Republic v Yego (Criminal Case E039 of 2019)
[2024] KEHC 10253 (KLR) (19 August 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E039 OF 2019

RN NYAKUNDI, J

AUGUST 19, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

ABIGAEL CHEROTICH YEGO ..... ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge were that on the 17th day of June 2019 at Moi's Bride township within Moi's Bridge sub-location within Uasin Gishu County murdered LIVINGSTONE KAMAU.

2. The accused pleaded not guilty to the charge as stipulated under section 203 of the Penal Code. She was represented by Learned Counsel Mr. Chepkwony whereas the prosecution was under the leadership of Mr. Mugun, Senior Prosecution Counsel. The Prosecution marshalled four witness in discharge of its burden of proof whose evidence has been tabulated as hereunder:

3. PW1: Loice Nasimiyu Gichia testified that on the 17th day of June 2019 at about 12:30p.m, she was in her kiosk situated within Moi's Bridge Township. A group of 3 young men approached her and inquired whether Kamau was her son, to which she answered in the affirmative. They notified her that Kamau had been stabbed on the neck by the wife and rushed to Moi's Bridge sub-county hospital for treatment. She then notified her husband who rushed home. Because Kamau had recently changed houses and they did not know the new house, they asked their grandson to show them the house. She opted to go to the hospital to see how Kamau was fairing. She found him lying dead in the hospital. He had a stab wound on the neck and his clothes and part of his body still had blood. Police officers collected the body and escorted it to the morgue. She was notified that her daughter-in-law, Abigael had been arrested over her son's murder.

4. PW2: Josephat Gichia Mwangi testified that he is the father of the deceased. He informed the court that on 17th day of June 2019 at around 12:30p.m, he was attending to a client when his wife (PW1) called to inform him that their son had been stabbed by his wife. On hearing the distressing news, he rushed home where he found his wife in distress. They did not know their son's new residence and asked one of their grandchildren to escort them to the house. They had a change of mind and decided to go to the hospital where they were informed Kamau had been rushed. Before he got there, 2 young men informed him that his son had succumbed to the injuries. Those young men escorted him to the police station where he booked a report. He was then accompanied to the deceased's house where they found blood all over the house. They were able to recover a knife (Exh 2) that they believed was used as the murder weapon. They also recovered a blood-stained purple blouse (Exh 3A) and also a blood-stained white curtain (Exh 3B). He identified the body of his son for purposes of autopsy.

5. PW3: Michael Wamalwa testified that he was a casual labourer. On 17th June 2019 at around 12:30p.m he was at home preparing lunch. He heard screams from a neighbouring house and rushed there to find out what was happening. He found Livingstone Kamau, his friend, lying in front of the door to his house. Kamau was bleeding from his neck and was groaning but could not talk. His wife, the accused, was standing next to him and had blood on her face, clothes and hands. Noticing the danger his friend was in, Michael rushed to get a bodaboda which they used to rush his friend to Moi's Bridge sub-county hospital. When they got there, the medical personnel attended to his friend. He decided to go home to take a bath then come back. When he returned, he found the deceased lying lifeless on a treatment table with the accused sitting next to him. He then went to inform friends and relatives of the deceased about what had transpired. He later became aware that the accused had been arrested over the murder.

6. PW4: PC William Kipruto testified that he was the officer charged with investigating this matter. On the 17th day of June 2019 at about 04:19p.m he was assigned this matter to investigate and immediately visited the crime scene together with his colleagues. They documented the scene by taking photographs and were able to recover a blood-stained knife (Exh2) and a white curtain (Exh 3B) therefrom. He also learned that the wife of the deceased had been placed in custody. When he interviewed her, he noticed that she had a blood-stained purple blouse (Exh 3A) which he kept as an exhibit. He sent samples that he collected from the scene, together with the knife and purple blouse for analysis. The ensuing report confirmed that the blood on the accused's clothes and that in the house and knife was the deceased. A post-mortem examination would also reveal that the cause of death was due to a stab wound to the left side of the neck. His investigations would also reveal that immediately prior to the accused stabbing her husband, the couple had had a disagreement over the fact that she had not prepared lunch for him. He therefore proffered charges of murder against her. He produced the Govt. Analysts report, Exhibit Memo Form and the Post-Mortem form.

The defence case

7. The accused person was placed on her defence in terms of Section 306 of the criminal Procedure code. She elected to give an unsworn testimony and did not call any witness. In her unsworn testimony, she admitted that she was the wife of the deceased. She told the court that on 17th June 2019 at around 12:30p.m the deceased came home for lunch. Because she had not yet prepared lunch, the deceased became displeased with her and they started having an argument. It was her testimony that the deceased had a history of violence therefore when he approached her menacingly, she took a kitchen knife that was on the table and stabbed him. The parties filed their submissions in respect to the ingredients of the offence of murder contrary to section 203 of the Penal Code. Counsel for the prosecution submitted that the fact and cause of death is not in dispute. The accused person does not deny that she is the one

who stabbed the deceased on the neck, an act which was the cause of his untimely death. Therefore, counsel identified one issue for determination which is whether her actions were preceded by malice aforethought. Mr. Mugun submitted that the accused person acted with malice aforethought.

8. On the question of malice aforethought he cited the provisions of Section 206 of the Penal Code and the decisions in Bonaya Tutu Ipu & another v Republic [2015] eKLR, Republic v Silas Magongo Onzere Alias Fredrick Namema [2017] eKLR. Given the above guidelines, counsel submitted that the element of malice aforethought even from the nature of the weapon used. The element was also inferred from looking at the part of the body that was targeted. Counsel submitted that the accused person aimed her stab at the deceased's neck. She knew, or ought to have known that stabbing someone on the neck could kill the person or cause him to sustain mortal injuries or at best, grievous bodily harm. That the use of the knife was completely unnecessary and downright excessive in the circumstances.

9. In conclusion, he submitted that the accused should be denied the shield of self-defence. The attack on her was verbal and never escalated to a physical fight. She was under no imminent danger that would require her to pre-empt an attack and thwart it. He urged the court to convict her on the strength of the evidence adduced.

10. As for the accused, Learned Counsel Mr. Chepkwony submitted that none of the prosecution witnesses was present during the altercation that led to the untimely demise of the deceased. That whatever all these witnesses gave as testimonies amounts to mere speculation and hearsay and as such it cannot in good conscience be allowed to be admitted as evidence.

11. Regarding PW4's evidence, Mr. Chepkwony submitted that the witness being an investigating officer does not automatically grant him the knowledge and expertise to adduce evidence or even speak as to their contents in any authority. That the authenticity of said evidence has a huge question mark on them as since we have not a detailed report/log as to how it was tagged, bagged and transported all the way to Kisumu for analysis. He argued that a lot could have transpired in transit from the crime scene to Kisumu.

12. It was further submitted for the accused person that no expert witness was brought before the court and as such the various documents produced can only be addressed by experts.

13. In summary, it was Learned Counsel's submission that the prosecution has not proved its case to the required standard set in criminal cases in the case of murder. It was the accused's unsworn testimony that there was a scuffle and it was the deceased who had the knife in that impassionate state the accused only feared for her life being diminutive in stature as compared to the deceased and also being female whereas the deceased was male. That further the accused has portrayed remorse to the part she played in the untimely demise of the deceased. With that, Counsel submitted that the prosecution has not properly established the element of malice aforethought. He therefore prayed that the accused person be acquitted.

14. Learned Counsel Place reliance on the following authorities: Republic versus Michael Mucheru Gatu (2002) eKLR and Republic versus Ezekiel Lokatukon (2021) eKLR.

Determination

15. The laid background is a summary of the case for consideration as to the guilt of the accused person. The court at this stage is obligated to establish whether the prosecution has set up a case against the accused person as per the required standard of proof of beyond reasonable doubt as the one who killed Livingstone Kamau

16. The prosecution's evidence is appraised as against the provisions of Section 107(1), 108 and 109 of the *Evidence Act*, which provides as follows:

107:

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108: The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109: The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

17. Within the ambits of criminal law, the accused is presumed innocent until proven guilty. Thus the presumption of the innocence of the accused person until otherwise by virtue of the evidence by the prosecution with essentials inherent in both procedural and substantive law prima facie the expression of beyond reasonable doubt, he remains in the realm of unknown. The reasonable doubt standard, is indispensable to command respect and confidence in the administration of criminal justice system for the same is underpinned in the Bill of Rights of a Constitution. In the law of evidence, conceptualization of the instruments of proof are ingrained evidence on oath by witnesses, physical, documentary or electronic evidence. This is what compounds the concept of the burden of proof to ink the evidence with essential elements of the offence as drafted against the accused person. The learned author of Wigmore in his book on Evidence, defines evidences as follow:

> " Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or logic, on which the determination of the tribunal is to be asked."

18. The Black's Law dictionary defines evidence as:

> " Any species of proof or probative matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc. for the purpose of inducing belief in the minds of the court or as to their contention. All the means by which any alleged matter of fact, the truth of which is submitted for investigation is established or disproved. Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or non-existence of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. That which tends to produce conviction in the mind as to existence of a fact. The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact."

19. The Court in Mbugwa Kariuki v The Republic [1976-80] 1 KLR 1085 emphasized:

> " That the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution

must negate that the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.

20. At a glance of the prosecution evidence, in support of the charge of murder contrary to s. 203 as punishable in 204 against the accused person proof the following elements;

    (a) Proof of death,

    (b) The unlawfulness of the death,

    (c) That it was actuated by malice aforethought and finally that the accused before court was the perpetrator of the crime. The hinges purely on circumstantial evidence.

21. These basic principles on circumstantial evidence are as articulated in the various jurisprudential decisions by the superior court as exemplified herein below: In Neema Mwandoro Ndunya vs. Republic CRA 466 of 2007 the court of Appeal cited with approval the case of R vs. Taylor Weaver and Donovan (1928) 21 CRC 20 the court said:-

> " Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics".

22. Similarly, in Teper vs. R (1952) AC at page 489 the Court said as follows:-

> " Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence, to be sure that there are no coexisting circumstances which could weaken or destroy the inference."

23. Therefore, for this court to solely place reliance on circumstantial evidence to hold a conviction, the evidence ought to satisfy a number of conditions which have been articulated in several decisions. In Ahamad Abolfathi Mohammed and another (supra) the court stated as follows:

> " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abang'a alias Onyango v. R CR. App. No 32 of 1990, this court set out: -
>
> > "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
> >
> > (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
> >
> > (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;
> >
> > (iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within al human probability the crime was committed by the Accused and none else."

24. The circumstantial evidence in this case points to the fact that the accused by an unlawful and wilful act with malice aforethought caused the death of the deceased. In the rejoinder defence, the accused person invited the court to look at the essential facts in this case, whether there was any form of provocation which could have made her to act in the way she did. It is to be emphasized that there are no eye witnesses to the incident and the only witnesses who volunteered information on the incident are those who fall within the class of circumstantial evidence.

25. The graphics of the events of this fateful day of 17th June, 2019 at Moi's Bridge township, when the deceased met his death is deducible from the testimony of PW3 and PW4. From PW3's testimony, he heard screams from the neighbourhood and upon attending to the incident, he found his friend Kamau lying in front of the door to his house. The deceased was bleeding from his neck and was groaning in pain but could not talk. His wife was standing next to him with blood on her face, clothes and hands. Given the critical nature the deceased was in, they decided to rush him to Moi's Bridge sub-county hospital. PW1 gave a narration of how three men approached her and inquired whether she was the deceased's mother. They informed her that her son Kamau had been stabbed on the neck by the wife. She in turn reached out to PW2, her husband and shared the information. They opted to go to the hospital and unfortunately found their son dead.

26. This evidential matrix underpinned to establish the offence of homicide contrary to section 203 points substantially to the manifestation of malice aforethought as defined in Section 206 of the Penal Code. The essential characteristics deemed to constitute malice aforethought are as provided by the legislature as follows:

    (a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

    (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.

    (c). An intent to commit a felony.

    (d). An intention to facilitate the escape from custody of a person who has committed a felony.

27. Further on the case of Rex v Tubere S/o Ochen (1945) 12 EACA 63 the court held that:

> " In determining existence or non-existence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

28. In Hyam v DPP (1974) A.C. the court held interalia that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

29. Finally, in Bonaya Tutu Ipu & another v Republic [2015] eKLR in which the court stated as follows on prove of malice aforethought;-

> " It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit v Uganda, CR App No 95 of 2004, the Court

of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

30. The foregoing authorities and provisions contain the different elements of the ingredient of Malice aforethought. The applicable elements in this instant case are the first three characteristics, which speak to the intention of a person. In my view the evidence from both the protection witnesses and the accused person is not very clear on the source of the conflict, which resulted in the accused stabbing the deceased with a knife. Without evidence of how the anger, disagreement was escalated into a full blown grievous harm incident may be indicative of something with as possibility of provocation but in my evaluation of the entire chain of evidence, it fell short of the elements of provocation under S. 207 and 208 of the Penal Code. It is trite that provocation is a partial defence for the offence of murder but the burden of proving provocation is not vested with the defence. The court must be told at once that there is evidence capable of supporting a finding that the accused was provoked. Therefore, the burden is on the prosecution to prove the elements of the offence beyond reasonable doubt and the defence in mitigation is then permitted to rely on provocation as a ground to rule out malice aforethought. It is true whatever the main defence relied upon by the accused, whether it be one of such as accident, self-defence, provocation, lack of intent or diminished responsibility which acknowledges that the accused caused the death. All these revolve around the evidential material presented to the trial court. The following elements have to be present for one to say that the killing was on provocation:

a. The accused acted in the heat of passion, before there is time for his passion to cool;

b. Caused by sudden provocation;

c. Provocation was as a result of any wrongful act or insult of such a nature as to be likely, when done to an ordinary person; ('An ordinary person' shall mean an ordinary person of the community to which the accused belongs.)

d. To deprive him/her of the power of self-control and

e. To induce him/her to assault the person by whom the act or insult is done

31. The words "in the heat of passion and before there is time for is passion to cool" necessarily connotes a subjective test and the words "any wrongful act or insult of such as nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control' brings in the objective element. The words "acted in the heat of passion, before there is time for his passion to cool." Are not a matter of degree but is absolute and there is no intermediate stage between icy detachment and going berserk. Our law on provocation does not state that the retaliation must be proportionate to the provocation or in other words the mode of retaliation must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. To do so would be to introduce a third condition to the law of provocation ..... As to what the nature of the assault should he has not been specified. This is more so because, as to what happened moments before the killing, comes out only from the confession of the Accused.... Common sense and the facts and circumstances of this case dictates that something ought to have happened on the evening of 17th June 2019 for the accused to have attacked her husband whom they stayed as husband and wife.'

32. In R. Manani {1942} AC 1 the Court observed:

" To retort in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger, in short , the mode

of retaliation must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter if there is no sufficient material, even on a view of the evidence most favorable to the accused, for a jury (which means a reasonable jury to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method, and continuance of violence which produces the death it is the duty of the judge as a matter of Law to direct the jury that the evidence does not support a verdict of manslaughter. If on the other hand, the case is one in which the view might fairly be taken (a) That a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to using violence with fatal results, and (b) That the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether, the accused, if acting as a reasonable man, had the time to cool. The definition, therefore, is between asking could the evidence support the view that the provocation was sufficient to lead to a reasonable person to do what the accused did" which is for the judge to rule."

33. The court of Appeal in Benson Mbugua Kariuki v. Republic [1979] eKLR stated thus:

> " The correct direction which a judge should give himself and the assessors in a criminal case is that it is for the prosecution to prove that the accused is guilty, such proof being beyond reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence; and if in respect of any matter; the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was not provoked, or that he was not acting in self defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and if any reasonable doubt arises in respect of any matter, the prosecution has failed to discharge the burden which it must discharge."

34. As appreciated from the above case law, provocation does not extenuate a person of his/her guilt of murder unless she or he was provoked at the time when he/she did the unlawful act of the power of self-control by the provocation which he/she received from the deceased and there was no opportunity for him/her to cool down as between the provocation and the act which caused death it is trite that any particular wrongful act or insult, whatever may be its nature amounts to provocation and whether the person provoked was actually deprived the power of self-control by provocation of the deceased is a matter of evidential facts to be proven by the accused on preponderance of evidence.

35. Again in the proposition formulated on provocation, within our legal system, there is the concept of the reasonable man standard in which the court must test the interplay of this conceptual framework. The law does envisage that to retort to the heat of passion induced by provocation by a simple blow or strike is a very different thing from using a deadly instrument like a concealed knife, sword or firearm etc. What does the law on stipulation stipulate? Is that the mode of retaliation by an accused person against his/her victim of assault or grievous harm or homicide must bear a reasonable relationship to the provocation of the offence for it to be reduced to manslaughter. The accused in this case killed her husband according to her evidence at some point during the day in the house where they lived. Looking the evidence of provocation from the lens of the accused person, I find no sufficient material to form

the view that a reasonable person in the shoes of the accused person was so provoked by the normal domestic obligations of her preparing food for her spouse, which traditionally is part of the legitimate expectation of the husband from his wife. This obligation does not in any way endanger the provisions of Art. 27(4) of *the Constitution* on grounds of equality and freedom on non-discrimination. This is an inquiry for another day.

36. The inference to be drawn from the case for the prosecution against the accused person which is more convincing and credible that she was driven through transport of passion and loss of self-control to the degree and method and continuum of violence which culminated into the death of the deceased. As to how the accused reacted to the words or gestures from the deceased to render her as a subject of passion or loss of self-control leading to execute violence with a dangerous weapon whose consequences were fatal to the right of life of her own husband has not been brought within the definition of Section 207 and 208 of the Penal Code by the defence. How mere words or request made by one spouse to another in the context of this case is such that it does not meet the threshold sufficient enough to reduce an offence of murder to that of manslaughter. This is not a case where we have evidence that the accused prior to th alleged provocation was subjected to brutal treatment and striking of blows by the deceased on the day of the murder. To be deprived the whole or in part of her good judgment applying the test of a reasonable man in the shoes of the accused lacks support of cogent evidence to persuade this court to reduce the offence of murder to manslaughter. Whether this court was to find in favour of the accused person on grounds of provocation, such finding falls short of the evidence to satisfy the questions of law and fact.

37. In my view, the provocation alluded to by the accused person may have been a mere anger which could not have necessitated a level of rage to trigger the consequences of actions to exercise her powers to commit the unlawful act which to me was done with malice aforethought

38. For the present purposes in retracing the contours of provocation in this case, from the competing evidence adduced by both the prosecution and the defence, I find that provocation has no grounds to stand on and it is therefore instructive to dismiss it for want of merit. Similarly, the question I then ask myself is whether the defence offered by the accused meets the criteria outlined in Section 17 of the Penal Code. To redraw the distinction between provocation in Section 207 & 208 and the concept of self-defence the courts in Ahmed Mohammed Omar & 5 Others V. Republic [2014] eKLR, PALMER v R [1971] A.C. 814 and R v McINNES 55 Cr. App. R. 551 are in agreement on the applicable principles as stated herein below:

> " It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. .....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ..... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that

the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

39. As stated above, it seems to me that any examination of the prosecution and the defence case inevitably does not bring the conduct of the accused person within the provisions of section 17 of the Penal Code. Again properly analysed there is nothing on the part of the accused person which consistent with the defence of self in view of the really serious injuries suffered by the deceased which included use of a knife, properly manipulated against another human being it does result into fatal injuries. Consequently, to keep the prosecution evidence within the conceptual framework of the code, there is nothing to go by to justify or excuse the conduct of the accused person.

40. The discussion as outlined above and from the testimonies of the prosecution witnesses together with the accused's defence, it is the finding of this court that the element of malice aforethought was manifest in the accused's actions and as such positively bringing her conduct within the provisions of Section 206(a) & (b) of the Penal Code. Consequently, the standard of proof beyond reasonable doubt as vested on the prosecution has been dutifully discharged to enable this court to make a finding of guilty and conviction against the accused for the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code.

Sentencing

41. The accused in this case has been convicted of murder contrary to section 203 and as punishable under Section 204 of the Penal Code. This court held a trial within a trial to receive submissions from the state on the aggravating factors and learned counsel Mr. Chepkwony on behalf of the accused person on mitigation. It is also in our procedural law on sentencing hearing to receive the Victim Impact Statement on oath or as a component of the Probation officer's report. This is a case where the accused person was convicted of having occasioned the death of her husband Lawrence Kamau. The Senior prosecution Mr. Mugun urged the court to take into account factors that the accused used a dangerous weapon duly exhibited and identified as a knife being the physical evidence in support of the charge. Further Learned Counsel for the prosecution invited the court to appreciate the contents of the post mortem report which showed that the accused in committing the crime, targeted vulnerable parts or organs of the deceased namely: the lateral mid neck, the left side of the neck between the Oesophagus and cervical vertebra to the right side of the neck, which injuries went as far as affecting the internal carotid arteries bilaterally. In addition, the Senior Prosecution submitted that this was a case of gender based violence as against the accused person and the deceased which in his view was not justified nor excusable to exonerate the convict from her unlawful conduct.

42. Besides the mitigation and aggravating factors submissions from both counsels seized of these proceedings, the court on its own motion called for the reports from the probation officer dated 13th August, 2024, the directorate of children's services report of even date and finally the victim on their accord filed a supplementary report dated 16th August, 2024.

43. In the first instance, the probation officer did investigate into the family background of the accused, her personal history, the circumstances of the offence, the offender's attitude towards the offence, the view of the victim's family and the community attitude towards the offender and the offence committed.

44. According to the report it was established that no reconciliation processes were attempted by the offender's family citing feat of anger and bitterness exhibited by the victim's family but on the 19th of August, 2024, in a belated report filed in court, there was some evidence of victim offender mediation. This would also count towards something in determining the appropriate sentence. That the matter has been going on for around six years and it is only until recently that the offender asked for forgiveness

from the victim's father informally when they met in court. The officer concluded that the same shows lack of remorse and insincerity on their part. A life was lost and the offender's family did not take the matter seriously. An interview with the deceased father revealed that anger and bitterness still persist.

45. The report as a result recommended that based on the above social inquiry findings, the offender is not suitable for a non-custodial sentence. The matter should thus be dealt with in any other lawful manner that the court may deem fit.

46. The directorate of children's services equally filed a report regarding the condition of the child of the accused person who is reported to be 4 months and three weeks old. When an interview was done with the parents of the accused person, they stated that the accused person is their first born daughter among other 9 children. That she was in a come-we-stay kind of marriage arrangement with the deceased. That their union was blessed with a female child who passed on at the age of 2 months.

47. The interview revealed that after their daughter was released on bond, she got into a relationship with another man, a motorcycle rider in Soy location and the relationship was blessed with on issue, Biden Kipngetich a four-month old baby. That the child was diagnosed with a medical condition that leads to high fevers and convulsions and has been undergoing treatment at Trans Nzoia County Referral Hospital and the health centres within their homestead. The accused's parents proposed that if their daughter is found guilty of the murder charges, then they would prefer the child to remain under her custody so that she can continue breastfeeding him for at least one year then they can take him into their custody.

48. An interview was also conducted with the accused person who gave her background history and stated that she got into a relationship with the deceased (victim) in 2018 and they moved in as husband and wife. That the deceased was operating pool table business within Moi's bridge town. They lived happily in marriage and were blessed with a child but unfortunately passed on two months after birth due to pneumonia related complications. After the death of their child, the husband entered into extra marital affairs that led to frequent quarrels and whenever she questioned him about the relationships with other women the deceased warned her that she didn't have control over his life.

49. The quarrels went on for a while and she involved her parent in-laws who attempted to mediate their case without success. On the fateful day they quarrelled over the same infidelity suspicions and a fight ensued between them and in the process the husband picked a knife and she was able to grab it from him. That the husband wrestled her to the ground and while holding the knife he was accidentally injured around the neck and he fell on the ground outside the door.

50. She told the children officer that her parents have not been able to initiate the reconciliation process. That she was arrested in the last week while attending court and because she had left the child at home, the parents later brought the child to her which got the attention of the judge and prompted for a report from the children's officer and the probation officer. She was of the view that she would wish to nurse her child in prison until when the case is determined and if she is found guilty she would still prefer to continue breastfeeding her child in prison because his medical condition could worsen if denied a chance to breastfeed.

51. The observations made observations made on the child were that while at the court cells, the child looked stressed and continuously cried and nothing could soothe him. That at the women prison, the child looked fine, calmed and well breastfed. The child was also under close observations by the medical personnel at the institution.

52. The children's officer also conducted an interview with the victim's father who essentially stated that he has been following up with the case at the court to ensure that justice prevailed. That all this time

during court proceedings he never knew that the accused had a small baby until when she saw her with the baby. That the accused had approached him severally and asked for forgiveness from his family for the actions wasn't intentional. That he has tried to reach out to her parents for reconciliation in vain. He stated that where he has reached he has left it to the court to decide though he has forgiven her.

53. The Children officer's report recommended that based on the information gathered from the accused, the parents and observations made during a visit to Eldoret women prison, it was evident that the child is better placed with the biological mother (accused) considering his age where he needs to breasted for better growth and development. The officer recommended that considering the circumstances, the minor should remain in the care and custody of the mother until when he is within the age that his health is not at risk if not breasted and can continue with weaning.

54. On a different trajectory, the deceased's family members filed a letter dated 16th August, 2024 contradicting everything stated during the proceedings. The family stated that they have had constructive engagements with the family of the accused led by the accused person's father David Yego and have completely mended their fences. That the accused's family has reached out to them for forgiveness and they have, without conditions accepted the apology. To that end, restorative justice, in this case has been achieved. They therefore prayed that the court should consider a non-custodial sentence for the accused in view of her circumstances and for reasons that there has been successful Alternative Justice Systems employed in this case.

The Law

55. The provisions of Section 204 of the Penal Code provide for a death sentence for the offence of murder. However, in the case of Francis Muruatetu Versus Republic (2017) Eklr, parameters were set on sentencing an offender found culpable under Section 203 of the Penal Code. The applicable factors include:

    a. Age of the offender

    b. Being a first offender

    c. Whether the offender pleaded guilty

    d. Character and record of the offender

    e. Commission of the offence in response to gender-based violence

    f. Remorsefulness of the offender

    g. The possibility of reform and social re-adaptation of the offender

    h. Any other factor that the court considers relevant.

56. Similarly, the principles in the 2023 Judiciary of Kenya Sentencing Policy Guidelines are significant in guiding the court to mete an appropriate sentence. the objectives of sentencing include:

    That sentences are imposed to meet the following objectives:

    SUBPARA a.

    Retribution: To punish the offender for his/her criminal conduct in a just manner.

    SUBPARA b.

    Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

SUBPARA c.

Rehabilitation: to enable the offender reform from his criminal disposition and become a law-abiding citizen.

SUBPARA d.

Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

SUBPARA e.

Community protection: to protect the community by incapacitating the offender.

SUBPARA f.

Denunciation: To communicate the community's condemnation of the criminal conduct."

57. A sentence may not be imposed which does not serve at least one or more of the purposes outlined above and which reflects our statutory scheme in the penal provisions of the various statutes.

58. In Veen v The Queen (No. 2) (1987-88) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson & Toohey JJ – High Court of Australia stated that:

> "However, sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of a criminal punishment are various: Protection of Society, deterrence of the offender an of others who might be tempted to offend, retribution and reform. The purposes overlap and none of the can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. they are guideposts to the appropriate sentence but sometimes they point in different directions."

59. Since the advent of Muruatetu, the courts have departed from the prescribed sentences in many cases in which the offenders have been prosecuted under Section 202 and 203 of the Penal Code. The future of minimum mandatory sentences remains unclear given the recent jurisprudential development in this area of law. This is a case in which murder as defined in Section 203 of the Penal Code was proved beyond reasonable doubt having manifested malice aforethought as defined in Section 206 of the Penal Code. Life in Kenya is sacred and is protected under Art. 26 of *the Constitution* as a right to be enjoyed and guaranteed by every citizen and residents alike within our republic. Therefore, no person shall be deprived of his life intentionally save in execution of a sentence of a court in respect to an offence under the law in force or in exceptional circumstances provided within our legal system.

60. From the plea made by the victim impact statement by the father of the deceased for them justice in this matter shall be properly served if the accused person is sentenced to death. Learned Counsel Mr. Chepkwony on behalf of the accused person submitted on mitigation that the offence as committed is regretted, the accused is a young adult who is ready to transform herself and rehabilitated within the home-based environment. Learned Counsel also contended that any incarceration of the accused would have far reaching negative implications for her and the family. Senior Prosecution Counsel Mr. Mugun on behalf of the state submitted that there is no evidence that the accused person regrets or is remorseful of the offence committed against her husband. In addition, Senior Prosecution Counsel invited the court to appreciate the entire circumstances in which the accused armed herself with a knife

and severally used it to stab the deceased person severally around the left neck region. Further, Senior Prosecution made reference to the post-mortem report dated 24th June 2019 to demonstrate that the heinous crime was committed with malice aforethought by the accused person.

61. This court agrees with Prosecution Counsel that this is clearly a case of gender based violence. As the court in S v Kekana (2014) ZASCA once observed that:

> " Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear that their live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and boldly integrity."

62. Interestingly, at the heart of this case was domestic violence from a female spouse against the husband. I say so for reasons that the domestic violence sphere in Kenya has always been taken to be specifically initiated by men of the house against their wives. This change of circumstances is clearly provided for in The *Protection Against Domestic Violence Act*, 2015 which expressly criminalizes and outlaws domestic violence which is committed by both men and women jointly or severally.

63. In this matter from the facts of the case, the manner in which the deceased died, manifested a component of domestic gender based violence. The crime committed against the deceased was brutal, violent and lack of accountability on the part of the accused person. When aggravating factors such as breach of trust, use of a dangerous weapon and persistent multiple injuries in the very sensitive organs of the deceased, it was foreseeable to the accused person that the injuries indeed would cause death or grievous harm. I am of the view in this case that the aggravating factors of the crime of murder far outweighs the mitigating factors offered by the accused.

64. The facts which deserve notice for purposes of this sentencing hearing emerge from the additional information received from the probation officer and the Children's officer as regards the personal circumstances of the offender but more significantly, is the impact upon the likely hardship to be suffered by the minor at the moment alleged to be of tender years. There is no doubt that the hardship stemming from prison goes well beyond the pain experienced by the convicted offender. The family and dependants of convicted prisoners often experience significant inconvenience and hardship for sins or wrongs not directly committed by the very innocent family members or dependants but a negative ripple effect which flows from the unlawful acts or omission by the offender. This approach is what the Children's officer made an attempt to allude to in the report dated 13th August, 2024. Unfortunately, the courts and the legislature have not been able to find a coherent manner in which to reconcile this tension. To what extent the family/dependent hardship can mitigate the severity of criminal penalties is a moot question. That is the balancing act of the competing interests this court faces in arriving at a fair and proportionate verdict. This area of law on whether family hardship should constitute compelling and exceptional circumstances to mitigate sentence severity requires some more doctrinal and robust, predictable jurisprudence. Generally speaking, there may be considerable thought by the session judge or trial magistrate to ascertain how individual circumstances on family or dependant hardship is a factor in mitigation on sentencing.

65. When the matter came up before the court in R v. Panuccio Unreported, Victorian Court of Appeal 4th May, 1998. In that case the court held that:

> " Although the court is not, both as a matter of compassion and common sense, impervious to the consequences of a sentence upon other members of the family of a person in prison,

> such factors will need to be 'exceptional' or 'extreme' before the court will tailor its sentence in order to relieve the plight of those other family members. Such a principle is clearly an obvious one, because the court's primary function is to impose a sentence which meets the gravity of the crime committed by imprisonment imposed does not have consequential effects upon the spouse, children or other close family members who are dependent in one form or another upon the person imprisoned.
>
> Thus it has been often stated that it is a general principle of sentencing that the curt should usually disregard the impact which the sentence will have upon the members of a prisoner's family unless exceptional circumstances have been demonstrated."

57. It must be understood that this case is a jurisprudential question dealt with in a foreign land but fortunately, it speaks directly on the subject matter before hand as against the convict whom I am about to pass sentence for the offence of murder contrary to Section 203 of the Penal Code. The purpose of the principles or object of them as elucidated by the court are for the protection of something that is encompassed within the subject matter of sentencing. I have labored on this issue but I am still not still persuaded that non-custodial sentence is the fair and proportionate sentence for this heinous crime. Yes, indeed family hardship may contribute as a mitigation factor given the very victim of this offence. Thus I think may be the reasoning behind the supreme court's decision in Francis Karioko Muruatetu (2017) eKLR that judicial discretion remains to be the bedrock in sentencing regime.

58. The upshot of it, the following orders shall abide in seeking to achieve a fair outcome of this trial.

    i. First and foremost, the convict/offender be and is hereby sentenced to a forty-eight (48) months custodial sentence.

    ii. Secondly, in terms of Art. 53(2) of *the Constitution*, the mother of the accused is hereby appointed as Guardian Ad litem and in complying with survival rights of the minor, she shall ensure access to the mother for purposes of breastfeeding and bonding sessions which shall be arranged with the women prison management at Eldoret.

    iii. Thirdly, in the interim, the clinical services at Eldoret prisons shall make arrangements for a medical report as to the allegations made by the mother on the health status of the minor.

    iv. Fourth, each party be at liberty to apply.

    v. 14 days right of appeal.

DATED AND SIGNED AT ELDORET THIS 19TH DAY OF AUGUST, 2024

R. NYAKUNDI

JUDGE

In the Presence:

Mr. Mark Mugun, for the state.

Mr. Chepkwony for the Accused.