

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT CRIMINAL CASE NO. E002 OF 2022**

REPUBLIC.....

.....PROSECUTION

VERSUS

JOSEPH            KAMAU            MUTHUNGU.....

.....ACCUSED

**JUDGMENT**

1. The accused was arraigned before the court charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya.
2. The particulars of the charge are that on the 25<sup>th</sup> day of December 2021 at Kedong Ranch AP Camp in Naivasha

Sub County within Nakuru County murdered Ayubu Polo.

3. The information was read to the accused and he pleaded not guilty thereto and the case was fully heard. The prosecution case is that on the 25<sup>th</sup> day of December 2016, the accused was supposed to go on patrol duties with his colleagues (PW1) Senior Sergeant David Kisot, (PW2) Sergeant Koech, APC Ochieng and APC Muiruri.
4. That at the time of departure the deceased was not available to join his colleagues, as a result (PW1) Senior Sergeant Kisot went to the tent where the accused was staying to establish the reason why he was not available for duty. That he found the accused lying on the bed dressed up and holding a firearm and although he tried to wake him, he did not respond and they reported the matter to Senior Sergeant Polo (herein “the deceased”).

5. That the deceased managed to wake up the accused and instructed him to hand over his firearm for safe custody until the following day. The accused gave out the firearm peacefully and the other officers were released to go and work. In the meantime, the firearm recovered from the accused was handed over to (PW3) No. 236184 Vick Preston Omondi Junior to take it to the Armoury.
6. That as (PW3) Junior was going to the Armory he met the accused who asked (PW3) Junior why he had taken his firearm and (PW3) Junior told him he had been disarmed by the deceased and then the accused tried to convince (PW3) Junior to give him back the firearm but (PW3) Junior referred him to the tent where the deceased was. It is in evidence that, at that point, the accused remarked that "Huyu C.O amenizoea sana" (this C.O has been on me a lot).

7. That (PW3) Junior opened the box to keep the firearm, the accused grabbed it and cocked it and then aimed at (PW3) Junior, who surrendered and told the accused that, he had no problem with him. At the same time (PW5) APC Abdi who was present told the accused to relax and the firearm was released to him.
8. That the accused shot in the air three (3) times, which attracted the deceased who inquired while in the tent saying; “Nani huyo nini hiyo” (what is that. What is it”), and then the accused blasted five (5) continuous firing towards the tent.
9. That the deceased was trying to get out of the tent to run away but came face to face with the accused and the accused shot him in the chest and he fell down. That, the accused followed him and shot him again as deceased was lying down and then put the gun in the mouth and shot the deceased again.

10. It is in evidence that the accused started searching for his colleagues who had to run for their lives and hid behind the tent as the accused took a torch and started looking for them. (PW3) Junior and (PW5) APC Abdi ran out of the camp for cover 100 meters and managed to contact the other officers who had gone on patrol duties. That as the accused colleagues ran for safety they could see dust build up as the accused was following them

11. (PW3) Junior stated that, he eventually reached a tarmac road after travelling for 40 minutes and went at Suswa and returned to the scene the following day where they found officers from APTC and DCIO office at Naivasha. The Scene of Crime Personnel processed the scene and deceased's body was taken away to the morgue.

12. On 26<sup>th</sup> December 2021 (PW6) No. 223078 C.I Salim Juma was tasked to trace the accused and recover the

G3 rifle in his possession. That at 9.13hours the tracking indicated that the accused was at Naivasha CBD and then his phone went off. At 12.22hours, the accused's Airtel number indicated that he was at Nakuru CBD Gusii road street and was communicating with a lady at Ngara Nairobi and then the search team split into two groups as the tracking revealed the lady was travelling to Nakuru and was at Flyover. The officers laid an ambush.

13. That after 13.00hours accused and the lady were close to each other communicating on the lady's telephone No. 0795526026 and accused's No. 0798247408. The officers swung into action and managed to arrest both of them and later recovered the firearm was serial No. 03055 with 29 live bullets of 7.62x51mm. The accused was charged after investigation and more so when post mortem results showed that the deceased died due to gun shots fired by the accused.

14. At the close of the prosecution case, the accused was placed on his defence. He testified that, prior to his arrest, he was attached to Akila Range within Kedong Ranch.
15. That on the 24<sup>th</sup> December 2021, he was the on patrol duty along Narok-Mai Mahiu road highway and went back to the camp. That the following day was Christmas day and he was given time off. That Corporal Junior told him to hold for him duty to allow him attend to his motor vehicle that was spoilt.
16. That, he later requested for an off to go for Christmas outside the camp and when he went to the deceased, the deceased sent him to call Sergeant Kesot (PW1) whom he found asleep but did not wake him up. However, he was released to go out of the camp to join the others but ensure they returned to the camp.
17. The accused testified that he requested another Corporal to hold duty for him and went to Suswa town

to a Wine and Spirit shop where in the company Corporal Samuel Mbugua he drunk Kenyan cane 750mm, and later hard alcohol 350mm. That he cannot recall when he left the town.

18. The accused testified that he never used to eat but would drink daily and that is why he was transferred from Embakasi to Kedong Camp but he was not subjected to any disciplinary action. He referred to a letter dated 31<sup>st</sup> January 2022, which was written by Commandaner James Kamau (marked as DMFI).

19. That he cannot recall what happened on the material date as he was lying on his Techno phone when he woke up and saw a lot of WhatsApp messages saying that "Joseph Muthunga" had killed Ayub Polo. That as he sensed that if he returned to the camp, he would not be safe and if he went to the police station he would be shot as he was said to have escaped with a gun, he stayed in the forest.

20. That, the following day he called his girlfriend who told him to surrender but they first meet at Nakuru town. However, he was arrested before he surrendered. He conceded that he was issued and had a rifle and 20 rounds of ammunition and the rifle was recovered in the bushes wrapped up in a jungle sweater.

21. He produced the investigation diary OB 75/3/01/2022 and OB No. 72/3/01/2022 (D.Exh 2). He denied the statement attributed to him and stated that, he was given a plain piece of paper and put around 20 signatures. He also denied having any disagreement with the deceased and stated that he did not plan to kill him as he was his friend. That, he was assaulted to agree that, he was the one who led the officers to where the firearm was.

22. In cross-examination he confirmed he was with Corporal Mbugua on 25<sup>th</sup> December 2025 but he could not recall calling Corporal Mbugua and telling him that, he had

killed the deceased. That he heard evidence to the effect that it is the firearm he had that caused the deceased's death. He concurred that he has not produced any evidence to show that he was very drunk that, he doesn't know but the case is in court for the court to determine who killed the deceased.

23. At the conclusion of the trial the parties filed their respective submissions. The prosecution in submissions dated 24<sup>th</sup> September 2025, cited the case of; Antony Ndegwa Ngari versus Republic (2014) eKLR where the Court of Appeal discussed the ingredients of the offence of murder. The prosecution further relied on the case of Republic vs Otieno & another [2024] KEHC 4784 (KLR) where the Court held that the prosecution must provide credible evidence to prove occurrence of death and its cause beyond reasonable doubt.

24. That the evidence PW1, PW2, PW3, PW4, PW5, PW6, PW8 and PW13 proved occurrence of deceased's death.

Further, (PW12) who conducted the post mortem on the deceased body and established cause of death as herein stated.

25. The prosecution referred to the case of; Republic vs Akeno Akurot [2015] KEHC 3676 (KLR) where the court held that direct medical evidence such as the post-mortem report which is crucial in establishing the cause of death must be considered in conjunction with other evidence adduced by the prosecution witnesses.

26. On whether the accused unlawfully killed the deceased, the prosecution referred the court on Article 26 of the Constitution of Kenya, 2010, which states that a person can only be deprived of life to the extent provided for under the law.

27. Further, that every homicide is unlawful unless authorized by law or excusable and/or in justifiable

circumstances such as self-defence or defence to property.

28. That PW3, PW4 and PW5 witnessed the accused shoot in the direction of the tent where the deceased was watching the news. That the ballistic report established that exhibit C1-C7 was fired from a G3 Rifle No. S.No. A03055 the accused had in his possession.

29. The prosecution relied on the case of; Republic vs Jibo [2024] KEHC 12223 (KLR) where the Court held that the targeting of vital parts of the body with a lethal weapon is compelling evidence of unlawfulness especially where supported by eyewitness and ballistic evidence.

30. Further, that in the case of; Republic vs Bakari Kaingu Shungu [2020] KEHC 750 (KLR) the Court held that proof of an unlawful act arises where there is use of excessive force without lawful excuse or justification

and the intent can be inferred from the manner and location of the injuries

31. The prosecution referred to section 206 of the Penal Code (cap 63) Laws of Kenya, as to what constitutes malice aforethought, and relied on the case of; Republic vs Ndege [2025] KEHC 1199 (KLR) where the Court stated that malice aforethought may be inferred from the nature of injuries, weapon used, part of the body targeted and conduct of the accused. Further, that in the case of; Tubere s/o Ochen [1945] 12 EACA 63 the Court held that in determining malice aforethought the court it is required to consider all the factors cumulatively.

32. That in the instant case, the accused armed himself with a G3 rifle and deliberately fired several shots at close range targeting the head, chest and legs of the deceased, resulting in fatal injuries. Reliance was placed on the case of Republic vs Stephen Mutembei

Muthinja [2016] KEHC 6459 (KLR) where the Court held that firing a gun at a person demonstrated an intention to cause death or grievous harm.

33. That the defence of the accused amounts to mere denial as it is unsupported by any evidence of self-defence, provocation or mistake. That it is discredited by the collective evidence of the prosecution witnesses. The prosecution submitted that it has proved the ingredients of the offence of murder to the required standard of proof and urged the court to find that the accused caused the death of the deceased.
34. However, the defence in submissions dated; 22<sup>nd</sup> October 2025, cited section 203 of the Penal Code which creates the offence of murder, and argued that in order for the prosecution to sustain a conviction for the murder it must prove beyond reasonable doubt the elements of the offence stated herein.

35. That the burden of proving all the elements of the offence lies with the prosecution under section(s) 107, 108 and 109 of the Evidence Act. Further, that the duty never shifts to the accused as held in the case of; Woolmington vs DPP [1935] AC 462.

36. The defence conceded that the to the occurrence of death and cause thereof. On whether the accused caused the death of the deceased, the defence argued that the evidence of key prosecution witnesses was contradictory and unreliable.

37. That (PW3) Vick Omondi Junior and (PW5) APC Abdi Fatah who placed the accused at the scene of the shooting both testified that they saw the accused shoot in the air and towards the deceased's tent.

38. However, in cross-examination both witnesses testified that the scene was dark as there was no electricity and that their view of the deceased's tent was obstructed

by another tent meaning that they did not see the fatal act.

39. Further PW3 conceded that he did not record in his statement that he saw the accused shoot the deceased in the mouth at close range; while PW5 stated that he could not tell if any other gun was fired and that his gun was not subjected to ballistic examination.

40. That in addition (PW6) C.I Salim Juma who recovered the firearm testified that the accused had been issued with 20 rounds of ammunition but that when he recovered the gun it had 29 rounds of ammunition. However, the prosecution never reconciled this anomaly.

41. The defence further argued that the chain of custody of evidence was broken at multiple links. Firstly, while PW1, PW2 and PW3 confirmed that the accused gun was taken and placed in the armoury, the prosecution

never produced the armoury movement register to show whether the gun was re-issued to the accused or to any other person. That the records would have confirmed the number of guns and ammunition at the camp on the day of the offence. That the absence of this documentary evidence creates uncertainty as to whether the firearm used to commit the offence was in the accused possession or it was used by any other person.

42. That the prosecution had the responsibility to lead evidence to show that only one firearm was used to create a nexus with the accused. That in the absence of such proof leaves the matter open to speculation on who fired the fatal shots.

43. The defence further argued that the recovery of the firearm was not properly established. That (PW6) C.I Salim Juma confirmed that he never recorded in his

written statement that the accused led him where the gun was hidden.

44. On the issue of ballistics, the defence argued that (PW10) confirmed receiving one (1) rifle, one (1) magazine, twenty-nine (29) rounds of ammunition and seven (7) spent cartridges. However, she could not explain where the cartridges were recovered from and which specific rifle fired the cartridges as there were two (2) G3 rifles in the camp. Further, the cartridges presented to (PW10) did not strike any objects and were therefore not fatal bullets. That (PW11) the Investigating Officer confirmed that the bullet fragments recovered from the scene were not subjected to DNA testing to establish that they come from the deceased's body.

45. The defence further submitted that the circumstantial and forensic evidence must form a complete chain pointing irresistibly to the guilt of the accused to the

exclusion of any other hypothesis. That in the present case the chain on the recovery of the firearm, ballistics and documentary proof was broken.

46. The defence cited section 206 of the Penal Code on what constitutes malice aforethought and argued that there was no prior quarrel, grudge or bad blood between the accused and the deceased as testified to by PW1, PW2, PW3, PW5 and PW11.

47. Moreover, at the time of the offence the accused was visibly drunk, staggering, incoherent and was unable to perform his duties as testified by the prosecution witness PW1 to PW8. That the intoxication prevented the accused from forming malice aforethought.

48. The defence further cited section 13 (2) of the Penal Code which provides the circumstances under which intoxication constitutes a defence and sub-section 4 that states intoxication shall be taken into account to

establish whether the accused was capable of forming an intent as an element of the offence.

49. The case of *Said Karisa Kimunzu vs Republic CR. App No. 266 of 2006 (MSA)* was cited where the Court held that, the trial court is required under section 13(4) of the Penal Code to consider evidence of drunkenness or intoxication to determine whether an accused was capable of forming and had formed the intention to kill.

50. That the conduct of the accused fleeing the camp, not boasting, and showing signs of disorientation was consistent with confusion and not malice aforethought. That in addition, if it is assumed that the accused fired the gun, then the surrounding circumstances of the offence being that it occurred in unclear and dark conditions, while he was confused and intoxicated and had no motive which creates reasonable doubt that he deliberately intended to kill the deceased.

51. The defence prayed that the court finds that the prosecution failed to prove the elements of the offence beyond reasonable doubt and acquit the accused under section 215 of the Criminal Procedure Code.

52. At the conclusion of the trial and in considering the evidence, I find that the offence of murder which the accused is charged with is stipulated under section 203 of the Penal Code as follows:

*“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”*

53. Pursuant thereto, the ingredients of the offence are settled by various court's decision as follows; a) proof of the death of the deceased, b) that the death was caused by an unlawful act or omission of the accused, and c) that the act was committed with intent to kill or cause grievous harm, basically malice aforethought.

54. The court of appeal decisions in the case of; Roba Galma Wario v Republic (2015) eKLR reiterated these elements, emphasizing that proving these ingredients beyond reasonable doubt is crucial for conviction, with malice aforethought distinguishing murder from manslaughter.

55. In considering the evidence herein, I find that, the fact that death of the deceased occurred is not disputed by either party herein. As to the cause of death Dr. Ngulungu testified that, the cause of death was multiple injuries involving head, chest and musculoskeletal tissue, therefore blood loss due to multiple close range gunshots to the head, neck, chest and limbs.

56. As to who caused the death of the deceased, (PW3) Vick Preston Omondi testified that the accused grabbed a firearm from him, cocked it and shot at the tent where the deceased was. That as the deceased got out to inquire into the shooting he met with accused face to

face and the accused shot him in the chest and the deceased fell down. That the accused shot the deceased again in the mouth. Therefore, PW3 is an eye witness who tendered direct evidence.

57. (PW4) Pius Mutiwa Nathan who was at the camp testified that, he heard gun shots three times and saw the accused advancing towards the tent where the deceased was. That he left to seek for reinforcement.

58. (PW5) APC Abdi Fatta Mohamed testified that he heard a commission was at the Armory between (PW3) Junior and the accused. That, he peeped and saw the pistol in the accused's hands and the accused cocked the gun and shortly thereafter he heard a gunshot. That the accused fired two (2) shots towards the tent where the deceased was and advanced towards the deceased, as he continued firing.

59. Pursuant to the evidence of all these witnesses it is confirmed that, the accused was armed and fired

towards the tent where the deceased was. That shortly thereafter the deceased was seen lying on the ground after the shooting.

60. Furthermore, it is in evidence of (PW8) Corporal Samuel Mbugua that the accused called him and told him that he killed the deceased, thus confirming and/or corroborating the evidence, PW3, PW4 and PW5 state that they saw the accused shoot at the deceased in the tent.

61. Similarly, the evidence of (PW7) Senior SSP Shem Munialo is that the accused was issued with a rifle serial No. A03055. It is in evidence that it is that firearm that was used to shoot the deceased. PW10 confirmed that the subject firearm was in good working condition and so was the magazine therein and rounds of ammunition. Thus, it was capable of firing.

62. Further, the accused does not deny he had the firearm and that the firearm was recovered hidden in the bush

and covered with a jungle uniform. He confirms the same in his evidence in defence.

63. The accused testified that, from the time he left Marakwet hotel to the time he was woken up, he could not tell what happened and only woke up lying on his phone with lots of WhatsApp messages that, he had killed the deceased.

64. However, the accused afore defence is not tenable in the presence of the evidence of (PW1) Senior Sergeant David Kisot and (PW2) Sergeant Paul Koech who found him asleep, woke him up and he gave his gun to the deceased. Similarly, (PW3) Junior and (PW5) APC Abdi Fatta who saw the accused shoot at the tent where the deceased was and the shot killed the deceased.

65. From the evidence of these witnesses the accused was alert and fully awake from the time he was woken up, disarmed and regained the gun and commenced the shooting.

66. It is therefore the finding of this court that the accused shot and killed the deceased.

67. The question is; did the accused have malice aforethought. (PW3) Junior testified that when the accused went to pick the firearm from him, he uttered words to the effect that. "Huyu C.O amenizoea sana".

68. (PW4) Pius Mutiwa testified that after the deceased had taken the accused gun, the accused remarked and/or stated that; "Afande Polo amenifuata sana tutaonana kesho". From the afore utterance, it is clear the accused had a motive to harm or kill the deceased.

69. In addition, the evidence reveals that, he shot the deceased severally. On conducting post mortem, Dr Titus Ngulungu observed gunshots on the back of the neck 25mm, multiple exits on left shoulder at all area of approximately, 140x100m, all laceration, anterior aspect of the left shoulder and back of the calf 8mm. That there were lacerated vessels of areas caused by

gunshots and extensive skull fracture scalp hematoma with some parts missing.

70. Furthermore, a look at the deceased's photos taken at the scene reveal an ugly scene of cruel murder. The gunshot on the neck and head shattered the entire body structure. The deceased's mouth is bloody and there is another gunshot on the leg. Therefore, the shooting was not out of single gunshot or an accident. The gunshots were aimed at fully eliminating the deceased. The afore evidence clearly reveal the accused had malice aforethought.

71. However, before concluding the judgment the accused also offered a defence of intoxication. The accused cannot take refuge in alcohol, because if he was so drunk as to fail to appreciate what was going on, then he cannot have uttered the threatening words, he uttered as to how he would deal with the deceased. He

would not have cocked the gun, sought out the deceased and killed him.

72. He would not even have pursued the other officers with intent to harm them. He simply went berserk and on rampage to clear whoever came his way. His conduct of hiding the gun and attempting to escape before arrest does not lead to an intoxicated person bordering on "insanity".

73. Finally, the accused has alluded to issues of inconsistency in the evidence of witnesses and failure to subject all firearms to forensic examination, however those submissions are not tenable in the presence of direct and overwhelming evidence herewith.

74. Consequently, I find the accused guilty as charged and I accordingly convict him.

75. It is so ordered.

Dated, delivered and signed this 9<sup>th</sup> day of March 2026.

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms. Chepkonga for the State

Mr. Wairegi for the accused

The accused present virtually

Ms. Hannah: Court Assistant