1, was injured, and was seriously bleeding. He told the court



that he immediately called the DCIO and the OCS, and informed them of the incident. He also called Police Constable Toroitich, who came in their station Land Rover, to pick him and the DCIO, and they headed to the scene. He stated that they met with other officers, who included the OCS, and Administration Police Officers from Amagoro and Kocholia. They saw the body of the deceased lying on the road. He said that PW1 emerged from the left side of the road, crying, asking to be assisted to go to hospital.

11. PW4, Mohamed Simiyu, testified that, on 11th November 2014, he was engaged to clear some tipper haulier trucks, being registration marks and numbers KBQ 335A, KBE 979V and KBF 073A or H. He had interacted with the drivers for about 10 years. He took the documents for stamping and the vehicles were released, for they were not carrying any goods. On 12th November 2014, while he was on duty, he was asked by Kenya Revenue Authority officers and security officers, if a problem had arisen the previous night, and he said he did not know of any. He was asked to accompany them to Amagoro DCIO's office, where he was shown 3 trucks, that were parked in the compound. He confirmed that he had cleared them the previous night, though 2 had different number plates, while 1 did not have a number plate. After the day in question, he never saw the drivers again, though he had seen the tipper haulier trucks crossing the border.
12. PW7, Inspector of Police Joseph Chirchir, testified that he renewed the firearms for the officers on duty that night. On 12th November 2014, at about 1.30 AM, he was called by the then DCIO, Grace Makupe, and was asked to rush and join them, for their driver had been shot dead. They made arrangements with other officers, and they headed to Koteko area, along Malaba-Bungoma highway. He found 3 tipper lorries, parked facing Bungoma, with their headlights on. He saw the body of the deceased lying on the road, in a pool of blood. He checked the scene and saw that the body had been dragged from across the road, as revealed by the bloodstains, up to where the body was lying. Crime scene officers were contacted, and they documented the scene. They later learnt that the owner of the lorries was Nator Suleiman, of Mombasa, the accused herein, and they got his mobile number, which was tracked to Mtito Andei. They contacted their counterparts at Taita Taveta, and were later informed that the accused was arrested, by Mariakani Police Station officers. A firearm was allegedly recovered from him, being a HKP 30L serial number 213008658.
13. PW7, initially testified before Kiarie J, on 18th February 2020. He was re-called, and testified on 9th December 2021, before Karanjah J. He stated, at cross-examination, upon the re-call, that when the accused was arrested, at Shangai, by officers from Mariakani Police Station, and a pistol, MAP 30L S/No. 3130V8658, was recovered from him. He testified that that pistol, MAP 30L S/No. 3130V8658, was handed over to him, on 13th November 2014, by Inspector of Police Paul Muturi. He could not recall signing an inventory or OB, at Mariakani. He stated that the pistol given to him was S/No. 3130V8658. He confirmed that PW8 was among those who arrested the accused, at Mariakani, and that PW8 recorded a statement, where it was disclosed that the pistol, that he had recovered from the accused, was S/No. 3130V8658. He said that the serial number of the pistol, that he had referred to earlier, in court, when he first testified, HKP 30L serial number 213008658, was given to him by IP Muturi. At re-examination, he reiterated that the pistol was S/No. 3130V8658, and that that was the correct serial number.
14. PW8, Police Corporal Anthony Gitonga, testified that, on 12th November 2014, he was attached at Mariakani Police Station. At about 11.45 AM, he received a call from Mombasa, informing him that a vehicle that was moving towards Mombasa, had passed Voi. He and his colleagues were initially told it was a white Nissan Hardbody, which was being driven at high speed, by a person of Asian origin. The registration mark and number of the vehicle was said to be KCA 666D. He called his in-charge, who was at a roadblock, just after Mariakani, from the Mombasa direction. He was told the vehicle had



passed the barrier, after its driver failed to stop, after he was asked to. He and his colleagues proceeded to the road, and created a traffic jam, by stopping other vehicles. The vehicle approached, and they stopped it, but the driver tried to avoid arrest, and turned back towards the Voi direction. On seeing an oncoming vehicle, he turned again towards Mombasa, stopped the car, got out, fired a gunshot and started running away on foot. He was arrested, with help from members of the public. After securing him, they recovered a firearm, whose serial number was KHP30L 213-6V8658. They went back to the road, and recovered a spent cartridge. They recovered number plates for motor vehicles KBF 073, KBQ 335U, KBK 979V ZD 2390, ZD 8159 and KAN 456V, and other items, in a bag, which included KShs. 10,000.00 cash, and passports in the names of Mohamed Kabuko and Sebastiam Gidi, both of whom were Tanzanians.

15. PW9, Senior Superintendent of Police Lawrence Ndiwa, he was at the DCI headquarters firearms laboratory. He produced a report, made by his colleague, Charles Koilege, who had handled the exhibits. The ballistics report was in relation to firearm HK-P30L S/No. 213-008658, and the opinion formed was that that firearm, HK-P30L S/No. 213-008658, was capable of being fired, and it had fired exhibits F1-F13, being the cartridge cases forwarded by CID Teso.
16. PW10, Dr. Were Mbiri, testified that he worked for the County Government of Bungoma, at Webuye Hospital. On 20th November 2014, he performed a postmortem on the body of the deceased, at the Lumboka Hospital mortuary. He said that there were 2 entry wounds on the posterior thigh of the left lower limb. 1 entry wound had 1 exit wound on the anterior side of the same thigh. The second entry wound was on the left lower chest wall on the posterior side. That wound had 4 exit wounds on the anterior chest. He said that the body had bruises on the face; and, internally, haematoma in the chest cavities on both sides. There were several perforations of the intestines. He formed an opinion that the cause of death was severe and acute internal haemorrhage, that led to cardio-respiratory collapse, following bullet wounds.
17. PW11, Grace Makupe, testified that on 12th November 2014, at about 12.40 AM, she received a call from PW3, who informed her that PW1 had called him, and reported that they had been attacked, at Koteko area, and the deceased had died. She called Police Constable Mutua, and PW7, and they proceeded to the scene. At the scene, she found 3 lorries, parked on the left side, as one faced Bungoma. She found the police station, KBZ 679Y, parked about 10 metres in front of the three lorries. She found the body of the deceased, near the door of the first lorry, which was registration mark and number KBK 117Q. She heard the voice of PW1, calling her from the thicket, and he came out, crying that he was dying.
18. She told the court that PW1 was bleeding from the right shoulder, and complained of some pain on the right leg. She ordered PW3 to take him to hospital, in the station Land Rover, and PW1 handed over to her his pistol and red spotlight. At the scene, she was able to collect 13 empty cartridges, near the body of the deceased, and two ricochets. Before the body was taken to the morgue, they searched for the pistol that the deceased had, but it was missing. They commenced investigations, and went to the border point, with other officers. They were able to get the telephone number of the accused person, and she called her counterpart, in Taita Taveta, and told him what had happened. At around 11.45AM, he received a call, from Kimwanga, and was told of a pistol that had been found. They were informed that the pistol was taken to Bungoma, to the Administration Police Commandant. They went there, and confirmed that it was the pistol the deceased the deceased had been assigned, on the material night.
19. At about 5.00 PM, on the same day, she received a call from Mariakani, and was informed that the police there had intercepted the vehicle the accused was driving, and had arrested him. PW1 cause the fact of the said arrest to be recorded in the Malaba Police Station occurrence book, and the accused to be collected from Mombasa. She said after the accused was brought to Malaba, they prepared their



- files and the accused was taken for medical examination. They sent 3 pistols for ballistics examination. She told the court that PW1 informed them that the person who shot him was a short man of Arab origin. She said PW1 was able to identify him, at the scene, for there were lights from the vehicles, and that he, PW1, and the man had talked for more than 10 minutes, before the shooting incident.
20. The court found and held that the prosecution had established a prima facie case, with probability of success, and the accused person was put on his defence.
 21. The accused testified as DW1. He made a sworn statement. He testified that, on the material date, he was headed to Kampala, from Mombasa. He arrived at Malaba at 9.00 PM, and that he immediately proceeded to a mosque, for prayers. Thereafter, he contacted his Malaba manager, called Hussein, and they met at the mosque. He instructed him to facilitate his entry into Uganda. He said that he had to surrender his handgun or pistol at the Malaba police station, but the OCS was not present. He was told to return the following day, to surrender the gun. They booked rooms at a hotel, called Gede, and while there, one of their drivers, called him, on phone, through his manager. He was informed that their vehicle had broken down along the highway, and they needed a mechanic to go to the scene.
 22. He stated that the truck had broken down some 20 kilometres or so, from Malaba, at a dangerous zone, heading towards the Nairobi direction. On arrival at Koteko, they found 4 trucks, and the one which had broken down truck registration mark and number KBK 117Q. While the mechanic worked on the truck, a motor vehicle, heading towards Malaba, from Bungoma, passed by, but stopped, and took a U-turn, to where they were. It did that on 3 occasions, before it stopped next to his pick-up, and the occupants asked them what they were doing. He explained their purpose of being there, but they demanded to inspect and search the truck. He stated that he objected, and asked them to identify themselves. He suspected that they were Kenya Revenue Authority officials.
 23. He told the court that he allowed them to search the vehicles' cabins, and, in the fourth truck, they found number plates of their 4 vehicles, which had been removed by Uganda officials and retained. He explained that some of the number plates, produced in court, belonged to them, and some did not. He claimed that, after the search, those persons decided to search the drivers, who refused to be searched. They wanted to search 1 turnboy, and they handcuffed him, and that was when the drivers fled. He stated that after the drivers fled, they wanted to search him, and he agreed, though the men were yet to identify themselves. In one of his pockets, he had Kshs. 10,000.00, and Kshs. 50,000.00, in the other. They took the money. He asked why they took his money, and they said once they were through, they would return the money.
 24. He testified that they asked him to remove his shirt, and he explained to them that he had a money-belt, with Kshs. 750,000.00. They took the money-belt, and put it in their vehicle. The 3 men searched his motor vehicle, KCA 666D, and he complained that he had not been informed of what they were looking for. While they were searching, he heard a voice say, 'Jameni,' It was coming from the side of the lorries. It was followed by gunshots, and people dispersed, and he got under the motor vehicle. He stated that other trucks had stopped to establish what was happening to them. He got up from under the vehicle, and got into the pick-up from the left side. He denied threatening anyone with a gun or pointing a gun at anyone. He denied shooting PW1 and his colleagues. He confirmed that he had a gun, at the time, secured in a holster, at the back of his body. He said that the officers stopped the body search, once they found the money. In his confusion, his mind led him to think of going back to Mombasa.
 25. DW2, Alhedad Hussein Khamis, testified that, on 11th November 2014, he got a call from the accused person, informing him that he, the accused, was coming to Malaba, and he needed facilitation, to cross the border into Uganda. He said the accused called at 9.00 PM. They went to Malaba Police



Station, then they left to look for accommodation. He said that they parted, on the understanding that he would meet them the next day, to surrender his gun. The next day, at 6.00 AM, he went to the guesthouse, and he found that the accused and his associate had left at night, when they got a call, about a stalled vehicle. He tried to call the accused, but the calls were not going through. He went back to the office, to attend to other matters. At about 7.00 AM, he received a call, from the accused, who informed him that they had been attacked, at Kotiko area, and that he should go and report at the police station. He said that when he got to the station, he was asked to go see the OCS. He explained that his boss was attacked by unknown people, and the OCS told him that the said 'unknown' people were police officers.

26. DW3, Abdalla Akida, testified that, on 11th November 2014, he joined the accused person at Malaba, where they met with DW2. They went to Malaba Police Station, and as they were leaving, the accused said that they could not leave for Kampala that day. They went to sleep at Gede Hotel, and at around 12.00 midnight, he heard a knock on his door. It was the accused person, who informed him that one of their vehicles had broken down, around the Koteko area. They left with a mechanic, to fix the vehicle. A vehicle approached them, and 2 or 3 people disembarked. The men began to ask them questions, without identifying themselves. He said they wanted to search the drivers and fundis, but they resisted. They then focused on the accused person, and wanted to search him. He said that the accused was cooperating with the men, who were yet to identify themselves. He testified that while the search was going on, there was a flash of light, and someone said, 'Jamani,' and the people around began to run. He said the accused went under the pick-up, on the left side, and the others ran into the bushes. He, DW3, got into a lorry of another person. He denied seeing the accused take a gun and shoot anyone.
27. At the conclusion of the oral hearings, the parties filed written submissions, which I have read and considered.
28. The principal issue, which comes up for determination, is whether the prosecution has proved its case, against the accused person, beyond reasonable doubt.
29. The accused was charged with 1 count of murder, and another, of attempted murder. I shall consider the 2 charges in turn.
30. The elements, for the offence of murder, are well settled. The prosecution is required to prove the death, the cause of it, the role of the accused person in the causation, and the fact that the causation was with malice aforethought. See Republic vs. David Ruo Nyambura & 4 others [2001] KEHC 826 (KLR) (Etyang, J) and Joseph Kimani Njau vs. Republic [2014] eKLR [2014] KECA 229 (KLR) (Visram, Koome & Odek, JJA).
31. On the proof of the death of the deceased, the evidence was overwhelming. PW1, PW3 and PW11 testified to seeing the body of the deceased lying on the road, dead. PW10 conducted post-mortem on the body, and prepared the post-mortem form, dated 20th November 2014, which was produced as PEXH-3. Indeed, the deceased died. There was a death.
32. On the cause of death, the evidence of PW10, the medical officer, is critical. He noted gunshot wounds, with 3 entry points, and 5 exit points. There were bruises on the face. There was hematoma in the chest cavity, both sides; with several perforations of the intestines. He concluded that death was caused by acute internal haemorrhage, leading to cardio-respiratory collapse, following the gunshot wounds.
33. On whether the accused was party to the causation, there was evidence that placed him at the scene. The accused himself admitted to being at the scene, but denied firing the fatal gunshots. He testified that he was cowering under a pick-up, as the shots were fired, which testimony was supported by that of his witness, DW3. The principal witness, on the prosecution side, on the causation, was PW1, who



was himself at the scene. He testified that he saw the accused shoot at the deceased, and also that the accused shot at him, that is at PW1, and injured him.

34. It is incumbent that the prosecution demonstrate that the death of the deceased was caused by the accused person. The weapon, used to cause the death, was a firearm, said to be a handgun or pistol. Where fatal injuries are caused by a firearm, there would be need to provide forensic evidence, which establishes that the gun that caused the injury was fired by the accused person. Guns have serial numbers, and are of different calibres, and each have their own unique characteristics, which ought to be brought out in a ballistics or forensics report, by an expert. Was such evidence tendered, to connect or link the gun which fired the fatal shots to the accused?
35. PW8, who was then stationed at Mariakani Police Station, told the court that they arrested the accused person, with a firearm, whose serial number was given as KHP30L 213-6V8658. PW7 testified that they went to Mariakani Police Station, and escorted the accused person to Malaba Police Station, and that he, PW7, took possession of the firearm, recovered from the accused, said to be serial number HKP30L 213008658. PW9, the firearms expert, testified that the firearm that he received, for examination, on 19th December 2014, was serial number HKP30L-213-008658. PW7 was later recalled, and he changed his testimony, to say that the gun, that PW8 recovered from the accused, was S/ No. 2130V8658. He reiterated that he did not deal with PW8, who had recovered the gun, but another officer, IP Muturi, who did not testify.
36. DW1 admitted that he was a licensed gun owner, but denied that he was the one who shot the deceased. He stated that he had his own pistol, when he was arrested, and that a police pistol was not recovered from him. He gave the number of his pistol, which he had, and which the police recovered from him, as HK/P/30L/S/213/0V8658. He stated that that was the gun that he handed over to PW8. He produced a statement by IP Muturi, as D. Exh. No. 5, and said that it was stated, in that witness statement, that the serial number of the gun recovered, from him, was of that serial number, HK/P/30L/S/213/0V8658. He also produced the witness statement, as D. Exh. No. 6, of PW8, the officer who arrested him, where the gun recovered was identified as HK -30NS/2193-6V8658. DW3, who was also at the scene, on that fateful night, stated that he did not see the accused person discharge a bullet from a firearm.
37. I have perused the 2 exhibits, D. Exh. Nos. 5 and 6, being the statements recorded by the police from IP Muturi and PW8. IP Muturi recorded, in his statement, dated 13th November 2014, that he was among those who arrested the accused. He searched him, and recovered a pistol, whose serial number he recorded as HK-P30L S/No. 213-OV8658. PW8 recorded, in his statement, dated 13th November 2014, that he was also in that arresting party. Upon the arrest, the accused was found in possession of a pistol HK-P30L S/No. 213-6V8658. When PW8 testified, he said they recovered a pistol S/No. 213-OV8658. PW7 was re-called, on 9th December 2021, to testify before Karanjah J, and he stated that the serial number, of the said pistol, in the witness statement of PW8, HK-P30L S/No. 213-6V8658, was a typing error, and that the correct number was HK-P30L S/No. 213-OV8658.
38. The accused person has argued, that the firearm, that was submitted for ballistics examination, was not the one that was allegedly recovered from him, at the time of his arrest, and that there was a difference in the serial numbers. The arresting officer, being PW8, talked of HKP30L 213-0V8658; while PW7, the re-arresting officer, stated that the serial number of the firearm, that was handed over to him, by the arresting officers, and which he later took for ballistics examination, was HKP30L 213-008658. He later testified, on re-call, that the gun he collected from the station, where the accused was initially held, after arrest, was S/No. 2130V8658, which he asserted was the correct serial number for that gun.



39. That, no doubt, creates a discrepancy, regarding the description or particulars of the gun that was used to shoot and kill the deceased. Was it HKP30L 213-0V8658 or HKP30L 213-008658? The officer, from Mariakani Police Station, who was among those who arrested the accused, PW8, testified that he recovered a pistol, whose serial number was HKP30L 213-0V8658. However, the officer, from Malaba Police Station, PW7, who re-arrested the accused, from Mariakani Police Station, and escorted him to Malaba, talked of a firearm bearing a different serial number, HKP30L 213008658. That firearm, with that second serial number, that is to say HKP30L 213008658, was what was subjected to ballistics or forensics, by PW9. However, PW7 later revised his testimony, upon re-call, to state that the correct serial number, for the gun he collected from the arresting officers, was S/No. 2130V8658.
40. The witness statements, taken from the police officers, who had arrested the accused, and recovered the gun, in his possession at that time of arrest, IP Muturi and PW8, both dated 13th November 2014, had identified the gun as S/No. 2130V8658. PW7 was one of the investigating officers. He must have had possession of the said statements, when he allegedly forwarded the allegedly recovered gun, HKP30L 213-008658, for ballistics, and when he initially testified on 18th February 2020, before Kiarie J, only for him to revise that testimony before Karanjah J, on 9th December 2021. I note, though, that when he testified on 18th February 2020, he made reference to the statement by PW8, which he described as self-recorded, and stated that it was recorded, in it, that the recovered gun was S/No. 2130V8658.
41. The question, then, would be, was the gun that was subjected to ballistics or forensics, HKP30L 213008658, the same gun as that which was recovered from the accused, S/No. 2130V8658? Should the accused be held liable, based on a piece of evidence that could not be tied to him? Was there a switch of the firearm, between when it was recovered by the police at Mariakani, and when or after it was handed over to the police from Malaba? Certainly, what was tested, by PW9, was not the firearm that was recovered from the accused, by PW8 and IP Muturi.
42. The prosecution did not seek to explain the discrepancy, or to demonstrate that it was possible for a gun to have several serial numbers. More crucially, although the accused admitted to being a licensed gun-holder, and he recited its number, as HK/P/30L/S/213/0V8658, being the same number that PW8 referred to, no evidence was tendered, by the prosecution, from the police bureau, responsible for licensing of firearms, on the gun or guns registered to the accused person, to try to connect any of the firearms licensed to him, to the injuries sustained by the deceased.
43. The testimony of PW7, and the material generated by him, do not add up. The testimony, that he gave on 18th February 2020, sharply contrasts, materially, with his testimony of 9th December 2021. In one, he says that the gun recovered was HKP30L 213008658, in the other he says it was S/No. 2130V8658. 2 exhibit memos, forwarded guns and ammunition to the ballistics expert, for testing. One exhibit memo was dated 14th November 2011, and the other 13th November 2014. Both were received at the laboratory on 19th December 2014. Both were generated by the same person, for they bear the same handwriting, and signature. One was purported to have been prepared by CID Kaloleni, and the other by CID Teso. The one that forwarded HKP30L 213008658 was allegedly issued by CID Kaloleni. That would suggest that PW7 never took possession of HKP30L 213008658, on 13th November 2014, as alleged in his testimony of 18th February 2020, for that firearm was forwarded for ballistics, at the Nairobi CID laboratories, directly by CID Kaloleni, and not CID Teso, going by those exhibit memos. It would appear to suggest that the accused was not transferred to Malaba, together with the gun, that was allegedly recovered from him, contrary to the testimony of PW7.
44. PW9 told the court that he received 2 sets of firearms and ammunition to subject to ballistics. One set was from CID Teso, while the other was from CID Kaloleni. It was not CID Teso which forwarded HKP30L 213-008658 to PW9, for ballistics, but CID Kaloleni. Officers from CID Kaloleni should



have been presented in court, as witnesses, to explain how they got to submit HKP30L 213-008658 for ballistics, when the gun recovered from the accused, according to the officers who actually arrested him, PW8 and IP Muturi, was S/No. 2130V8658; and also how they got to forward that gun for ballistics in Nairobi, if the same had been handed over to PW7, who was CID Teso, as he had alleged, in his testimony of 18th February 2020.

45. The accused person has placed reliance on Republic vs. Edward Kirui [2010] KEHC 2733 (KLR) (Ochieng, J), which was overturned in Republic vs. Edward Kirui [2014] KECA 310 (KLR) (Mwera, Mwilu & Gatembu, JJA). In the instant case, the disparity is in the serial number of the gun that the accused allegedly had in his possession, when he was arrested at Mariakani, and the one that was submitted for ballistics examination.
46. The Court of Appeal, when faced with a similar situation, in Eric Akeyo Otieno vs. Republic [2008] KECA 87 (KLR) (Bosire, Aganyanya & Aluoch, JJA), of different serial numbers, with respect to the same firearm, gave the benefit of doubt to the accused person, who was the appellant in the appeal. It was stated as follows:

“... With the greatest respect to the learned Judge, we do not find that his conclusions were supported by the evidence on record, which showed that the rifle G3 serial number 359359 issued to the appellant was not the one given to Inspector Wandaka who in turn handed it over to the firearms examiner who read the serial number of the gun he received from Inspector Wandaka and confirmed that its serial number was 369369.

We agree with learned counsel for the appellant that the appellant’s defence raised a reasonable doubt on the prosecution case, the benefit of which should have been given to the appellant.”

47. In the 2 decisions the Court of Appeal appears to take conflicting positions, when confronted with similar situations. In one, Republic vs. Edward Kirui [2014] KECA 310 (KLR) (Mwera, Mwilu & Gatembu, JJA), the issue was around a rifle issued to the respondent, the accused at the trial court. According to him, it was body parts number 08378 and serial number 23008378. PW2 testified that the firearm given to the respondent was 0878; while PW8, in charge of the armoury, said the respondent was issued with rifle number 23008378. PW9, the ballistic expert or firearms examiner, said he was given rifle number 3008378. The trial court was of the view, given the varying numbers, that there was doubt on the identity of the gun issued to the respondent, which doubt was resolved in favour of the respondent. On appeal, the Court of Appeal took the view that the key number was 08378, and overturned the decision of the trial court.
48. In Eric Akeyo Otieno vs. Republic [2008] KECA 87 (KLR) (Bosire, Aganyanya & Aluoch, JJA), the firearm issued to the accused, according to the police officer, who submitted it for ballistics, was said to be FMP 369369, according to the firearms movement register, and not 359359. The firearms examiner testified that the firearm that was given to him for examination, and which he examined, was serial number 369369, and that it was from it that the spent cartridges that he examined were fired from. The accused testified that the firearm issued to him was serial number 359359. He called a witness, who presented a firearms movement register, which did not reflect a gun bearing serial number 369369, but serial number 359359. The trial court convicted, on the basis that there was an error, in recording 369369, instead of 359359, which could be treated as a mere slip. On appeal, the Court of Appeal quashed the conviction, on grounds that that mix-up represented a doubt, which ought to have been resolved in favour of the accused.



49. Given these 2 conflicting positions, I would go by Eric Akeyo Otieno vs. Republic [2008] KECA 87 (KLR) (Bosire, Aganyanya & Aluoch, JJA), and find that an error of that kind ought to be resolved in favour of the accused. The gunshot that caused the death ought to be traced to a firearm that the accused person had possession of. Where there are conflicting details on the identity of that firearm, the way to resolve the conflict would be to rule in favour of the accused.
50. The burden of proof, in criminal matters, lies with the prosecution, throughout. It never shifts to the accused. The standard required is beyond reasonable doubt. Any doubt raised, or any gap in the evidence, which brings out a doubt, ought to be resolved in favour of the accused person. The prosecution has presented evidence, on the firearm, allegedly used by the accused, to kill the deceased, which is inconsistent. One piece indicates that the accused was arrested while possessing a gun serial number HKP30L 213-6V8658, which was never presented for forensics. The other piece indicates that another firearm, HK-P30L S/No. 213-008658, which those who arrested the accused did not recover from him, was presented for forensics, and it was asserted, by the prosecution, through PW9, to be the one that was used to fatally injure the deceased. That ought to create a doubt, or a gap, in the evidence, which ought to break the chain of causation.
51. Legislation does not make it mandatory, that investigators prepare an inventory of property that they recover from a suspect, upon arrest. However, the National Police Standing Orders do give guidelines, which require preparation of inventories on what is recovered from suspects. Of course, common sense and reasonableness require that whatever is recovered ought to be documented, for accountability and preservation. Where an inventory is prepared, for whatever reason, and under whatever circumstances, it becomes a matter of some importance, for the same could be of evidential significance.
52. The inventory, of the exhibits, allegedly recovered from the accused person's motor vehicle, registration mark and number KCA 666D, was produced as exhibit PEXH-24, and it stated that the serial number, of the pistol recovered from him, was HK-P30L serial number 213-008658. That inventory was produced in court by PW14. PW14 was one of the investigating officers. She testified that she was the one who prepared that inventory. The accused person was arrested at Mariakani. PW14 was not in the arresting party, for she was not based at Mariakani, where the arrest happened, but at Malaba. She did not travel to Mariakani, upon the arrest of the accused, to re-arrest him, and bring him to Malaba. It was PW7 who travelled to Mariakani, and it was him to whom the accused person, and the items recovered from him and his vehicle, were handed over. It would be difficult to understand the circumstances, under which an inventory, of what was recovered from the accused, upon his arrest, at Mariakani, could be recorded by an officer who was not party to that arrest and recovery, and who was, in any event, at another police station, nearly 1,000 kilometres away. Such an inventory would be of little probative value.
53. Contrary to the testimony of PW14, the alleged inventory was not prepared by her, but by one Gikandi, who signed it on 14th November 2014. PW14 was not the maker of that document, to the extent that she did not sign it. According to PW8, one of the arresting officers, the arrest happened on 12th November 2014. So, if the arrest of the accused was on 12th November 2014, that should also be the date when the gun was recovered, and that ought to have been the ideal date for generating an inventory of what had been recovered. For an inventory to have probative value, it ought to be generated contemporaneously with the recovery, or shortly thereafter, preferably when the arrested person is being booked into the station. The purported inventory was generated 2 days after the arrest and recovery of the firearm.
54. Secondly, Gikandi, who purportedly signed the said inventory, did not testify at the trial, and it is not known whether he had recorded a statement with the investigators, and if he had, whether the same



- was made available to the parties. There is no telling whether he was party to the arrest of the accused, and the recovery of the firearm, for him to prepare an inventory of what the accused was in possession of at his arrest. The genuineness of the alleged inventory, prepared by him, 2 days after the arrest of the accused, and the recovery of the items, could be called to question. Gikandi should have been availed, as a prosecution witness, for he was a signatory to a document, purporting that the gun, that PW8 and IP Muturi recovered, as S/No. HKP30L 213-6V8658, or S/No. HKP30L 213-0V8658, was, in fact, S/No. 213-008658. His testimony would have shed light on the riddle.
55. Thirdly, P. Exh. No. 24 was headed or titled inventory into items recovered from the motor-vehicle driven by the accused at the time of his arrest, on 12th November 2014, at 13.00 hours, yet at the tail end, it was signed by Gikandi, as a handing over officer, on 14th November 2014, and by James Opiyo, as a taking over officer, on the same date. Was it an inventory or a handing over document? A recovery inventory would be a receiving document, documenting the items received from the suspect or arrested person, at the point of his arrest. It should, ideally, be signed by the suspect or arrested person, as acknowledgement, by him, of what he was in possession of, at the time of his arrest, and of what was been taken away from him, and received by the officer preparing the inventory. It is an accounting document, between the suspect/arrested person, on one hand, and the arresting/recovering officer, on the other. P. Exh. No. 24 was not signed by the accused. He was not party to it. It was a document between 2 police officers. It cannot be of any value as a recovery inventory.
56. Whereas it is clear, from the trial record, that James Opiyo was an officer at CID Teso, it is not clear who Gikandi was. It is not clear whether he was based at CID Teso, or CID Kaloleni, or at Mariakani Police Station. It is not clear how he or she came into the picture, so as to generate an alleged recovery inventory, to hand over the property of the accused to James Opiyo, in a transaction that did not involve the accused. PW7 testified that he was the one who travelled to Mariakani, to re-arrest and collect the accused from the police station there, and it was to him that the accused and his gun were allegedly handed over. Of course, he testified that he was accompanied by other officers, and James Opiyo might have been one of them.
57. James Opiyo did not testify, although his name came up, with respect to firearms and ammunition being handed over for ballistics testing. Since he was one of the signatories, to the alleged recovery inventory, he should have testified, and produced it, for he was better placed to explain the circumstances of its making. Since one of the items, listed in the alleged recovery inventory was the pistol, HK-P30L S/No. 213-008658, which he allegedly subsequently handed over for ballistics, he would have been better placed, than PW7, to shed light on the circumstances under which PW8 and IP Muturi had recovered a pistol S/No. 2130V8658, on 12th November 2014, from the accused, yet the recovery inventory, generated on 14th November 2014, listed a pistol, S/No. 213-008658, as the recovered item.
58. According to PW9, the ballistics report, that he produced, in relation to firearm HK-P30L S/No. 213-008658, formed the opinion that the firearm was capable of being fired, and it had fired exhibits F1-F13, being the cartridge cases forwarded by CID Teso. What is clear, from that report, is that firearm HKP30L 213008658 was the weapon used to shoot the deceased and PW1. However, there are doubts as to whether the firearm, that the accused person was arrested, in possession of, S/No. 2130V8658, was the same one, HKP30L 213008658, that was submitted for ballistics examination. Additionally, there should be doubts, as to whether the accused person ever handled the firearm identified as HKP30L 213008658, at the material time.
59. Based on the above, I am not persuaded that the prosecution marshalled sufficient evidence, to establish that the accused person caused the death of the deceased, for a doubt arises as to the firearm that shot



or discharged the missiles that killed the deceased. Not enough evidence was adduced, to connect the accused person, to the firearm which discharged the missiles, that caused the fatal injuries.

60. On malice aforethought, the various ways it manifests itself are spelt out in section 206 of the Penal Code. There is direct intention to kill, sputtered out verbally or in writing. It could also be inferred, from the conduct of the accused. One, where the injury caused it so bad that it can only be inferred that there was an intention to kill, or cause grievous harm, from which death occurs. Two, the injury is caused in circumstances which suggest an intention to commit a felony, of one kind or other, and death occurs in the process. Three, where the injury is caused in circumstances where there is indifference, on the part of the accused, as to the consequences of what he is doing, when he is expected to know that that conduct could cause a deadly injury.
61. The prosecution submitted that the deceased was shot dead on 11th November 2014 by the accused person. They stated that the accused person had allegedly lost a large sum of money to the officers, and, therefore, it was reasonable to conclude that the accused person might have thought of causing the death of the deceased. What the prosecution argues is more about the motive, rather than the mens rea. Gunfire is deadly, and an intention to kill would naturally be presumed in cases where firearms are involved. A person who shoots at another would be presumed to either intend to kill the victim, or to intend to cause that person grievous harm, or to commit some grave felony. Should death arise, from injuries inflicted by gunfire, malice aforethought would be imputed, and the resultant offence would be murder.
62. There is no dispute, that the deceased died of gunshot wounds. The person who fired those gunshots must have intended to kill the deceased, or to cause to the deceased grievous harm, or he must have intended to commit some felony, or was indifferent to whether his actions caused death or grievous injury. Now that the deceased died of his gunshot injuries, that would mean that the person who shot at him had malice aforethought, and the deceased was murdered.
63. The question, however, remains, whether that person was the accused. As concluded above, there is a gap in the ballistics or forensic evidence, on which gun fired those fatal shots. Was it HKP30L 213-0V8658, which the accused owned or possessed, and was allegedly recovered from him, at the time of his arrest, according to the arresting officer, PW8; or was it HKP30L 213008658, which PW7 submitted for forensics, but which does not appear to be traceable to the accused person. The deceased died of gunshot wounds, but which gun fired or discharged those shots, and how was the accused connected to that firearm? That was not clearly brought out. In view of that gap, it cannot be said that the accused killed the deceased, and malice aforethought cannot be pinned on him, in the circumstances.
64. It is my finding and holding, therefore, that the offence of murder, charged under count 1, has not been proved beyond reasonable doubt.
65. On the second count, of an attempt to cause death, the elements are as stated in *Cheruiyot vs. Republic* (1976-1985) EA 47 (Madan, JA), quoting *Rex. vs. Gwempazi s/o Mukhonzu* (1943) 10 EACA 101 (Sir Joseph Sheridan CJ, Gray CJ & Manning J), *Rex. vs. Luseru Wandera* (1948) 15 EACA 105 (Sir Barclay Nihill CJ, Edwards CJ & Sir John Gray CJ) and *Mustafa Daga s/o Andu vs. Rex.* (1950) EACA 140 (Sir Barclay Nihill, Sir Graham Paul CJ & Edwards CJ), stated as follows:

“In order to constitute an offence contrary to section 220, it must be shown that the accused had a positive intention to unlawfully to cause death ... The essence of the offence is the intention to murder ...”



66. A more recent rendition of the same is to be found in *Abdi Ali Bare vs. Republic* (2015) eKLR [2015] KECA 794 (KLR) (Githinji, Mwilu & M’Inoti, JJA), where it was stated that:
- “... it has long been accepted that on a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence ... to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example must be sufficiently proximate to murder to be properly described as attempt to commit murder ...”
67. Section 388 of the Penal Code defines attempt as:
- “(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
- (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
- (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”
68. PW1 testified that the accused person shot at him, and the bullet went through his collarbone, and exited out through the back. He was also shot on his right thigh. Whoever shot at PW1 intended to cause him grievous harm, given the injuries that he suffered, and an attempt to cause death could be inferred from the offensive and deadly nature of the weapon used. However, the prosecution has failed to prove that the shots, fired at PW1, came from a firearm that was being handled by the accused. There were other individuals at the scene. It was at night.
69. The evidence placed on record was that the serial number of the firearm, that was found on the person of the accused, at the time of his arrest, was HKP 30L 213-0V8658, yet inadequate evidence was adduced to establish that that was the same firearm that was submitted for ballistics examination, for the gun delivered for forensics was serial number HKP30L 213008658. It was one thing, for PW1 to assert that he saw the accused fire at him, and totally another to establish that the missiles that hit him were fired or discharged from a gun handled by the accused. Injuries sustained by gunshots must be traced to a firearm fired by the person alleged to have been attempting to commit murder. The assertion that the accused was seen firing the gun, must be supported by evidence that the missiles, inflicting the injury, were fired or discharged from a gun that the accused was handling. There must be a connection between the injury and a gun traced to the accused person. In this case, there is no such linkage.
70. It is, therefore, my conclusion, that the evidence tendered, in support of the second count, falls short of establishing, beyond reasonable doubt, that the accused person fired the shots that caused injury to PW1, with an intention to kill him.



71. I believe that I have discussed enough, to demonstrate that there was insufficient evidence that the accused caused the killing or death of the deceased person herein, with malice aforethought, and attempted to kill PW1. I, accordingly, find him not guilty of the murder of No. 83387 Police Constable Benson Moracha Monari, contrary to section 203, as read with section 204, of the Penal Code, and of attempting to cause the death of No. 81316 Police Constable Stephen Omondi Malele, contrary to section 220(a) of the Penal Code, and I hereby acquit him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya.

DELIVERED, VIA MICROSOFT TEAMS, DATED AND SIGNED IN CHAMBERS, AT MILIMANI, NAIROBI, ON THIS 10TH DAY OF APRIL 2026.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Wandugi Karathe, Advocate for the accused.

