

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO. E015 OF 2021

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

WILSON SIMIYU SITUMA.....
ACCUSED

JUDGMENT

1. The accused person herein, Wilson Simiyu Situma, faces a charge of murder. It is alleged that he murdered Alfred Olu Obayo, on 22nd February 2021, at Texas Annex Hotel, in Busia Town, within Busia County, contrary to sections 203 and 204 of the Penal Code, Cap 63, Laws of Kenya. He denied the charges, and a trial was conducted. The prosecution presented 14 witnesses.
2. PW1, Mercy Kamai Kalasinga, was with the deceased, her alleged boyfriend, at the Texas Annex Hotel, working, on 22nd February 2021, when, sometime after 7.00 PM, she saw a tall light-skinned person, who she had not seen prior, point a gun at the deceased and discharge a gunshot. The deceased died as she, and others, made efforts to rush him to hospital. The police came, conducted preliminary investigations, and removed the body to the mortuary. The police visited her house, and conducted a search. She also attended an identification parade, at the police station, where she pointed out the accused, as the person she saw at the scene, holding a gun and firing a shot at the deceased. She stated that the deceased had expressed fear for his life, saying that one of his former wives, who she identified as Sarah, had previously made attempts to kill him.

3. PW2, Stephen Egesa Omukaga, was an employee at the Texas Annex Hotel. He had left work, and gone home, when the events unfolded. Someone telephoned him at about 8.20 PM, and informed him that the deceased had been killed. He rushed back to the hotel, and confirmed that the deceased had been shot, and was lying on the ground, bleeding profusely. The police arrived, and removed his body to the mortuary.
4. He stated that there was a person who used to visit the deceased at the hotel frequently, who made him, PW2, uneasy. When he talked to the deceased about that man, the deceased said that one of his former wives, Sarah, had hired that man to kill him. He testified that that man showed up at the hotel on 21st February 2021, at 5.00 PM, and found PW2 there. The man was unable to meet the deceased, for he was busy, and he left, saying he would return. On 22nd February 2021, a different man arrived, at 10.00 AM. That man kept eyeing the deceased, then he left. Sometime after the death, the police called PW2 to an identification parade, at which he picked the accused, being the person who was with the deceased on 22nd February 2021, at 10.00 AM. He said that the man he saw on 22nd February 2021 had a black spot on the forehead, and a minor growth at the back of the head.
5. PW3, Tom Omondi Owande, was a manager at Texas Annex Hotel, at the material time. He was at home, on 22nd February 2021, at about 8.00 PM, when he was telephoned, and informed that the deceased had been shot dead by thugs. He rushed to the scene, and found the body of the deceased at the scene. The police had already arrived. The police removed the body from the scene. He said that he did not know the accused, and had never seen him prior to meeting in court.
6. PW4, Everlyn Baraza, and PW5, Philip Nakisa Saini, were not witnesses to the events of 22nd February 2021, but to an

event that happened on 8th August 2021, when they were allegedly attacked, at 9.00 PM, at their home, at Endebess, Chepchoina, Trans Nzoia. An intruder had entered their bedroom, and demanded money. He was armed with an AK 47 firearm. They engaged and attacked the intruder, and overpowered him. The police arrived, and arrested him, and recovered the firearm. They identified that intruder as the accused, with PW4 saying that he had a swell growth near his right ear. PW4 said that she knew nothing about the events of 22nd February 2021.

7. PW6, No. 231200 Police Inspector Calistus Muduko, was the identification parade officer. He mounted the parade on 20th August 2021. 3 witnesses were availed, including PW1 and PW2, and Everlyn Atieno Juma. He stated that the suspect was the accused person, who had not had opportunity to be seen by the witnesses. The parade comprised of 8 individuals, who had superficial looks like the accused. It was mounted at the police yard, in private. The accused consented to the parade, but had no witness or Advocate. He chose a position in the lineup. The 3 witnesses were called, separately or alternately. PW1 and PW2 identified the accused, by touching him, while Everlyn Atieno Juma did not identify anyone. After the parade, the accused protested, saying that the witnesses had seen him, on CCTV, at the police station. Nevertheless, the accused signed the parade form, which PW6 produced as an exhibit.
8. PW7, No. 86640 Police Corporal Douglas Wamalwa, was a scenes of crime officer. He visited the scene of the murder, on 23rd August 2021, in the company of the investigating officer, Police Sergeant Peter Chema. He took several photographs, of the hotel veranda, of the blood of the deceased on the floor of the hotel, and of his body at the mortuary at postmortem. The photographs were subsequently printed on 10th March 2021.

9. PW8, Christine Makhanu Obayo, identified herself as the only widow of the deceased. She testified that on 22nd February 2021, on her way home from work, she saw a girlfriend of the deceased, who she identified as Sarah, outside Texas Annex Hotel, with 2 young men, who included the accused. Later, at 8.00 PM, she was telephoned and informed that the deceased had been shot and killed at the hotel. She rushed to the scene, and found that the police had arrived. She later went to the mortuary, and identified the body, for postmortem purposes.
10. PW9, No. 235124 Police Inspector Mbalani Alfred Kahi, was a ballistics expert. He testified on tests he had done on 2 occasions, the first in July 2021 and the second in August 2021. The first test related to 2 spent cartridges. He established that the 2 were fired from an AK47 rifle. He also established that the gun which fired them had been previously used in robbery incidents in 2017 in Vihiga, 2019 in Nandi Hills, 2020 in Kitale and 2021 in Kwanza. The second related to a AK47 rifle SR No. AB3876, a magazine and 2 rounds of ammunition. He established the gun to be Chinese made, in working condition, and that it had been used to fire the bullets the subject of the spent cartridges that he had examined previously.
11. PW10, No. 238517 Police Inspector John Kemboi, testified on the events of 8th August 2021, involving PW4 and PW5. He was alerted of the incident, and rushed to the scene. He found that the suspect had been subdued, and arrested, and had a rifle. PW10 recovered the rifle, with 2 bullets. He identified the gun as SR No. AB3876. The crowd had injured the suspect, who he identified as the accused person in this case. He was taken to hospital. He also testified that a Samsung phone was also recovered from the accused, with 2 SIM cards, from Safaricom and Airtel.

12. PW11, No. 68207 Police Seargent Noah Siror, was with PW10, when they responded to the distress call by PW4 and PW5. They found the suspect, the accused herein, at the scene, sitting, injured, bleeding from the head. They took him to hospital; he was treated and discharged. He was then taken to the police station, and booked in the cells. He was subsequently handed over to DCI, together with the recovered firearm, SR No. AB3876.
13. PW12, Dr. Dixon Mchana, was the pathologist who conducted autopsy, on the body of the deceased. He noted a bullet entry wound, on the right side of the chest, with an abrasion collar; and an exit wound at the junction of the right neck and shoulder, with the edges pointed outwards. There was also a glazing abrasion injury on the chin. There was also a bullet wound on the right middle finger and a laceration at the base of the right thumb. Internally, there was a compound fracture of 3 ribs, a gaping laceration of the right $\frac{1}{2}$ of the diaphragm, perforation of the right lung from the base coming to the diaphragm and upwards towards the exit, the cutting off of the major vessels of the neck causing bleeding into the right chest, the cutting of the small vessels of the affected ribs, rapture of the left half of the liver causing bleeding into the abdominal cavity, and unstable fractures of the 1st and 2nd spinal bones with injury to the spinal cord. His opinion was that death was caused by the multiple injuries, secondary to the gunshot wounds. He further opined that the firearm used was of high velocity calibre, fired at short range. He said that there were either 1 or 2 shots.
14. PW13, No. 55535 Police Sergeant Peter Nzemya, was the investigating officer. He detailed the steps that he took, in the course of his investigations.
15. PW14, No. 69291 Police Constable Stephen Kimanthi Ndatho, testified on the events of August 2021. He was called

to the scene by PW10. He found that the accused herein had been arrested by members of the public, in a case of attempted robbery. PW10 had gone there to rescue him, from members of the public, who wanted to lynch him, after his accomplices had escaped. They calmed down the crowd, and recovered the AK 47 rifle SR No. AB3876, and a magazine, with 2 bullets of calibre 7.62, which members of the public had wrestled from the accused person. They also recovered a black muffin from him, a Samsung mobile phone and 2 SIM cards. He and PW11 prepared an inventory of what they had recovered from him, which was then produced in court, in proceedings that were conducted at Kitale, in Kitale CMCRC No. E3600 OF 2021, relating to that incident on 8th August 2021. PW14 identified the accused as the person that he rescued from the crowd on 8th August 2021.

16. On 30th June 2023, I delivered a ruling, where I found and held that a *prima facie* case had been established against the accused person, to warrant his being required to present a defence. A defence hearing was conducted. The accused person made a sworn statement, but did not call witnesses.
17. The accused person, Wilson Simiyu Situma, testified as DW1. He started by stating that he was dark in complexion. He testified that he had a dispute, with PW10, over a piece of land at Kitale, and that the string of criminal cases that have faced him were framed by PW10, against him, in the quest to gain an advantage over him, with respect to that dispute. Kitale CMCCRC No. E2404 of 2021 was said to be one of them, where the accused spent 2 years in custody, with the proceedings terminating on 3rd November 2022, in his favour. Kitale CMCRC No. E4667 of 2021 was the other, of robbery with violence, allegedly committed on 15th January 2021, although he was arraigned on 18th October 2021. He was convicted, and sentenced to life imprisonment, but the conviction and sentence were quashed on appeal, in Kitale

HCCRA No. E058 of 2023. He stated that PW4 was the complainant in that case, yet she was a village elder, suggesting collusion between her and PW10.

18. There was also Kitale CMCRC No. E1163 of 2022, where the complainant was an Isaac Njoroge, relating to a robbery on 16th January 2021, where the gun that he was allegedly armed with was the same one received in the alleged incident of 8th August 2021. He said that case ended with his acquittal. He stated that in Kitale CMCRC No. E4667 of 2021, the said gun, SR No. AB3876, had been handed over for ballistics, on 8th January 2021, and it could not, possibly, have been available on 22nd February 2021, for use to kill the deceased herein. He also referred to Kitale CMCRC No. E1162 of 2022 and Kitale CMCRC No. E1164 of 2022, which were withdrawn. He said that he was not in court on 18th August 2021, but in prison. Regarding Kitale CMCRC No. E3600 of 2021, he said the same did not exist, as he only heard of it in court. He said he never was a party to that case. He stated that an order had been made, herein, for production of that file, but that order was never complied with.

19. He denied being found with SIM cards from Safaricom and Airtel, saying that such are subject to registration, and were traceable. He argued that an attempt should have been made to establish that they belonged to him. He asserted that he has never used a Samsung phone, for he always had a Techno instead. He stated that when he sought to get Safaricom establish under whose name the SIM card line was registered under, he was told that the data was not available. He also said that he sought triangulation to show where he was on that date, but he was informed that that data was also not available.

20. He also testified that he had a letter from DCI Busia, dated 20th August 2021, which indicated that he was

arrested at Endebess, in possession a AK47 SR No. 69291, in the incident involving PW4 and PW5. He wondered, if that was the case, how come then the instant case says he was arrested with AK47 SR No. AB3876, and not AK47 SR No. 69291. He further wondered that, if he was arrested with AK47 SR No. 69291, why was that gun not connected to the death of the deceased herein. He further testified that the report by PW9, dated 17th July 2021, referred to a AK47 SR No. 93648, which did not align to the other guns referred to in the other documents.

21. He made reference to the investigation diary, which mentioned watchmen who were at the Texas Annex Hotel, on duty, on the date of the murder, and who should have been the ones opening the gates for visitors, yet the 2 were never called as witnesses. On the Chepchoina incident, he referred to an investigation diary, which talked of a recovery of a AK47 rifle, but without indicating its serial number. He also testified that no material was presented, with respect to Inquest No. 6 of 2021, which was referred to by some of the witnesses.

22. On the identification parade, he testified that the forms did not list him as having been a member of that parade, and argued that he was not, therefore, party to the parade. He stated that the parade was conducted on 20th May 2021, yet he was arrested on 26th May 2021, in connection with the Kitale case, and that his connection to the instant case only arose in August 2021. He argued that the parade was conducted 6 months after the incident, and it involved 7 individuals from Texas Annex Hotel, who must have been known to the witnesses. He argued that, although PW1 and PW2 alleged to have identified him at the parade, they testified that they did not see who killed the deceased.

23. He stated that some of the prosecution witnesses mentioned Sarah as a suspect in the murder, yet she was

never investigated. He argued that the said Sarah wrote a statement with the police, but she did not mention whether she knew him. He stated that the police had his mobile telephone, recovered in the August 2021 incident, according to them, yet they made no attempt to extract data from it, to establish whether he had had any communication with persons within Busia. He also argued that the police should have procured CCTV images or evidence. He denied killing the deceased, and asserted that he had never visited Busia, prior to the commencement of these criminal proceedings.

24. At the conclusion of the oral hearings, the accused person filed written submissions, through his Advocate, Mr. Otieno, which I have read through, and noted the arguments made in them.

25. The offence of murder has 4 elements: proof of the death, the cause of it, the role of the accused in the causation, and malice aforethought. A conviction is dependent on these elements being positively proved.

26. On proof of the death, PW1, PW2 and PW3 saw the dead body of the deceased at the scene. PW8 viewed the body at the mortuary. The testimony of PW7 is a little mixed-up, for he says he visited the scene on 23rd August 2021, and took photographs, of the scene, and of the body at the mortuary, and that he printed the photographs on 10th March 2021. PW13, the investigating officer, was among the police officers who visited the scene shortly after the killing, found the body there, and removed the body from the scene to the mortuary. PW12, the pathologist, performed postmortem on the body. Proof of the death was overwhelming.

27. On the cause of the death, PW12 did an autopsy on the body, and noted gunshot wounds. He opined that the cause of the death was the multiple injuries, secondary to the

gunshot wounds, caused by missiles fired from a high calibre and velocity firearm, discharged at close range.

28. On the role of the accused, in the causation, the prosecution presented only 1 eyewitness, PW1. She testified that she was at the scene, on 22nd February 2021, with the deceased, when the accused, who she did not know prior, showed up, and shot at the deceased. She identified him at an identification parade, mounted by PW6, 6 months later, on 20th August 2021.
29. PW2 was not an eyewitness, for he was not at the scene, at the time the deceased was shot, so he did not witness the shooting. His case was that he had seen the accused on the morning of 22nd February 2021, having a discussion with the deceased, at the hotel. He was a witness at the identification parade mounted by PW6, on 20th August 2021, and picked out the accused as the person that he had seen with the deceased on the morning of 22nd February 2021. He mentioned that another man had been frequently visiting the deceased, at the hotel, and that his last visit was on 21st February 2021.
30. The other testimony of interest, in that direction, is that of PW8, who claimed to be a widow of the deceased. She testified that, at about 6.30 PM, she passed by the hotel, and saw 2 young men outside, talking to Sarah, an alleged widow or girlfriend of the deceased, who had been said to have had previously threatened the deceased. PW8 was not a witness, at the identification parade on 20th August 2021, and, therefore, she never confirmed whether the accused person was one of the 2 young men that she saw outside the hotel, with Sarah, minutes before the shooting happened, although she stated in open court that he was among them.
31. The accused was arrested and arraigned in court, in connection with the murder, after some events that

happened on 8th August 2021. He was arrested at Chepchoina, in an alleged botched robbery, at the home of PW4 and PW5, which went awry, and he was cornered, and a gun wrestled from him. The police arrested him, and allegedly charged him with attempted robbery, in Kitale CMCCRC No. E3600 of 2021. The gun that was allegedly recovered from him, in the incident of 8th August 2021, was subjected to ballistics, and the outcome was that the ballistics done on the spent cartridges, recovered from the scene of 22nd February 2021, had been fired from that gun. The accused, based on that, was then handed over to the police at Busia, where the identification parade of 20th August 2021, had him identified, and he was then charged with the offence of the murder herein.

32. The case then boils down to one of identification of the accused, for if he was positively identified as the person who discharged the firearm on 22nd February 2021, which resulted in the death of the deceased, then he would be responsible for causing that death.
33. The question then would be, was the evidence adduced on identification adequate? Let me start with that of PW1 and PW2. They testified to have had seen the accused at the hotel, where the deceased was killed. PW2 allegedly saw him earlier in the day, while PW1 saw him at the material time of the killing. Both showed up at the identification parade, and both positively identified the accused as the person they saw at the hotel on 22nd February 2021. The parade was mounted 6 months after the events of 22nd February 2021, and it could be argued that there was a lapse of time, which could have affected memory. However, these were traumatic events, of a killing of a person who was close to both, and with whom they had interacted with that very same day. The images of what happened that day, both before, at and after the shooting, in the circumstances, could linger in the mind for a long time. A lapse of 6 months, between the date of the

event and that of the identification parade, would not be unreasonable, in the circumstances.

34. Was there possibility that the identification was not foolproof? The shooting happened at a public place, a hotel, in the early evening, when the scene was still bustling with activity. The deceased was said to have had sat at a veranda, that was well lit, and, therefore, conducive to identification. PW1, from her testimony, described the scene, which pointed to her being fairly close enough to the deceased and the assailant, to pick out features of the assailant, which could help with identification. PW2 interacted with the person, who he later identified as the accused, during the day, when there was adequate light, for the purposes of identification.

35. However, that physical identification of the alleged assailant, of itself might not have been adequate. The killing was by means of a firearm. In such cases, a connection must be established, between the assailant and the firearm alleged to have been used in the killing.

36. In the instant case, 2 spent cartridges were recovered from the scene of 22nd February 2021. The firearm, from which they were fired, was not recovered at the scene. It was suspected that they had been fired from an AK47 rifle. The 2 spent cartridges were then subjected to ballistics, and the expert, PW9, opined that the same were fired from an AK47. He generated a report, on 14th July 2021, indicating that the records in his possession established that the same firearm, the AK47, which was yet unidentified at that stage, had been used previously, at multiple addresses or locations, to commit robberies.

37. Then on 8th August 2021, the accused was cornered in the botched robbery, that I have discussed above. He had, in his possession, from the evidence recorded from PW4, PW5,

PW10, PW11 and PW14, a firearm, which turned out to be an AK47. The same was identified by PW10, PW11 and PW14 as bearing serial number AB3876. That firearm was submitted for ballistics, by PW14, on 13th August 2021, and was examined by PW9. PW9 identified it as bearing serial number AB3876, and established that it was from it, that the spent cartridges, that he had examined earlier, and which were the subject of the report dated 14th July 2021, on the Busia incident, were fired. He generated a report, to that effect, dated 20th August 2021. That report formed the basis for the mounting of the identification parade of 20th August 2021, and the subsequent arraignment of the accused in court.

38. On the face of it, it would appear that there was a link or connection between the spent cartridges that were collected from the scene of 22nd February 2021, the firearm that discharged them, and the accused person, sufficient for the drawing of a conclusion that the accused person was responsible for the causing of the death of the deceased herein.

39. The accused, in his defence, asserted that he had nothing to do with the said murder. He accused PW10 of vendetta, pointing at numerous criminal cases where he had been charged. He stated that he and PW10 were locked in an active land case, and asserted that PW10 was abusing the criminal justice system, to his disadvantage. The defence then is that these charges are trumped up against him, for he had nothing to do with the death. He has placed on record a ruling and a judgement, where criminal prosecutions terminated in his favour, as evidence of the vendetta.

40. Regarding the recovery of the firearm that is said to have been used to discharge the gunshots that killed the deceased, he has argued that there was inadequate evidence

to connect him to that firearm. He placed a number of documents on record, to demonstrate that.

41. The arrest of the accused, on 8th August 2021, when the said firearm was allegedly recovered from him, led to his being charged of attempted robbery with violence, using that firearm, in Kitale CMCCRC No. E3600 of 2021. Evidence relating to the recovery of that firearm was allegedly produced in that case. An inventory and the report by PW9, of 20th August 2021, were among them. A photocopy of the inventory relating to the recovery of the said gun was produced in these proceedings, and the prosecution argued that the original inventory had been produced in Kitale CMCCRC No. E3600 of 2021.

42. The accused person protested that there was no criminal case known as Kitale CMCCRC No. E3600 of 2021, for he never took plea in that case, and no proceedings had been conducted in that matter, to warrant production of the alleged inventory. He asked for an order to have the court file, in Kitale CMCCRC No. E3600 of 2021, made available, for the purpose of perusal by the court. An order, to that effect, was made herein, on 27th May 2025. The court at Kitale did not avail the file in Kitale CMCCRC No. E3600 of 2021. Instead, a letter was written to this court, dated 19th August 2025, intimating that that file was missing, efforts to trace it had been unsuccessful, a skeleton file had been opened and that the police file was also missing. The alleged skeleton file was not availed.

43. The non-availability of the court file in Kitale CMCCRC No. E3600 of 2021 is troubling, for that criminal case turned around the events of 8th August 2021, when the firearm that was allegedly used to kill the deceased was allegedly recovered from the accused. Indeed, the instant criminal proceedings were only mounted upon that alleged recovery, for it would appear that the police, at Busia, intended to

conduct an inquest instead. If any proceedings were indeed conducted in Kitale CMCCRC No. E3600 of 2021, there would be material which would shed light on whether the firearm, said to be AK47 serial number AB3876, was recovered from the accused.

44. That issue came up in Kitale CMCCRC No. E4667 of 2021, where the same AK47 serial number AB3876 was allegedly used to commit a robbery with violence, on 15th January 2021, at Kiminini, Trans Nzoia. It was alleged, in that case, that the said firearm had been recovered from the accused on 8th August 2021, upon his arrest at Chepchoina. The accused was convicted. He filed an appeal, in Kitale HCCRA No. E058 of 2023, whose judgement was delivered on 3rd March 2025, a copy of which has been produced as a defence exhibit herein. The High Court took the view that there was no evidence to link the accused to that gun, for when PW10 arrived at the scene at Chepchoina, the accused did not have possession of the firearm. The court was also not satisfied, by way of concrete proof, that the accused person faced numerous other charges, for crimes committed by him. The appeal was allowed.

45. The accused has argued that the identity of the firearm used, on 22nd February 2021, to kill the deceased, and that allegedly recovered from him, on 8th August 2021, is clouded in mystery. For one, he has placed on record, as D Exhibit 9, the investigation diary, with respect to OB/14/8/8/2021, Chepchoina, relating to attempted robbery and recovery of a firearm. The entry was made by PW11, Police Sergeant Siror, and it talked of a recovery of a firearm from the accused, an AK47 rifle without a serial number. PW11 was cross-examined on 27th March 2023, herein, on that. He conceded that he did not identify, in his self-recorded police statement, the serial number of the firearm that he allegedly recovered from the accused, and that he did not minute the serial number of the gun in the OB. He also said that he was not

responsible for alterations made to his typed police statement. Although he insisted that the serial number of the firearm was AB3876, the entry, in OB/14/8/8/2021, told a different story, and so did the story in his handwritten self-recorded police statement.

46. The second thing is that the case herein moved from an inquest to a murder case, after PW9 generated the report dated 20th August 2021, subsequent to the arrest of the accused, on 8th August 2021, allegedly in possession of the firearm the subject of that report. Upon the issuance of that report, the SCCIO Busia, according to a document that the accused produced as D Exhibit No. 6, released a signal, dated 20th August 2021, bearing reference DCI/C/CRI/6/12/VOL. IV/168, addressed to his superiors, informing them that the accused had been arrested in Endebess, in connection with the murder of the deceased herein, and a firearm, AK47 serial number 69291, was recovered from him, and forwarded to the firearms examiner for analysis, and that the accused was to be arraigned in court for the murder.
47. The question would be, which firearm was recovered from the accused, on 8th August 2021, at Chepchoina, Endebess? Was it an AK47 serial number AB3876, or an AK47 serial number 69291, or an AK47 assault rifle without a serial number?
48. One other incongruence appears in the document that the accused produced as D Exhibit No. 7, another report, by PW9, dated 17th July 2021, allegedly produced in Kitale CMCRC No. E1162 of 2021, where the accused faced a robbery with violence charge. It involved examination of an AK47 assault rifle serial number 93648. PW9 concluded, in that report, that the said rifle, No. 93648, had discharged the spent cartridges that he had been asked to examine. What was more crucial was his finding that the same rifle, No. 93648, had also been involved in a shooting incident in

another case he had handled, being DCI Kwanza CR No. 812/23/2021 and CID/F'ARMS/LAB 031/2021 Exhibits (A2, A3, A5, A7).

49. Yet, PW9 had earlier generated another report, dated 14th July 2021, which was produced herein as P. Exhibit No. 5(b), where he had concluded that the spent cartridges, collected from the scene of the killing of the deceased herein, had been fired from the same gun or firearm as that the subject of DCI Kwanza CR No. 812/23/2021 and CID/F'ARMS/LAB 031/2021 Exhibits (A2, A3, A5, A7). The reading together of the reports of PW9, dated 14th July 2021 and 17th July 2021, would lead to the conclusion that the spent cartridges, examined in both cases, were fired from the same firearm, being an AK47 assault rifle serial number 93648. Of significance is the fact that these 2 reports, dated 14th July 2021 and 17th July 2021, were generated before the accused person was arrested on 8th August 2021, allegedly in possession of an AK47 assault rifle serial number AB3876, if one goes by the testimony of PW10, or an AK47 rifle which did not have a serial number, if one goes by PW11.

50. After the arrest of the accused, on 8th August 2021, PW9 generated another report, dated 20th August 2021, which contradicted his earlier reports, dated 14th July 2021 and 17th July 2021. He was presented with an AK47 rifle, said to be serial number AB3876, allegedly recovered from the accused on 8th August 2021. Upon examining it, he concluded that that rifle, serial number AB3876, was what was used to discharge the spent cartridges that killed the deceased on 22nd February 2021, and it was also the same firearm that was involved in the incident the subject of DCI Kwanza CR No. 812/23/2021 and CID/F'ARMS/LAB 031/2021 Exhibits (A2, A3, A5, A7). That conclusion contradicts the reports dated 14th July 2021 and 17th July 2021. The effect of it all, is that there are reports on record, drawing different conclusions, on the firearm that was used to kill the

deceased herein, on 22nd February 2021. On one hand, that dated 14th July 2021, when read together with that dated 17th July 2021, says that the firearm used was an AK47 assault rifle serial number 93648; while the other, dated 20th August 2021, says that the fatal shots were discharged from an AK47 rifle serial number AB3876.

51. Then there is the ruling that was delivered in Kitale CMCCRC No. E1163 of 2022, which the accused had produced as D. Exhibit No. 2, in that case where he had been the accused person. The same turned on the examination of a rifle said to be an AK47 serial number 23350, linked to robberies in Eldoret West, Kiminini and Trans Nzoia West. The report of the ballistics expert, relied on, was dated 17th July 2021, and it would appear to be the same as that produced herein as D Exhibit No. 7. There are handwritten markings on it, around AK47 assault rifle serial number 93648, suggesting that the same should have read AK47 assault rifle serial number 23350, or even AK47 assault rifle serial number AB3876. It would appear that No. 93648 was, in fact, the service number of the police officer who submitted the rifle for ballistics. That case was dismissed, on grounds that there was inadequate evidence, linking the accused to the said firearm, and the robberies in the areas mentioned.

52. In view of the above, it would appear that there are gaps, on the identity of the firearm that discharged the fatal shot that hit the deceased, and on the connection between the alleged firearm or firearms and the accused person herein. The testimonies of PW1 and PW2 placed the accused at the scene, at the times alleged, however, in view of the gaps highlighted above, the doubts arising ought to be resolved in favour of the accused person, on the basis that there is no proof, beyond reasonable doubt about the firearm used, and whether the same was connected to him in anyway.

53. The accused has raised a variety of other issues. He has decried the fact that, despite a number of the prosecution witnesses pointing a finger at the former wife of the deceased, as a suspect, the prosecution chose not to investigate her, and rushed to charge him, based on the alleged recovery of the firearm that was allegedly traced to him. I agree, there was evidence, from PW1, PW2 and PW8, that the deceased had expressed fear for his life, and that he had suspected his former wife or girlfriend, Sarah, of masterminding plans to kill him. They also explained that he lived in the hotel, most of the time, and stayed at other places, apart from his home, for that reason. Yet, when PW13, the investigating officer, testified, he did not seek to explain whether Sarah was treated as a suspect, despite being mentioned by various witnesses, whether she was investigated, and whether she had been eliminated as a suspect. That evidence ought to have opened the possibility that the deed could have been carried out by other individuals.

54. Secondly, it would appear, from the testimonies, that there was no connection or relationship between the deceased and the accused. The only thing, that appears to have brought them together, was the killing. As the 2 were not known to each other, it would appear that the accused would have had no motive to kill the deceased. The only possible motive was robbery, but the evidence did not point in that direction, for nothing was stolen from the deceased or the premises, and no attempt was made, by the assailant, to steal anything.

55. Of course, the implication was that the accused was a hired gun or hitman. That should have opened the door for the prosecution to seek to establish who had hired him. Such evidence called for investigations touching on his

communication devices, and of other known suspects, such as Sarah, before their elimination from the list of suspects. No investigations were done in that direction, and it was largely left to the accused person to pursue Safaricom, in an effort to exonerate himself.

56. The accused complained about the prosecution referring to cases, involving him, pending in other courts, some of which he said did not exist. In particular, there is Kitale CMCRC No. E3600 of 2021. The legal burden of proof was on the prosecution throughout the trial, to establish that the accused person was responsible for what he was accused of. Some of the evidence required to establish that proof was held in other cases, and the pleadings and proceedings in those other cases ought to have been marshalled and placed before this court. That point was raised and addressed by the court, in Kitale HCCRA No. E058 of 2023, in the judgement produced herein as D Exhibit No. 1. It was not enough to suggest, in the reports of the ballistics expert, that the accused was a notorious hardened criminal, who had numerous cases on his head. There was a duty, on the part of the prosecution, to adduce evidence on them, and bring out the critical elements of those other cases, which have a bearing on this murder charge.

57. One such case was Kitale CMCCRC No. E3600 of 2021, which turned around the events of 8th August 2021, which gave life to these criminal proceedings. The proceedings, in that crucial case, were not brought into these murder proceedings, yet the same could have sealed many of the gaps that have arisen. The prosecution did not show interest in pursuing those proceedings, and bringing them here. It leaves one with the sense that whatever transpired, in Kitale CMCCRC No. E3600 of 2021, would be prejudicial to the prosecution case in these proceedings, hence the lack of appetite, on the part of the prosecution, to have those proceedings produced herein.

58. There was the complaint about the accused being unaware of Inquest No. 6 of 2021. I have seen reference to Inquest No. 6 of 2021, in some of the exhibits produced by the prosecution, particularly in the exhibit memos and the reports of the ballistics expert. My understanding of it is that the prosecution may have intended to mount inquest proceedings, before evidence emerged that suggested that the accused was the man behind the trigger. I do not think the issue of Inquest No. 6 of 2021 should be one of much consequence.
59. Regarding the identification parade, the accused submitted that the parade form did not list him as a member. The issue raised is frivolous. The form is clear, that the parade was being mounted because of the accused. He was the only suspect. The other 8 were not suspects in the murder being probed. The 8 were being paraded, with him included, to assist with establishing whether the witnesses could identify or pick him from a crowd of like-looking individuals. There are columns, in the form, indicating where he stood amongst the other 8. To the extent that he was not listed among the 8 members did not render the parade deficient.
60. He argues that the 8 were employees of the deceased, or workers at his hotel, which meant that they were well known to the 3 witnesses. He did not lead any evidence to prove that allegation. As a court, I would have no way of establishing that without evidence. The issue was raised at defence hearing; the prosecution had no opportunity to provide evidence on it. I note, from the record, that the issue was raised, during cross-examination, when the parade officer, PW6 testified. He stated that he had 8 parade members and 3 witnesses. He explained that the 3 witnesses were all employees at the hotel. He did not say that the 8 members of the parade were also employees. The transcript

appears to suggest 7 of the parade members were employees of the hotel, but that was not what the Judge captured in his handwritten notes.

61. There was the issue of the watchmen or guards not being called as witnesses, yet it was them that the investigation diary captured as the reportees, to the police, of the incident. Their evidence would have been useful, for if they manned the gates, they would have been able to identify the individuals who entered the hotel in the course of that day. However, the prosecution is not bound to call everyone who knows anything about the matter. Only the most critical witnesses matter, in this case, that would be those who witnessed the actual shooting incident, as it was them who could provide evidence as to the identity of the person who pulled the trigger. A guard who was at the gate, and far from the interior of the hotel where it happened, although knowing something about who might have entered the hotel that day, might not have been critical as a witness.
62. On CCTV images not being provided, as proof that it was the accused who perpetrated the act, the answer would lie with whether there were CCTV cameras in the first place, and if there were whether they were in working condition. The fact that the prosecution did not resort to them, could mean that there was no such footage, either because there were no cameras, or the cameras, if they were there, were not working. The accused person has not provided any evidence that there existed such footage. If the footage did exist, it was open to him to subpoena its production, if he desired to rely on it to make any point.
63. On the accused being in prison on 19th August 2021, and not in court, I cannot quite make out the point the accused person is raising. He produced a document from Kitale GK Prison, as D Exhibit No. 3, which had a list of remandees who were to be taken to various courts, at Kitale

and Kapenguria. The entry, against the name of the accused, indicated that he was to be moved to the Busia Police Station, on 19th August 2021, ostensibly for the purpose of the identification parade that happened on 20th August 2021.

64. In the end, I am not persuaded that there is proof, beyond reasonable doubt, that the accused person played a role in the causation of the death of the deceased herein, in the circumstances.
65. On malice aforethought, the same is defined in section 206 of the Penal Code. It is about intention to kill, and knowledge that certain acts could cause death, yet the perpetrator engages in them, regardless. The intention could be direct, where the perpetrator voices or utters or expresses that he was going to kill. It could be indirect, to be implied from the conduct of the perpetrator, which causes or leads to the death.
66. The deceased herein died of gunshot wounds. They were inflicted using a high velocity calibre firearm. Whoever inflicted them must have intended to cause death, or grievous harm, or to commit a felony, all of which are elements of malice aforethought.
67. Overall, there is inadequate evidence, to establish malice aforethought, on the part of the accused, in the causation of the death of the deceased, from the evidence recorded herein, to the extent that the evidence on the connection or link between the accused and the firearm, which allegedly discharged the fatal shot, was muddled.
68. In view of everything said above, I do hereby find and hold that the prosecution has not established, beyond reasonable doubt, that the accused person herein, is guilty of unlawfully causing the death of the deceased, Alfred Olu Obayo, on 22nd February 2021, contrary to sections 203 and

204 of the Penal Code. I, accordingly, acquit him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya. Orders accordingly.

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

**W MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Tony Onanda, instructed by the Office of the Director of Public Prosecutions, for the Republic.

Mr. Tyson Otieno, Advocate for the accused person.