Republic v Achala (Criminal Case E019 of 2019)
[2024] KEHC 10116 (KLR) (12 August 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E019 OF 2019

RN NYAKUNDI, J

AUGUST 12, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

DAVID SILOBA ACHALA ..... 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 offence are that on the 26th day of February, 2019, he murdered Fiona Kisuya.

2. The accused person pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The lead prosecution counsel in these proceedings was Mr. Mark Mugun for the state whereas the Accused person was under the retainer of Learned counsel Mr. Nyairo.

3. The prosecution called 8 witnesses who gave evidence to establish the ingredients of the offence of murder

Prosecution's Case summary

4. Having presided over the matter and having gone through the submissions by both counsels, the submissions by the state counsel captures a fairly true record of the evidence adduced and I shall proceed to adopt the same.

5. PW1: Aaron Kipyegon Kurgat testified that on the material day at around 0800hrs, he was at home when the accused, someone who has been his friend for a year ever since he came from the USA, called him outside the house. They lived together within the same compound. The accused told him that there was something he needed help with and kept insisting that it was urgent. While walking back to the accused's residence, the accused told him that he had killed his girlfriend after a quarrel

and that he needed help in cutting up her body and then burn it. The accused showed him a bag where he had stashed the body. Startled by this revelation, this witness went back to the house and sought help on how to tackle the challenge. He was then advised to report the matter with the police, which he immediately did. He called a police officer and was advised to report the matter at the police station. Although he had started the journey to the police, he rushed back to the house when he was made to understand that some officers had already gotten to his house. He opened the gate for the policemen and immediately noticed that there was smoke coming from the blue water-drum/tank. Inside the water-drum/tank, they found a partially burnt decapitated and severely mutilated body of the deceased. They also found a blood-stained panga and wooden bar. The accused was arrested. The police officers documented the scene by taking photographs. In cross-examination, he added that he knew that the deceased and the accused went drinking alcohol the night before the incident. He admitted that he knew the accused was sick and used to take injections. He could tell whenever the accused fell ill but he had appeared normal when they had met the previous day.

6. PW2: Collins Ngisirei Cheruiyot testified that on 26th February, 2019 at around 1000hrs, he had gone back to his business premises to open it so that it can be cleaned. Aaron (PW1) informed him that the accused had confided in him the fact that he had killed his girlfriend and had wanted his help in disposing off the body by burning it. Aaron further told him that he was on his way to the police station to report the matter and asked him to keep an eye on the developments at his homestead. He was quite familiar with Aaron, the accused and the deceased including where they lived. He then rushed to the homestead and peeping through a hole in the gate, he noticed that there was smoke coming from a blue drum/tank. He relayed this information to PW1 and together they rushed back to the house in the company of police officers. When they got inside the compound, they found the decapitated and mutilated body of the deceased. The accused was arrested concerning the murder of his girlfriend, Fiona Kisuya. He also told the court that the accused and deceased had a troubled relationship. He admitted that on the night prior to the incident, he had served them with alcohol which the duo had drunk between 2000-2130 Hrs when they left his establishment. He did not get an impression that they were excessively drunk.

7. PW3: Swyneerton Nazoi Achala testified that he is accused's brother. The house where the accused lived in Kapsoya belonged to him. He was aware that the accused lived with the deceased. He testified that the accused had lived in the USA with their parents and while there was diagnosed with schizophrenia. When he was deported, he would buy medicine in bulk for the accused, which he would personally inject the accused or ask PW1 to do it for him whenever he was out of town. He also testified that a female doctor at MTRH used to attend to the accused when he was in Eldoret and Prof. Mwanda when he was in Nairobi.

8. PW4: Humphrey Kisuya Murakani testified that he is the deceased's brother and a friend to the accused. He identified the mutilated body of the accused for post-mortem.

9. PW5: Dr. Kibet Keitany testified that he is a pathologist working at MTRH. He conducted a post mortem on the body of Fiona Kisuya. On examination of the external part of the body, he found that there was complete separation of the head from the rest of the body. There are also 3 cut wounds on the right side of the cheek, the longest of which measured 4x0.5cm. There was also amputation of the upper limbs at the wrist and distal. There were indications of defensive injuries on the right forearm. The Cardiovascular system was collapsed and bloodless.

10. The head had superficial burns on the scalp and upper trunk. The head was also decapitated. On the spinal cord was severe transection of the cord with decapitation at C1/C2. The cause of death was ruled out as severe haemorrhage due to complete decapitation of the head due to sharp force trauma.

11. PW6: Darmas Kibet was a government analyst who produced a report on behalf of his colleague, Mr. Kweyu. His testimony was basically that the blood on the wooden pole and panga matched with that of the deceased.

12. PW7: PC Kipngetich Kitur documented the crime scene. He produced photographs that he took at the crime scene.

13. PW8: Lucky Sanga testified that he was the investigation officer in this matter. On 26/02/2019 he was directed by the DCIO to respond to a distress call from PW1. Together with other colleagues, they went to Mariakani estate in Kapsoya where they found a body of a woman, later identified to be Fiona Kisuya, in a blue water drum/tank smoke coming out of it. The body was removed from the tank and they determined that it had been decapitated and both palms cut off. They were able to recover a wooden pole and panga which were blood stained. Inside the house, they recovered two SIM Cards, an Itel Phone and used pregnancy kit which indicated that they had possibly fought over the pregnancy right before she was murdered. They also recovered from the house, documentation from Mathare Mental Hospital indicating the name of the accused as the patient. His investigations also revealed that the accused person had approached PW1 for help with disposing off the body of the deceased. He had confessed to PW1 that he had murdered his girlfriend and stashed her body inside a blue water drum/ tank. He sent the samples collected at the scene for analysis and charged the accused person with the present offence.

14. In support of the case for prosecution, learned senior prosecution counsel canvassed his case by way of written submissions urging this court to find that all the ingredients of the offence of murder have been proved beyond reasonable doubt to warrant the court to find the accused person guilty and have him convicted of the crime as initially charged of causing the death of FIONA KISUYA. He buttressed his arguments by placing reliance on the following authorities:

    a. Anthony Ndegwa Ngari v Republic (2014) eKLR

    b. Bonaya Tutu Ipu & another v Republic (2015) eKLR

    c. CNM versus Republic (1985) eKLR

    d. Leonard Mwangemi Munyasia v Republic (2015) eKLR

    e. Mwachia Wakesho v Republic (2021) KECA 223 (KLR)

15. When placed on their defence, DW1: Dr. Eunice Temet testified that she is the head of psychiatry at MTRH. Although she did not personally attend to him or prepare his mental health assessment report, she was aware that the accused was a patient at the facility. Dr. Kwoba, now deceased, had attended to the accused and diagnosed him with schizophrenia, which is a mental illness or psychotic disorder which impairs one's thought process and the patient can have erratic changes in mood and behaviour. The initial treatment plan was to recommend that the accused be observed further at Mathare mental hospital. She was also made aware of treatment notes from Terrell state Hospital in the USA, which confirmed that the accused had moments of lucidity and illucid moments. She admitted that the doctors in the USA were, as captured on page 2 of the report dated 8/18/2017, established that in as much as the accused suffered from a mental illness, they suspected that he could be exaggerating the symptoms. They did not test whether was exaggerating the symptoms. Dr. Temet also accepted that by trying to cover-up his actions, the accused's actions were consistent with those of a man who knew that those actions are wrong and carried penal consequence. She also admitted that by eliciting help from a friend to help cover up the fact that he had killed his girlfriend, the accused's actions were consistent

with those of a man who knew that killing his girlfriend was wrong and carried penal consequences which he was keen on avoiding that.

16. On the part of the accused person learned counsel M/s Odwa countered the submissions by the prosecution inviting this court to find that the accused person was insane when he committed the offence and therefore cannot be found guilty of the offence in absence of mens rea. In agitating for that perspective, it was learned counsel's contention that the mental assessment by Dr. Kwoba and other related psychiatric examination show that the accused suffered from Schizophrenia, he was paranoid, disoriented in time and could not remember most of the things when being interviewed by the doctor. According to learned counsel, even if we were to take it that the prosecution evidence addressed all the issues to prove the offence of murder beyond reasonable doubt, the question of insanity cannot just be wished away. It was learned counsel's contention that the principles in the following authorities would demonstrate that the charge falls short of the requirements set by the law of a case proven beyond reasonable doubt to call for a finding of guilty and conviction of the accused.

    a. Ahamad Abolfathi Mohammed & another v Republic (2018) eKLR

    b. Republic versus Samuel Githinji Wagura (2022) eKLR

    c. *Wakesho v Republic (Criminal Appeal 8 of 2016)* (2021) KECA 223 (KLR)

    d. HM V Republic (2017) eKLR

    e. Hassan Hussein Yusuf v Republic (2016) eKLR

    f. Republic versus JKN (2021) eKLR

Analysis & Determination

17. Having given that background and having considered the evidence tendered and the submissions filed, it is my singular duty to establish whether the prosecution has mounted a case against the accused persons within the required standard of proof of beyond reasonable doubt as the one who killed FIONA. 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.

18. 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.

19. The standard of proof is the extent to which a party ought to prove its case in order to succeed. This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented. This court should therefore examine whether the prosecution has discharged such a legal onus.

20. This initial burden of proof that the state bears to proof all the ingredients of beyond reasonable doubt in order for the accused persons to be convicted may only appear to be shifted to the accused persons only in two circumstances. First, is in the exceptional circumstances formulated under section 111 of the *Evidence Act*. Secondly, where the defence raised falls within the rubric of insanity, justification, excusable, self-defence or any other presumptions known in law. When an accused person raises any of these defences, more so the ones on self-defence, provocation, he/she is not denying the facts rather he/she affirms the action or omission asserted by the prosecution but invokes justification or excuses against criminal liability. The other defences like insanity are to have him/her exonerated from liability for reasons of mental infirmity such as in this case.

21. Under Art. 50 (2) (a) of *The Constitution* the accused is presumed innocent until the contrary is proved either by direct or circumstantial evidence. Two primary classifications are used for evidence: circumstantial evidence or direct evidence. Circumstantial evidence indirectly proves a fact whereas direct evidence directly establishes a fact. In People v Bretagna (298 NY 323, 325-326 [1949]) the court addressed itself in the following language:

> " Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. * * * Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred" see People v Hardy, 26 NY3d 245, 251 [2015) By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)"; Schneider v Kings Hwy. Hosp. Ctr., 67 NY2d 743, 744 [1986]"

22. An analysis of the facts of the case reveal that is purely a direct evidence case. The Blacks law dictionary defines direct evidence as piece of evidence often in the form of the testimony of witnesses or eyewitness accounts. Examples of direct evidence are when a person testifies that he/she: - saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place. It was PW1 testimony that the accused person confided in him and sought help to dispose the body. This is undisputed given that the recurring theme throughout the case is the defence of insanity.

23. It is trite that any crime in our legal system must comprise mens rea and actus reus. The trial court is under duty to ensure that before any conviction is entered both actus reus and mens rea have been proved to the required standard of beyond reasonable doubt. See Joseph Kimani v R 2014 eKLR). In this case, the following ingredients of the offence of murder must be proved beyond reasonable doubt without any conjecture or suspicion.

    a. The death of the deceased one Geoffrey Mateje Lulu

    b. The death was unlawfully caused

c. The death was caused with malice aforethought

d. The accused persons participated in or caused the death of the deceased.

24. An analysis of the evidence adduced by the Prosecution weighed against the evidence of the Defendant point out to the fact that FIONA KISUYA is dead. I have drawn inference from the testimony of PW1, PW2, PW4, PW5, PW6, PW7 and PW8. Of significance is the post mortem report which indicated that the cause of death was severe haemorrhage due to complete decapitation (of the Head) due to sharp force trauma. The defence does not contest that fact of death of the deceased. The evidence gives meaning to the concept of the burden of proof of beyond reasonable doubt.

25. The next ingredient is to determine whether the death of FIONA KISUYA was unlawful.

26. The right to life is protected and guaranteed under Art 26 of *the Constitution*. Therefore, no person is permitted to kill or cause the death of another person unless otherwise as provided for in our constitution or any other enabling statute. The law in Kenya presumes every homicide to be unlawful unless it is accidental or excusable or authorised by law. On this ground the court has to take into account the guidelines in Juma Lubanga v R (1972) HCD in which the court made the following observations:

> " Grievous harm as defined in the Penal Code involves a consideration whether the harm is such as seriously to interfere with the health or comfort, and the answer to the question may depend on the nature of the injury and the circumstances of the case."

27. Put differently, it must be presented in evidence that the victim of the murder suffered either physical or bodily harm as a result of the unlawful act of omission or commission. That the evidence demonstrates beyond reasonable doubt that the injuries inflicted leading to the loss of survival of a human being as known in law were unlawfully executed. It is therefore necessary to appreciate the scale of evidence on this ingredient as submitted before this court by the prosecution. In the present case, directly, the flow of evidence by the prosecution witnesses point out to the accused person as the perpetrator.

28. The assault of another human being is considered unlawful and intentional unless excusable as provided for under Section 17 on self-defence or property or on provocation under Section 207 as read with Section 208 of the Penal Code. The unlawfulness of the assault is the application of force whether armed with a dangerous weapon or not to the person of another directly or indirectly and those violent circumstances lead to the threatening or termination of the right to life as guaranteed in Article 26 of *the Constitution*.

29. In murder cases, or manslaughter for that matter, causation is a central issue. The prosecution must adduce evidence connecting the acts or omissions which contributed or caused the death of the deceased. The Prosecution establishing the cause of death is non-negotiable in so far as section 203 of the Penal Code is concerned.

30. The allegedly causative acts or omissions need not to the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death (The maxim here is that of acts or omission which occasion the acceleration of death)

31. The provisions of section 213 of the Penal Code which defines causing death to include acts which are not the immediate or sole causes of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances;

a. He inflicts bodily injury on another person and as a consequence of the injury the injured person undergoes a surgery or treatment which causes his death;

b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or/and proper precautions as to his mode of living;

c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused;

d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and

e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

32. In the case of R v Gusambisi s/o Wesonga (1948)15 EACA 65, every homicide is unlawful unless rebutted by evidence that it was either justifiable or excusable. These principles bring into play the provisions under section 17 on self-defence and section 207 as read with 208 of the Penal Code on provocation.

33. In this respect any potential defences to the unlawful acts which causes death have been excluded in respect of all of that range of acts which caused the fatal injuries leading to the victim succumbing to death. That those acts or omissions done by the offender were in the prosecution of an unlawful purpose to endanger human life. As a matter of emphasis, the element of unlawfulness to cause death in exceptional circumstances is excusable by law in the event of an accident, natural causes, insanity self-defence and also provocation.

34. From the comparative law this element of prosecuting an unlawful purpose was discussed in the case of Macartney v R (2006) 31 WAR 416, in which Steytler P observed of the meaning of unlawful purpose:

> " The words "unlawful purpose" are very wide, even wider than the old common law requirement that the act of violence occur in the course of or in furtherance of a felony involving violence. As was pointed out in R V. Georgiou (2002) 131 A Crim R 150 at 160, the framers of the section have chosen the words "Unlawful purpose" rather than the word "offence" and the unlawful purpose is not limited to the strict elements of an offence, with the consequence, for example, that am act done in the cause of attempting to get away after the commission of an offence would be an act done for an unlawful purpose.
>
> It appears to follow that an act is done in the prosecution of an unlawful purpose if it is done in order to carry out or try to carry out an unlawful purpose, which includes trying to deter or avoid resistance to doing so and apprehension for doing so"

35. In my judgment, I think there is convincing evidence that FIONA is dead and the accused person caused her death by the alleged acts of assault as depicted in the post mortem report Exhibit No. 5. This element stands proved beyond reasonable doubt by the prosecution

36. The element of Malice Aforethought is at the heart of the offence of murder contrary to Section 203 of the Penal Code. It manifests itself as defined in Section 206 of the Penal Code in the following terms:

(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.

37. These provisions contain various characteristics of malice aforethought which can be individualised to specific circumstances and facts of each case. It is implicit to bear in mind though not defined under section 206 of the Penal Code, Malice aforethought is either direct or implied or inferred from the consequences of each case. Sometimes facts can speak to premeditation by the perpetrator to commit the offence of murder. Whereas on the other hand, malice aforethought may be a continuum of events manifested before, during or after the commission of the homicide itself by the offender. The extract from one of the landmark cases ever litigated in South Africa in S V Pistorius 2016 (1) SACR 431 (SCA), tends to articulate this concept of intention for purposes of clarity as follows:

> " In the case of murder, there are principally two forms of dolus which arise: dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions, It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent."

38. It is also of significance to mention the profound statement from the same court in S v Celumusa Dube CC03/22 in which the court observed on what constitutes premeditated murder:

> " That the concepts of premeditation and intention are different. Premeditation involved a thought process that contemplates a certain outcome and the means to achieve that outcome. Intention in all its forms (dolus directus, dolus indirectus and dolus eventualis) involves the perpetrator's state of mind before and while the criminal act is being committed. For our purposes see the principles in Rex v Tubere S/o Ochen (1945) 12 EACA 63

39. In malice aforethought under Section 206 of the Penal Code, there is the competing test of reasonable foreseeability that certain unlawful acts or omissions targeted at the deceased have high prospects of

causing death or grievous harm. In the case of Roberts v Queen (1971) 56 Cr. App R 95 (CA). The court remarked:

> " Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as a consequence of what he was saying or doing? As It was put in the old cases, it has got to be shown to be this act, and if of course the victim does something so 'daft', in the words of the appellant in this case, or so unexpected, not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of the assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.

40. From the perspective of the prosecution case, there is clear evidence that this heinous crime of murder committed by the accused person constituted manifestation of malice aforethought. Plainly so, this is deducible from the multiple injuries as deduced from the post mortem report produced by PW5, Dr. Kibet Keitany. In this respect, on examination carried out by PW5, the following visible injuries were detected: Severe pallor decapitation with complete separation of the head and the rest of the body, Multiple cut wounds in the right cheek (4x0.5cm), Bilateral distal upper limbs amputation at level of wrist and distal radioulnar with associated cut wounds; both hands separated from the limbs, Severe transection of cord and spine and C1/C2 level (decapitation). As a result of these injuries, PW5 concluded that the cause of death was severe haemorrhage due to complete decapitation (of the Head) due to sharp force trauma.

41. In this context the Connecticut Chief justice had this to say:

> " In common speech malice usually means hatred, ill-will, malevolence or animosity existing in the mind of the accused, but in the law of homicide its meaning is much wider. Malice, as the word is used in an indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feeling of hatred, ill-will or revenge existing in the mind of the slayer towards the person slain, but also cases of unlawful homicide which don't proceed from and are not accompanied by a such feeling. In the law of homicide, if a man intends unlawfully to kill another or do him some grievous bodily harm, such intention, whether accompanied or not accompanied by a feeling of hatred, ill-will or animosity, constitutes malice. Suppose A, intending to kill B, whom he hates, by mistake kills C, his friend, whom he loves; here he did not intend to kill his friend, and he did not hate him, but he loved him7; and yet the law says he killed his friend with malice. Malice includes all those states of mind in which a homicide is committed without legal justification, extenuation or excuse"

42. Looking at the evidence in its entirety, the prosecution has made out a prima facie case in support of the ingredients of murder as defined in Section 203 of the penal code save for what appears to be contentious or unresolved at the circumstances surrounding the attack, in particular the state of the accused's mind at the time of the killing. In order to delve into this issue deeper, it is plausible to look at the psychiatric report starting with the very initial mental examination on or before the accused was permitted to take plea as charged.

43. The initial examination conducted at Moi Teaching and Referral Hospital on 11th March, 2019 revealed that the accused suffered from schizoaffective disorder. He was sad and crying, his thoughts were slowed, he was hearing voices and he could not remember the dates but could recall the events.

Thereafter, another assessment was conducted at Mathari National Teaching & Referral Hospital, which concluded that the accused person was capable of making his defence. Subsequently, the assessment done at Moi Teaching and Referral Hospital on 5th October, 2020 recorded that the accused was calm, normal, no delusions, well orients in time place and person, coherent in speech, he had no illusions and he had understanding of the circumstances behind his arrest. The report added that the accused has been on treatment for mental illness for several years. It was the Doctor's conclusion that despite the mental illness he could follow the case proceedings.

44. During the accused's defence, Dr. Chelegat Saina filed a report for the accused dated 3rd May, 2024. The report gave a history of the accused's mental illness and indicated that the accused had undergone 4 mental assessments. The report concluded that on 5th October, 2020, the accused was fit to plead, because he was mentally stable.

45. In his defence, the accused elected to remain silent but exercised his right under Art. 50 to call the evidence of a psychiatrist consultant at MTRH, one Dr. Chelagat Saina dated 3rd May, 2024. However, pursuant to section 33 as read with Section 77, the maker of the document could not easily be procured and on his behalf, his colleague Dr. Eunice Temet gave evidence on oath and produced the medical report as Dexh 1. DW1 conclusion on examination and findings about the mental condition of the accused is capture elsewhere in this judgment

46. My evaluation of the evidence in this matter does show just before the accused was arraigned before this court to plea for the charge of murder, he was subjected to a mental assessment to establish his suitability to understand and appreciate the nature of the criminal proceedings under Art. 50 of *the Constitution* on fair trial rights.

47. This court upon reviewing the evidential value of the psychiatrist reports presented to this court, must admit without question the accused seems to have a history of mental infirmity with the experience of lucid moments. I agree with the submission on behalf of the Prosecution as submitted by Mr. Mugun to the extent that at the time the accused committed the offence he might have been in a state to appreciate the aspect of good judgment. This is informed by the fact that on the material day of the offence the accused person having committed the offence reached out to PW1 and told him that there was something he needed help with and kept insisting that it was urgent. While walking back to the accused's residence, the accused told him that he had killed his girlfriend after a quarrel and that he needed help in cutting up her body then burn it. The accused showed him a bag where he had stashed the body.

48. The defence of insanity is provided for in our legal system in Section 12 of the Penal Code where section 11 of the same code created the rebuttable presumption that every person is sane unless the contrary is proved. This is one exceptional case in the adjudication of criminal cases under Section 111 of the *Evidence Act*, the presumption of sanity is rebuttable by the accused proving that he was not sane at the time of committing the alleged offence of murder as explicitly indicative from the evidence of PW1. The supplementary rule

49. The Court of Appeal in the cases of Mwangi v Republic (1976-1985) EA 355 and Andrew Kathari v R Mombasa CACRA No. 69 of 1983, the court remarked thus;

> " That the defence of insanity as set out in Section 12 is restricted to the time of doing the act or making the omission and does not extend to the time the accused person is charged and cautioned nor does it cover the admissibility and inadmissibility of his confession. Counsel for the accused had on appeal attacked a statement made to the police by the accused

admitting the offence, arguing that at the time of making the statement the accused was insane."

50. In our jurisdiction, the defence on insanity is anchored in the M'Nagthen rules. That is how the defence of insanity came to be incorporated in our Penal Code. The key characteristics of the M'Naghthen rules are summarised as follows:

    a. Defect of reason: It forms the first limb of the rules that the accused person ought to establish. That at the time of the commission or omission of the act, he/she was labouring under a defect of reason from a disease of the mind. A disease of the mind is covered under what a psychiatry could classify as a mental disease. Common of them are psychotic illnesses such as depressive diseases and schizophrenia. Some conditions affect the brain and are therefore considered a disease of the mind. Anything that restricts supply of blood to the brain or causes or causes deterioration of the mental faculty.

    b. The Incapacities: this is the second aspect of the rules, which identified two incapacities. The first is that on account of the insanity he was incapable of understanding what he/she was doing and the second is that he/she was incapable of knowing that what he was doing was wrong. Where a person suffers from a disease of the mind from the medical point of view, which does not produce any of the two incapacities, then the defence would not lie.

        i. Incapacity to understand what one is doing

            Mental disorder may affect the person suffering from it to such an extent that he is not capable of appreciating the implications of his conduct

        ii. Incapacity to know that what one is doing is wrong.

            That in considering the second branch of the test of the defence of insanity, that is if the accused knew the physical nature of the act, did he know that he was doing wrong, the standard to be applied is whether he knew that according to the ordinary standard adopted by a reasonable man the act was right or wrong or that the act was wrong in law.

    c. Insane Delusions

        This is an insane belief, which cannot be eradicated from the person's mind by reasoning with the person. The rule on insane delusions is that an accused person suffering from such delusion must be treated as being in the same position of responsibility as if the facts with respect to which the delusions exists were real. The defence would be available, for example, in a case where a person is deluded into thinking that another is attacking them to kill them, and he kills that other person in purported self-defence.

51. The court in the case of Leonard Mwangemi Munyasia v Republic (2015) eKLR, stated that the test as to insanity is strictly on the time when the offence was committed and no other. The held:

> " Both Section 12 aforesaid and the M'Naughten Rules recognize that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crim. Borrowing from a medieval English Judge,

Brian CJ in a 1468 case of Greene vs Queen, and who in turn reiterated Cicero who famously remarked that: -

The thought of man is not triable, for the devil himself knoweth not the intendment of man",

We are of the view that a court cannot, as the trial judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus, it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person be considered as the backdrop."

52. In this context, what is probative value of expert evidence under Section 48 of the *Evidence Act*. The opinion of the expert is relevant, but the decision must nevertheless be the judge's. (see The Queen vs K.A. Wijehamy 61 61 NLR 522)

53. In critiquing expert evidence Lord Woolf in his Access to Civil Justice report stated: -

> " Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."

54. Expert opinions are admissible to furnish courts with information which is likely to be outside the courts' experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case. (see state v. Pearson and others (1961) 260 Minn. 477)

55. In the case of AG v Republic (Criminal Appeal E008 of 2021) [2022] KEHC 11299 (KLR) the court highlighted the following:

> " While expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.
>
> Firstly, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
>
> Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
>
> Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is cogent and give reasons why the court prefers the evidence of one expert as

opposed to the other. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact."

56. What the accused is persuading this court to find is whether at the time of committing the offence, he was in a state of mind of abnormality as defined in the case of R v Byrne 44 Cr. App. R. 246 the court in their quest to settle this issue defined abnormality to give rise under section 12 of the Penal Code on the defence of diminished responsibility for reason of insanity. The term abnormality of the mind was defined as follows:

> " ..... a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the minds activities in all its aspects, not only the perception of physical acts and matters, and the ability to form rational judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to consideration of the extent to which the accused's mind is answerable for his physical acts, which must include consideration of the extent of his ability to exercise will power to control this physical acts."

57. From the facts of this case, conversely given the strength of PW1 as regards the chain of events of 26th February, 2019, it manifests that on the material day, the accused person was not prevented by reason of mental derangement, imbecility, idiocy or disease of the mind to appreciate the nature and quality of the act he was doing of inflicting fatal injuries to the deceased. The question I pose is whether if indeed the accused was under an insane delusion as to the existing facts, would he have explained to PW1 with respect to the death of the deceased and the manner in which the unlawful act was committed. In my considered view, the delusion which existed at the time was not real. This is a man who was capable of understanding what he did and what he was doing as deducible from the conversation he had with PW1. In the case of complete insanity or mental illness, the accused could have not even known that he has committed an act or an omission which constituted the killing of his girlfriend, the deceased in this proceedings.

58. What the law by virtue of Section 12 of the Penal Code envisages, is for the court to delve into the test of incapacity which greatly restricts the availability of the defence compared to the test of a lack of knowledge. The element of incapacity is narrower than lack of knowledge because it is possible to generally possess the cognitive capacity to know the nature of his/her act or that it was wrong but not to have known of it at the time when the crime was committed. In construing the evidence of PW1, the nature and quality as comprising the impairment of either the surface features of the act, or its harmful consequences phases like one who appreciates and understands the deeper level that he had assaulted another human being was indicative of some level of cognition of one's conduct. This is one case I make a finding that the accused at the time had the ability to perceive the consequences, impact and the result of a physical act carried out, which resulted in the death of another human being whom he had an intimate relationship with during her lifetime.

59. It is appropriate at this juncture to lay a formulation of this case being that the accused circumstances can be conceptualized as that of diminished responsibility. Why do I say so? It is trite that where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind whether arising from a condition of arrested or retarded development of mind or any inherent causes induced by disease or injury has substantially impaired his mental responsibility for the acts or omissions which are traceable to the killing of a human being. This court from the evidence catalogues, the diverse strains of the insanity defence which in other situations has been adopted to absolve mentally ill accused persons of criminal liability. In this respect, there

are two tests which are interlocked in this matter as propounded in M'Naughten rules case. First, is the cognitive test and second moral incapacity. Essentially, the moral incapacity test asks whether an accused person's illness left him/her unable to distinguish right from wrong with respect to his/her criminal conduct. Whereas the cognitive incapacity test examines whether an accused person was able to understand what he/she was doing when she committed the crime.

60. History is the primary guide for this analysis and the scope for criminal responsibility though complex in such cases is animated in the evaluation and re-evaluation of the convincing and truthfulness of the testimony of PW1 who graphically put the circumstances at the scene of the crime in context. Against this backdrop, and balancing the relationship between criminal culpability, mental illness among them the workings of the brain, the ideas of free will and responsibility cannot be fully divorced from the unlawful acts and omissions committed by the accused person in this case. He may have lacked the requisite malice aforethought but on that particular day, he could tell right from wrong when committing his crime as shared with the prosecution witness who took the witness box as PW1.

61. It is in my disposition that the accused is exonerated from the offence of murder as defined under Section 203 of the Penal Code and in the alternative I find him guilty for a lesser charge of manslaughter as defined in Section 202 and punishable under Section 205 of the Penal Code and as a consequence thereof, I enter conviction for the aforesaid offence as per the law established. In short insanity in our law requires prove of total alienation of reason in relation to the offence charged as a result of mental illness, mental disease or defect or unsoundness of mind. The only distinction between insanity and the state of diminished responsibility recognized by our law is that for the latter state to be established, something less than total alienation of reason will suffice.

Verdict On Sentence

1. At this stage of the proceedings, the court is called to impose an appropriate sentence considering the various factors and objectives of sentencing. I must admit that it is one difficult tasks for this court as there exists no guideline as to the exact amount of time one should serve in custody for a particular offence. That is largely left to the discretion of this court, which I am mindful to exercise judiciously.

2. The accused person herein was charged with the offence of murder but convicted of a lesser sentence of Manslaughter as established in the provisions of section 202 and as punishable under section 205 of the Penal Code.

3. In mitigation, Learned Counsel Ms. Oduor filed submissions reiterating the issue of the insanity defence raised seeking the court to exercise discretion to sentence the accused to a non-custodial sentence. In considering the sentence which this court can impose against the accused person, the starting point would be the provisions of Section 205 of the Penal Code which prescribes a life imprisonment sentence. I am however conscious of the dicta in the case of Francis K. Muruatetu v R (2017) eKLR which moved away from the mandatory prescriptive sentences in the code and embraced judicial discretion, which is meant to consider the aggravating factors and circumstances surrounding the offence. The factors to be considered as laid in the case of Muruatetu are: -Age of the offender, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other relevant factor.

4. The imposition of a life sentence robs off one's whole life, which is pegged on his/her eventual death. The sentence does not speak to the aspirations of the objectives of sentencing as a whole as provided in the Judiciary sentencing policy guidelines.

5. In addressing the issue of life imprisonment, the Court of Appeal in the case of *Manyeso v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) had this to say:

> " we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

6. Additionally, in R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

> " The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

7. From the above cited authorities, it is evident that the courts are not restricted to the mandatory sentences. In the instant case and in ordinary circumstances, the court would have imposed a life sentence. However, in arriving at an appropriate sentence there is need to consider all the factors as laid in the case of Muruatetu and the objectives of sentencing well enunciated in the judiciary sentencing policy guidelines as follows:

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

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

   c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

   d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

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

   f. Denunciation: to communicate the community's condemnation of the criminal conduct.

   g. Reconciliation: To mend the relationship between the offender, the victim and the community.

h. Reintegration: To facilitate the re-entry of the offender into the society.

8. This was unlawful killing but the circumstances in Section 203 of the Penal Code are not present culminating into this court finding the accused guilty of manslaughter. It is crystal clear that the deceased is dead and the accused caused the deceased's death and did so unlawfully as set out in the judgment of this court. It transpired from the analysis of the evidence that the accused is culpable of homicide but on ground of diminished responsibility, I found him guilty of manslaughter which is the significant reformulation as implicit from my judgment. This is a mitigating circumstance in sentencing the accused person for the court concluded that the defence so raised of mental infirmity is a partial defence which is different from a complete defence as defined in Section 12 of the Penal Code.

9. For the foregoing reasons and considering the sentencing policy guidelines of the Judiciary, 2023, the various case law principles as outlined above, I have come to the conclusion that the accused person should serve a custodial sentence of 7 years with a credit period of the time spent in custody as per the provisions of Section 333(2) of the Penal Code.

DATED AND SIGNED AT ELDORET THIS 12TH DAY OF AUGUST, 2024

.....

R. NYAKUNDI

JUDGE

In the presence

Mr. Oduor, Advocate

Mr. Mugun, Senior Prosecution Counsel.