

**REPUBLIC OF KENYA**  
**IN THE HIGHCOURT OF KENYA AT GARISSA**  
**CRIMINAL CASE NO. 3 OF 2019**

REPUBLIC.....PROSECUTOR

-VS-

DENNIS LANGAT.....1<sup>ST</sup> ACCUSED

KENNEDY OKULI.....2<sup>ND</sup> ACCUSED

**JUDGEMENT**

**Introduction**

1. The Accused persons herein are charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code Cap 63 Laws of Kenya and the particulars as per Information dated 30<sup>th</sup> January 2018 signed by Job Mulati, Senior Principal Prosecution Counsel are that on the 10<sup>th</sup> day of November, 2018 at Rhamu in Mandera North Sub-County within Mandera County, Denis Langat and Kennedy Okuli, the Accused persons herein murdered, Abdia Omar Adan, the deceased herein. The Accused persons pleaded not guilty to the charge.
2. The prosecution's case was made up of 16 witnesses. In a snapshot, they presented their case as follows:-

3. **PW1 Mohammed Alio Musa**, the deceased's son testified that on the material day he was at home when he heard people enter the house asking his mother was about his whereabouts. He stated that his mother was outside praying when he heard her say 'What do you want with my son,' twice, then two gunshots. He dropped the child he was carrying and got out of the house. He asserted that the two Accused persons were CID officers who had harassed him severally in the past on claims that he sells *bhanghi*. During cross examination he stated that he did not see the people who were asking for him neither did he see any of the Accused persons shooting the deceased. He stated that he ran more than 10kms away to the bushes and that he did not have a bag full of *bhanghi* neither was he being pursued by the Accused persons. He stated that his reason for running were the gunshots and confirmed that no police officers pointed a gun at him. He denied throwing a bag next to the compound as the chase ensued. He also denied that the Accused person were accosted by a mob and that the gunmen who appeared were his partners in crime. During re-examination he reasserted that he did not have *bhanghi* and that on the material day he was not being pursued by police officers neither did he see any police officers being invaded or mobbed.

4. **PW2 Khalif Mohamed Osman** testified that while he was coming from the mosque he saw the persons who are known to him standing outside the deceased's home and then he heard

some noises coming from behind. He was then called by Noor Hassan who told him that the deceased had been shot. That he went to confirm the source of the noises when he saw a Toyota Land Cruiser KBZ 481Y belonging to the CID with 2 officers inside. He stated that the vehicle was moving towards Mandera and a crowd was building up. Together with other people they took the deceased to hospital but she was pronounced dead after some minutes. The people then started demanding from the police officers who were around to explain why the deceased was shot. He testified that after a while OCPD Mandera North Anthony Muriuki came with a team of armed officers and managed to control the crowd. He stated that 1<sup>st</sup> Accused was injured and that he saw him in the ward.

5. On cross examination he stated that he saw people at the deceased's compound. These were 15 armed people. He stated that he saw the Accused persons in the hospital ward and that the 1<sup>st</sup> Accused had some injuries.
6. **PW3 Abdi Rashid Alio** testified that he saw 2 officers at Al Safaa Hotel while he was going to his place of work. He stated that shortly after he saw them heading to the deceased's house and he then heard gunshots from the deceased's compound. He headed there and found the deceased bleeding and other people joined. They took her to hospital and he went back to the scene of the incident to look for spent cartridges and he found three

of them. He testified that he was with Mama Bishara and he also took photographs of the same and gave the cartridges to her for safekeeping. He went back to hospital at 7.30pm and found a huge crowd demanding justice for the deceased. He also found the 1<sup>st</sup> Accused being treated at the ward at round 2am.

7. **PW4 Bishara Hussein Sheikh** testified that she was at her shop on the material day when at around 6.30pm she saw many people running past her shop. She then heard gunshots coming from where the people were coming from. She stated that these people said that the gunshots had come from the deceased's place and she ran there. She found the deceased being taken to hospital and she was bleeding. Upon entering the compound, she found other people and saw 3 scattered cartridges which she took to the village elders. At 8pm she proceeded to hospital and found that the deceased had died. The next day she went to Rhamu Police Station to record her statement and the cartridges were given to the CID officer from Mandera.

8. It was the testimony of **PW5 Sgt. Michael Mesora** DCIO Mandera East that on the material day he proceeded to Rhamu together with Ochieng, Ndambula and PC Korir. On arrival they were briefed by DCIO Rhamu about the incident that had taken place the previous night whereby there was a shooting and somebody had died. They proceeded to the scene and found a crowd of people, around over 50 people together with

politicians, D.O, Chief etc. The crowd was violent but they introduced themselves and they calmed down. They then proceeded to Rhamu Hospital and found the deceased's body and witnessed the postmortem together with CIP Ochieng. He went back to Rhamu Police Station and verified from the arms movement book marked as MFI 1 that the Accused persons had been issued with pistols. He stated that the 1<sup>st</sup> Accused had injuries and was taken to Nairobi for treatment by Otieno. He took the two pistols into safe custody and they were taken for analysis together with the 3 spent cartridges given to them by members of the public. He then handed over to IP Otieno.

9. **PW6 No. 236604 IP Otieno** testified that the fateful day he joined his colleagues as they went to the hospital in Rhamu where their colleagues who had been injured were. He saw the Accused persons in hospital and police officers who were restraining a hostile crowd of people from accessing the hospital. They later managed to airlift officer Langat for treatment in Nairobi. He testified that CIP Ochieng handed over some exhibit for escort to ballistic. This included 2 Ceska pistols and 3 spent cartridges which he took the DCI office for analysis. In cross examination he asserted that the security situation in Rhamu area is very volatile and it was a norm or officers to go armed there.

10. **PW7 Alio Hussan Huka** testified that he was given 3 spent cartridges which were collected at the scene of the shooting which he then gave to the police officers.

11. **PW8 Nasra Mohammed Ahmed**, the deceased's daughter in law testified that she was in her plot doing domestic chores when 2 men whom she used to see coming for searches came to the compound. She indicated that the 2 were in civilian clothing. They asked the deceased where Mohammed was to which she responded by asking why they were looking for Mohammed and who they were. She saw the 2<sup>nd</sup> Accused shoot in the air and the 1<sup>st</sup> Accused shoot the deceased. She stated that the two left the compound and the driver of the CID motor vehicle came in. that by his time Mohammed had sneaked out and ran away and the driver took a box containing 350,000/- and left with the money.

12. In cross examination the witness pointed out she saw one officer shooting himself and that there were other people when the police shot in the air. She testified that her and her children saw the shooting of the deceased. That it was not true that her husband, the aforesaid Mohammed threw a package with drugs at the gate and that a crowd rushed inside the compound baying for the officer's blood thus forcing them to shoot in the air.

13. **PW9 Sgt. Dominic Nyongesa** based in Rhamu Police Station testified that on 9/11/2018 he was instructed to assign the Accused persons with arms as he is in charge of the armory. He also issued them with 12 rounds of ammunition which he indicated in the arms movement book. He then received the weapons from Corp Terter who told him that there was an incident involving 2 officers and that investigations had commenced. He checked the ammunition and found that the 2<sup>nd</sup> Accused's gun was less one ammunition but the 1<sup>st</sup> Accused was less four ammunition. He handed over the 2 weapons plus ammunition to Sgt. Masera, DCIO Mandera. The witness produced the arms movement book copy P. Exhibit 1.

14. **PW10 Corp Edwin Terter**, DCIO Mandera North stated that on 10/11/18 he was on official duties at Rhamu Police Station when 2 officers i.e. the Accused persons told him that they had gotten a report of a drug peddler at Rhamu. He reported to the DCIO and then authorized them to go and do surveillance, recover the drugs and arrest the suspect. That after an hour the 2<sup>nd</sup> Accused called him and told him to rush to a shop at Rhamu. He took the motor vehicle and when he got to where they were he saw a huge crowd around and stopped on the highway. He saw the officers come out from a plot compounding holding their guns up, when they got into the motor vehicle they said they said they had been attacked. He testified that he saw

the 2<sup>nd</sup> Accused bleeding on the finger and the later told him that the 1<sup>st</sup> Accused had been shot.

15. It was his testimony that the crowd started approaching them and throwing stones and he sped off to Rhamu Sub County Hospital where the Accused person were attended to. He then picked up the DCIO and drove to hospital and as they were entering he learnt that a woman had been shot at the scene. He asserted that there was a huge crowd claiming that the officers have killed their person and that the officers should also die. That the crowd began throwing stones and guns had to be fired. He stated that the officer was taken to Mandera Referral Hospital and also indicated that he did not know how the deceased was shot.

16. During cross examination, PW10 asserted that the Accused persons operation was officially known and sanctioned. He reasserted that he found a hostile crowd at the scene holding guns out and that both Accused had injuries coming out from the scene. He also stated that he was the driver who rescued the two officers and that there was even greater hostility from the crowd at the hospital. He asserted that he did not leave the motor vehicle, a Toyota Land Cruiser, as there was a very hostile crowd and he wasn't armed to enter the plot. He clarified that there were only 3 officers at the scene; him and the Accused persons and that he did not know who stole the alleged money at the scene and that he was on a rescue mission.



17. **PW11 Derow Mursal Mohammed**, the deceased's ex-husband testified that he witnessed the post mortem exercise on deceased's body.
18. **PW12 Dr. Adam Abdishid Sagure**, a medical officer based in Rhamu sub county, Mandera County produced the postmortem report on behalf of Dr. Mohammed who was out of the country. He asserted that the death occurred on 10/11/2018 and that the body was brought to them by the police to ascertain the cause of death. The postmortem was done on 11/11/2018 and the cause of death was established as shattered lungs caused by hemorrhage. He indicated that the shooting was a short range.
19. **PW13 Maathey Hellow**, the deceased neighbor testified that on the material day he heard noise and collusion at the deceased's place and heard knocks on the door and several '*fungua, fungua*'. He stated that he went to check what was happening with his two friends when he saw 2 officers known to him, one was knocking on the deceased's son door and the other went to the deceased. He identified the officers as the Accused persons. He stated that he saw the Accused telling the deceased to hand over the poach she was carrying but she refused then the 1<sup>st</sup> Accused shot her at the front neck. That he heard number of gunshots then he saw the officers leave the compound into a Toyota Land Cruiser that was parked outside and left. During cross examination he asserted that the Accused

persons walked into the land cruiser in normal and good health conditions and denied that one was shot.

20. **PW14 No. 81356 PC Andrew Mithika**, working at crime scene investigations at Mandera County testified that he visited the scene of the crime and did not find the deceased's body there but he photographed the scene and produced the photos in court together with the certificate of the photos marked as MFI 8a, MFI 8b And MFI 9 while **PW15 No. 231165 Mr. Alex Mutindi Mwansa**, superintendent of police attached to Ballistics Laboratory, DCI Nairobi testified that there were several exhibits submitted to the DCI lab by IP Daniel Otieno on diverse dates. He submitted the ballistic report in court.

21. **PW16 Evans Okenyo**, an investigator with IPOA testified that he investigated the deceased's scene and established that the Accused person were on official duty as confirmed by the DCIO and that he could not ascertain who fired the killer bullet as it was not handed over. He stated that the shooting took place when the deceased restrained the Accused persons from entering the compound thus attracting a crowd. PW16 testified that he found that the Accused persons were the only armed persons at the scene during the incident and that the 1<sup>st</sup> Accused shot himself in the botched operation thus he opined that the Accused persons deserved to be charged with the offence of murder

22. At the close of the prosecution case, the Accused persons were placed on their defence under Section 306 (2) of the Criminal Procedure Code. The defendants gave unsworn testimony and did not call any witnesses. **DW1 Dennis Langat**, testified that while he was at his place of work they were instructed by their in charge to go and inquire into the matter that there was a person peddling Cannabis Sativa (Bhang) at a certain kibanda. That together with the 2<sup>nd</sup> Accused they proceeded to the place and entered to a nearby hotel and did surveillance to confirm information which they did confirm to be true. They saw PW1 in possession of a white bag which they suspected to contain Bhang. It was his testimony that on seeing them, he threw the bag outside the homestead and they tried to catch up with the same bag. That is when they realized that the crowd was following them. One person from the town got hold of the bag and threw the bag into the Kibanda. That they tried to get the bag but the crowd did not allow them. That the crowd mobilized people and were furious and started attacking the officers. They realized they were in danger and shot in the air to disperse the crowd. That they immediately spotted a gun man in the crowd. He stated that he realized his left thigh was numb and informed his colleague (DW2) about it who then called for rescue He testified that he was rescued and taken to hospital where he realized that he had been shot and was subsequently rushed via air to Nairobi for hospitalization and was discharged after 1

week. That later he was alleged to have occasioned murder of the mother of PW1 and was charged with instant murder.

23.**DW2 Kennedy Okuli**, testified that on 10/11/2018 at 1640hours, they were informed of a report of a peddler of cannabis sativa who was a habitual dealer who had just popped in with drugs. That together with DW1 they were instructed by their boss to go and inquire of the same after booking the same in the OB. He testified that they were to apprehend the suspect. They proceeded to the place he was allegedly doing the trade in Rhamu Town. That they took cover in a local hotel nearby the place he operated from and there was an informer who was communicating to them via SMS. That they were informed that the bhang was in a white bag under a table. The officers made a move and when they went to the place they saw a white paper bag which the suspect threw near the entrance of his homestead.

24.It was his testimony that there were about 10 people near there. That the suspect fled and officers proceeded to where the bag was and one person threw it near the homestead compound. That they entered the compound where a crowd had gathered numbering about 20 people who had gained entry into the compound violently. That they were shouting and held DW1 back and pulled him back and injured his (L) finger. That he realized his life was in danger as they were surrounded by the

mob who were shouting. He testified that DW1 pulled the fire arm and shot 1 round of ammunition in the air to disperse the crowd and he also called their boss Edwin Corporal driver and informed him that they had been overwhelmed and he should come on rescue mission.

25.DW2 asserted that while making the call, he heard several gunshots coming from the crowd then he saw his colleague DW1 limping and had been shot. That the Corporal driver arrived with official motor vehicle and the crowd was still rowdy and unruly. DW2 helped his colleague into the motor vehicle and was taken to Rhamu District Hospital and the driver called the DCIO and informed him of the incident. The DCIO came to hospital while Accused 1 was being attended at the hospital and a rowdy crowd came to the hospital and started pelting stones to the hospital. That the deceased was also brought to the hospital. It was alleged that the 2 Accused persons shot her dead. They realized that she had passed on. He stated that Accused1 didn't know whether any other person was shot except himself but he heard gun shots. That they were in hospital over the injuries they sustained. The following day, they were sneaked out of hospital as the rowdy crowd had gathered at the hospital. They were taken to Mandera Hospital and the following day Accused 1 was taken to a hospital in Nairobi via air for treatment. He closed by asserting that his P3

form was prepared however he was charged with murder offence.

### **Defence Submissions**

26. Mr. Onono, counsel for the Accused persons through his written submissions reiterated that the Accused persons went to Rhamu area not a mission to threaten and harass *wananchi* but were on an officially sanctioned mission with officially issued firearms. He submitted that the Accused persons rushed to retrieve a white bag containing a substance which he suspected to be bhang and that's when the crowd closely followed them. That there was no bad blood between the Accused persons and the deceased and that they were following her son, PW1 and not her. He urged the court to note that the crime scene had been thoroughly interfered with and trampled upon by members of public therefore was not conducive to meticulous collection and collation of forensic evidence or any other evidence. Further he raised questions as to the credibility of PW8's testimony especially raising questions on her narration of PW10's movements on the material date. In conclusion, he urged the court to acquit the Accused persons stating that the prosecution's case does not add up and contains substantial inconsistencies leaving gaping areas of doubt.

## Analysis and Determination

27. Section 203 of the Penal Code under which the Accused persons were charged reads as follows:

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

28. From this section the prosecution is mandated by law to prove the following elements:

- (1) The death of the deceased.***
- (2) That the death of the deceased was unlawful.***
- (3) That in the causing death of the deceased the Accused had malice aforethought.***
- (4) That it was the Accused who killed the deceased.***

29. This was also upheld in the case of Anthony Ndegwa Ngarivs Republic [2014] eKLR, in which the elements of the offence of murder were listed as follows:-

- (a) The death of the deceased occurred;**
- (b) That the Accused committed the unlawful act which caused the death of the deceased; and**
- (c) That the Accused had malice aforethought.**

30. Similarly, in the n the case of Republic Versus Andrew Omwenga (2009) eKLR the court held that:

***“It is clear from this definition that for an Accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the Accused committed the unlawful act which caused the death of the deceased and (c) That the Accused had the malice aforethought”.***

31. Accordingly, this being a murder charge the prosecution must prove *mens rea* and *actus rea*.

32. Moreover, it is trite law that the burden of proof in criminal cases rests on the prosecution and the burden never shifts. The Accused has no burden to prove his innocence. In the case of ***Joseph Kimani Njau V Republic [2014] eKLR*** the Court of Appeal stated:-

***“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the***



*required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution.....”*

33. In *Republic vs Ismail Husseni Ibrahim (2016) eKLR* the court on burden of proof in criminal cases stated that:

*To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:*

*“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant’s guilt, but it does not mean that a defendant’s guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant’s guilt, after you weighed and considered all the evidence. A defendant must not be convicted*

*on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."*

**The death of the deceased**

34. In the present case, the death of the deceased is in no doubt.

The testimony of PW12 who produced the post mortem report proved this. He asserted that the death occurred on 10/11/2018 and that the body was brought to them by the police to ascertain the cause of death. The postmortem was done on 11/11/2018 and the cause of death was established as shattered lungs caused by hemorrhage.

**(b) That the Accused committed the unlawful act which**

**caused the death of the deceased;**

35. In the instant case, PW8 testified that she saw the Accused persons asking the deceased where Mohammed was to which the deceased responded by asking why they were looking for Mohammed and who they were. She then saw the 2<sup>nd</sup> Accused shoot in the air and the 1<sup>st</sup> Accused shoot the deceased. PW13 testified that he saw the Accused telling the deceased to hand over the poach she was carrying but she refused and then the 1<sup>st</sup> Accused shot her at the front neck. On the other hand, PW1 stated that his mother was outside praying when he heard her say *'What do you want with my son,'* twice, then he heard two gunshots although he did not see who fired the bullets. Additionally, PW12 testified that the cause of death was established as shattered lungs caused by hemorrhage and indicated that the shooting was a short range shot sentiments that I share given the photographic evidence adduced in court particularly the photos marked 4,5,6,7 showing the body of the deceased person and the bullet entrance and exit from the body. It is my considered opinion that the nature of the bullet entry point appears to have been occasioned from a close range shot.

36. Contrarily, the Accused persons stated that they were accosted by an armed crowd at the deceased's compound and that a commotion ensued as they were trying to arrest the deceased's son which led to both the deceased and the 1<sup>st</sup> Accused being shot. The Accused persons raised the issue of

self defence. I find that this is an attempt at a mere cover up by the Accused persons as there is no evidence pointing to the presence of any other armed person(s) at the scene of crime apart from them.

37. From the foregoing, I am convinced that there was a hostile crowd that formed while the Accused persons were trying to execute the arrest of PW1 and the Accused negligently shot at the deceased who also tried to constrain the officers from arresting PW1, her son. It was PW16 testimony that from his investigations, the shooting took place when the deceased restrained the Accused persons from entering the compound thus attracting a crowd. He also testified that he found that the Accused persons were the only armed persons at the scene during the incident and that the 1<sup>st</sup> Accused shot himself in the botched operation thus he opined that the Accused persons deserved to be charged with the offence of murder. The testimonies of PW2, PW3 and PW4 who arrived at the scene shortly after the incident allude to the fact there was a hostile crowd at the scene of crime. PW7, Officer Edwin Terter who rescued the officer confirmed the same as he testified that as they went to the hospital there was a huge crowd claiming that the officers have killed their person and so they should also let them die. This in fact indicates that the Accused persons were accosted by a hostile crowd as they were executing their official duties.

38. I fail to understand why the bullet heads recovered from both the deceased and the 1<sup>st</sup> Accused's bullet wound were not examined to establish where they were fired from. The failure by the police to submit the same is in my opinion a deliberate move in efforts to cover up for their colleagues, the Accused persons. Given the sequence of events leading up to the deceased's shooting and the evidence of both eyewitnesses i.e. PW8 and PW13, I am convinced that the 1<sup>st</sup> Accused negligently shot the deceased in the altercation that ensued while they were trying to arrest her son thus prompting a crowd to form after which he shot himself as a cover up as witnessed by PW8 and went on to shoot in the air to dissipate the hostile crowd. If indeed the Accused persons were accosted by another gunman there would have been evidence of the same collected at the scene. The report of the examining officer dated 23/12/2018 marked as Pexh. 12 shows that the 3 cartridges collected from the scene were from the Accused's pistol. Mr. Reuben K. Bett, the firearms examiner submitted in his report that further comparative microscopic examination of exhibits C1-C3 and exhibit D in conjunction with test cartridge cases and test bullets fired in exhibit B revealed sufficient matching firing pin markings, breech face markings, and bullet striation markings respectively. This enabled him to form the opinion that exhibits C1-C3 and d were fired by the Ceska Pistol S/No. F5731 which was issued to the 1<sup>st</sup> Accused as proven by the arms movement book marked as Pexh- 1 and corroborated by PW9 Sgt. Dominic

Nyongesa who issued the Accused persons with the pistols as the head of the armory. It is important to note that the 1<sup>st</sup> Accused pistol was less four ammunitions according to PW9 but only 3 cartridges were recovered and analyzed begging the question as to where the fourth bullet went as it was not accounted for; in my view this could have been the round that landed on the deceased's neck or the Accused's wound.

39. Having weighed the evidence by the prosecution witnesses and I am satisfied that the deceased died through an unlawful act capable of causing physical injury leading to her death occasioned by the Accused persons.

**(c) That the Accused had malice aforethought.**

40. **.Section 206 of the Penal Code** on Malice aforethought states that:-

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

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

***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is***

*accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

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

41. Additionally, Lord Zeups in Republic Versus Moloney 1986

3ALLER observed as follows:

*“The issue for the jury was a short and simple one. If they were for sure that at the moment of pulling the trigger which discharged the live cartridge, the appellant realized that the gun was pointing straight at his step father’s head. They were bound to convict him of murder. If on the other hand they thought it ought to be true that in the appellant’s drunken condition and in the further of this ridiculous challenge, it never entered the appellant’s head when he pulled the trigger that the gun was pointing at his step-father; he should be acquitted of murder and convicted of manslaughter “.*

42. I am persuaded by the evidence adduced that the Accused person’s purpose in pulling the trigger was negligent and not intended to kill or cause grievous bodily harm to the deceased.

The 1<sup>st</sup> Accused person did not have any reason at all to fire his gun towards the deceased person who was not armed. However, in executing their official duties, Accused 1 negligence caused the deceased's death.

43. My finding therefore is that the Accused persons had ***no intention to cause the deceased's death or grievous harm and that they had knowledge that shooting her would probably cause her death or grievous harm*** proving that there was no malice aforethought in their actions. Evidently, there is no sufficient evidence on record on the part of the prosecution to prove mens rea. Absent such evidence, the only logical conclusion is that the Accused persons shot the deceased negligently and with no malicious intent to end her life. There is certainly no doubt that the evidence relied on by the prosecution points to actus reus but not men rea in this case. Consequently, the prosecution have not proved the presence of both actus reus and mens rea in the trial of this case thus failing to prove the crime of murder beyond reasonable doubt as envisioned under **Section 206 of the Penal Code**.

44. **Section 179 of the Criminal Procedure Code** provides that a court may convict of a lesser offence. It provides that: -

***1) When a person is charged with an offence consisting of several particulars, a combination of***



*some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*

*2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”*

45. In Robert Mutungi Muumbi v Republic [2015] eKLR the Court of Appeal stated that: -

*“.....An Accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the Accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.*

46. In conclusion, Section 202(1) of the Penal Code defines manslaughter in the following terms: -

***“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.”***

47. Accordingly, in analyzing the evidence in totality, I find that the prosecution have proved the lesser offence of manslaughter contrary to Section 202 of the Penal Code against the Accused persons. The Accused persons are therefore guilty of the offence of manslaughter. Thus I make the following orders;

**(i) The Accused persons are thus convicted of the offence of manslaughter.**

**Dated and Signed at NYAHURURU this 16<sup>th</sup> day of June, 2021.**

.....  


**CHARLES KARIUKI**

**JUDGE**

**Dated, Signed and Delivered at GARISSA this 29 day of June, 2021.**

.....  


**JUDGE**