Republic v Wanjala (Criminal Case E029 of 2015) [2024] KEHC 10146 (KLR) (12 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10146 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E029 OF 2015

RN NYAKUNDI, J

AUGUST 12, 2024

BETWEEN

REPUBLIC .... PROSECUTION

AND

PATRICK WAFULA WANJALA ALIAS BENARD .... 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 diverse dates between 22nd February, 2013 and 25th February, 2013 at Maina Sub-location within Elgeyo Marakwet County murdered Beatrice Jepkosgei Kiprutto.

2. The accused pleaded not guilty to the charge as stipulated under section 203 of the Penal Code. He was represented at the trial by Mr. Miyienda advocate and the prosecution was conducted by Mr. Mugun, Prosecution Counsel. The Prosecution called a total of five witnesses whose brief recollection of the events is as follows:

3. PW1 Emmanuel Kaptoro a resident of Kiseruira location and a retired teacher recalled that one Bernard came calling to his home looking for employment. Fortunately, PW1 has some farming activities to be done, he therefore engaged him on a temporary basis allocating him a house within his homestead where he resided with a girl by the name Nelly. In the year 2013, PW1 noticed the presence of a woman who was coming at night to that house notwithstanding the presence of Nelly. In the course of events, Nelly went to PW1 to lodge a complaint about this second visitor who keeps on going to their house with the accused. On consideration of the matter PW1 decided to consult the father to this second girl who was visiting the accused person. According to PW1, without prior knowledge, he came to learn that Bernard had been arrested on allegations of having stolen a sheep and the circumstances in which were not privy to his knowledge, this second girl by the name Beatrice was found murdered and

that became a subject of investigation. On close examination by learned counsel Mr. Miyienda, PW1 confirmed that he did not know how the deceased met her death and who was the culprit.

4. PW2 Raymond Kipruto Yano gave evidence to the effect that in March 2013 he got information from PW1 that his daughter Beatrice had a relationship with the accused person. From the report shared by PW1, immediately soon thereafter his daughter went missing but on trace and find mounted by the police and members of the public, her body was located at Kapsowar Mortuary. Further, PW1 on being shown the documentary evidence in the form of photographs positively identified the deceased and also participated in the post mortem examination to establish the cause of death. Likewise, to PW1 evidence in cross examination by learned counsel for the accused Mr. Miyienda, he denied any knowledge as to how the deceased was killed and the person to be held accountable for the crime of murder.

5. PW3 Betty Jepkemoi Kipyego on oath told the court that on 13th February, 2013 on or about 3:00PM, she went out to get food for her cows from a neighbouring home. In that premises, the front was a shop and a residential house from the rear. The cow food was kept in the front room. She noticed that the room was untidy and took the opportunity to clean it up. It is at that moment she incidentally came in contact with the body of a human being hidden under the bed. As she was processing the shock, PW3 at the same time telephoned the Assistant chief of the area who in turn came to the scene in company of the police. The normal occupier of the house by the name Bernard also referred to as Patrick Wafula Wanjala was not present to provide any evidence as to the death of the deceased. She was later to be called upon by the police to record a statement on the matter.

6. PW4 Wilson Chepkurui Cheboi a retired Assistant Chief recalled that on 25th February, 2013 while at Kapsowar township he was called by the village elder who told him of a woman found dead in the house apparently occupied by the accused person. As one of the local administrators, PW4 in company of the OCS and other Police Officers visited the scene only to confirm the earlier information conveyed of a body of a human being found hidden under the body. In addition, PW4 confirmed that the accused person shared the residence in question with the deceased. That is how he became the prime suspect for the murder.

7. PW5 Edwin Kimutai a residence of East Marakwet ward testified to the effect that on 26th December, 2012, the accused person went to his home and made an offer to rent his room for Kshs. 300 per month. He therefore accepted the offer and the accused persons moved in but in the course of their landlord-tenant relationship, he had not met his wife. That is the substratum of the evidence relied upon by the prosecution.

The defence case

8. The accused person was placed on his defence in terms of Section 306 of the criminal Procedure code. He elected to give a sworn statement in which he denied any involvement or participation with the death of the deceased. He only recalled that on the 23rd February, 2013, he was invited for a circumcision celebration at Elgeyo Marakwet, which invitation he responded positively by taking part of the activities of the day. Thereafter, in the best of his recollection, the accused person left the ceremony and went back to his house and on knocking the door, nobody responded but on opening, the deceased person was seated and in anger. That is when he inquired why the deceased was bitter and unhappy but that question was met with an assault and in the struggle she fell on the bed. It was at that time when she collapsed and never to wake up. Further, the accused told the court that fearing for his life, he took flight from the house only to be arrested and charged with the offence of murder.

9. The Senior Prosecution Counsel, filed submissions in support of the prosecution case. Counsel submitted on the main elements of the offence of murder. On the cause of death, he submitted that save for instances where the pathologist who examined the body for purposes of ascertaining the cause of death in terms of the post-mortem report. On this, learned counsel cited the decision in Ndungu v Republic (1985) eKLR. In this instant case, PW2 testified that he witnessed the post-mortem of the deceased, his daughter. That the Post-Mortem form was regrettably not produced due to the fact that the doctor and the investigation officer were not availed to testify as expected despite the numerous adjournments for that purpose. Counsel submitted that it was not fatal to its case and cited the decision on Benard Reuta Masake v Republic (2019) eKLR. The accused himself admitted that he assaulted the deceased a result of which, the deceased dropped to the ground and never breathed again.

10. On the element of malice aforethought, Learned Counsel stated that the element can be inferred from the blunt force trauma secondary to bleeding from a ruptured spleen. On this counsel cited the decision in Bonaya Tutu Ipu & another v Republic (2015) eKLR and Kennedy Wesonga Kwoba v Republic (2013) eKLR.

11. In concluding, counsel submitted that the accused's person conduct immediately after the incident speaks volumes as to his state of mind-that he himself appreciated that he was wholesomely guilty of the murder of the deceased. That appreciation rendered him unable and unwilling to defend himself or surrender himself to the authorities.

12. The Accused person through learned counsel Mr. Miyienda submitted that from the prosecution's case, it would pass for one where there was no evidence to implicate the accused whatsoever.

13. Learned counsel submitted that the accused person willingly divulged what transpired. He told the court that he only hit the deceased with his fist after she hit him and he fell against the door of their room. The accused had drunk busaa before coming to their room. The accused and deceased apparently quarrelled over her refusal to prepare food. That the deceased provoked the accused by hitting him and as a result/consequence of which the accused hit her with a fist and she fell sustaining what probably led to her death.

14. On medical evidence, it was counsel's submission that the prosecution did not call the doctor who performed the post mortem to testify. So, as it is, the prosecution did therefore, not demonstrate or prove the cause death of the deceased. The post mortem report available though said that the cause of death was "blunt trauma bleeding from raptured spleen." This court can only conclude from the evidence of the accused that the deceased died due to the fist hit on her. This must have been caused by the heavy fall on the bed.

15. Learned counsel submitted that taking the totality of the evidence, it is clear that the accused did not have any intention to harm and kill the deceased. There was just a 'fight' of some kind and the fist blow by the accused on the deceased unfortunately went bad. That this is a case where the accused only intended to discipline or punish the deceased for those small misgivings in their house. The accused tried to help the deceased but when he realized she was not responding, he panicked and quickly decided to leave the scene for fear of attack from the people around upon discovery of what had happened.

16. Counsel further submitted that the prosecution did not prove the existence of 'mens-rea' on the part of the accused. That running away by the accused was spontaneous and out of fear. He was not escaping but just went to his home place fearing attack from the people around.

17. The accused would have chosen to cover what actually happened because there was no eye witness but he decided to upon up and spoke the truth. It is now time for "the truth to set him free." Accused was not in hiding when he was arrested in Kitale.

18. On sentence, counsel submitted that the incident took place in 2012. The accused was arrested in 2015. He urged the court to consider the period of 8 years and 7 months spent in custody as sufficient sentence for the accused on a finding of manslaughter.

Determination

19. Having laid that background, the evidence adduced and submissions tendered, it is this court's duty 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 Beatrice Jepkosgei Kiprutto

20. In order to establish conviction under Section 203 of the Penal Code

    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.

21. 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.

22. 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.

23. This is purely a circumstantial case. Circumstantial evidence is said to be the best evidence. It is what the court pronounced in Neema Mwandoro Ndunya vs. Republic CRA 466 of 2007 where 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".

24. Circumstantial evidence, though the best evidence, must be taken with utmost caution where the court relies on it entirely. 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."

25. 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: -
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> > "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."

26. It is now well settled by a catena of authorities as outlined above that commission of an offence under Section 203 of the Penal Code, the prosecution must lead evidence to connect all links in a chain, to point the guilty of the accused person or persons alone and nobody else. That is the threshold in which this criminal charge against the accused person must be tested against particularly to satisfy the criteria on the elements of the offence proven beyond reasonable doubt. In the instant case, the last seen theory comes into play on evaluation and scrutiny of the prosecution and defence evidence on causation and positive identification of the accused person as the perpetrator of the offence. This is about the time gap or lapse between the point in time when the deceased was seen alive and the proximity of the accused person being within equal range where the deceased body was recovered. In the instant case from cumulative evidence by the prosecution and that of the defence the deceased was last seen alive in her house, a fact correspondingly admitted by the accused person hence ruling out any possibility of other persons or a third party gaining entry to the premises to inflict the fatal injuries as confirmed in the post-mortem report.

27. From the evidence of PW1, who was an employer to the accused person, he acknowledges that during the period of contractual engagement with the accused, he cohabited with the deceased person since 2013. This is corroborated by the evidence of PW3 a neighbour to the deceased and the accused person. Similarly, PW5 confirmed that he had rented the very premises to the accused person at a monthly rate of Kshs. 300/=, in which he occupied with the deceased.

28. In rebuttal to the case by the Prosecution, the accused person admitted to having a love affair with the deceased and during its subsistence, they lived together at the house rented from PW5 as their landlord. In order to prove the previous connection between the deceased and the accused, PW3 confirmed that she occupies an adjacent room with that of the accused person jointly with his girlfriend. It so happened that PW3 had kept the cow food in the front room of that premises and that is when she discovered

the body of a human being which was positively identified by her father PW2 during the post-mortem examination. Thereafter, the accused was never found within the vicinity of the scene, however as the investigation commenced, will eventually revealed he was arrested as the principal suspect to the murder of the deceased. The chain of circumstantial evidence demonstrates that the murder of the deceased was not committed elsewhere and her body to be dumped in the very house she lived with the accused person. It is firmly established by the testimony of PW1, PW3, PW4 and PW5 cumulatively on a day to day basis, the deceased seems not to have left the residential room which they occupied in company of the accused person. In order to exonerate himself, the accused person seems to allude to the plea of alibi but late in the day at the time of the incident, he points out that there was an altercation with the deceased on arrival at his house. The essence of it trying to introduce the defence of self under Section 17 and provocation as defined in Section 207 and 208 of the Penal Code. Notwithstanding that defence, the date and time of the incident, the accused was squarely at the scene. As per his testimony, the deceased appeared to be unhappy and in rage and on being asked by the accused person to share the issues at stake, some kind of fight arose and from the pull and push, he actually pushed the deceased only to fall on the metal bar of the bed.

29. The murder charge is solely proved either by direct or circumstantial evidence, closely marshalled by the prosecution to establish malice aforethought beyond reasonable doubt. 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.

30. 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."

31. 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

32. 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.

33. It is a general rule of Kenyan criminal law that an accused person's unlawful conduct and culpable mental state must coincide in time precisely which means to exist contemporaneously from the facts in the circumstantial evidence the accused assaulted the deceased by striking her with a fist on the head which from the post mortem report, became the predominant cause of death. Thinking that the deceased was already dead, he placed his body under the bed in the house where they lived together. This is deliberate intended action caused the death of the deceased is indisputable. To accede to the facts of the present case it is implicit the conduct of the accused person was voluntary, which is a fundamental requirement to established the culpability of an offender. The involuntariness asserted by the accused person in his defence appears to be an afterthought in absence of cogent evidence to determine liability on the part of the deceased. It worth observing that the accused had taken flight from the scene at the time the body of his girlfriend was found hidden under the bed of the house by PW3. The other point worth noting, is on the reasonable test when the accused person found the deceased seated in anger coupled with a mood swing of unhappiness. What would the reasonable person do? Did the accused do what the reasonable person would do? As indicated above

in the evidence by the prosecution, the ability to appreciate the wrongfulness of one's conduct comes from the circumstances of PW3 which permeates both unlawful conduct and intention at the time of committing the homicide. This test is significant for reason that the accused person had a filial relationship with the deceased person having cohabited together either as husband and wife or concubine

34. In my view, the ordinary stresses and disappointments of life, which are the common lot of mankind do not constitute an external cause constituting an explanation or excuse for a malfunctioning of the mind which takes it to the level of the exception created in Art. 26(3) of *the Constitution*.

35. In view of the discussion outlined above, according to the dispositions of the five witnesses, it is the finding of this court that the circumstantial evidence on the fact of death, the unlawfulness of it, the manifestation of malice aforethought and the last seen theory, positively placing the accused at the centre of the murder remains uncontroverted by the defence. As a consequence, the standard of proof of beyond reasonable doubt vested with the prosecution has been established to enable this court make a finding of guilty and conviction for the offence of murder contrary to Section 203. With respect to sentencing, the learned counsel for the accused person is invited to file brief submissions on mitigation, the lead counsel for the state to tie in with submissions on aggravating factors including whether the accused has any previous convictions. Further it is also in our criminal procedural law that the victim family be granted leave to file their input on sentence before the final verdict.

Sentence

1. The offence in which the accused person has to be sentenced for is murder contrary to section 203 punishable under Section 204 of the Penal Code. Prior to 2017, upon conviction against an offender for the offence of murder the only sentence prescribed by the legislature was that of death. However, with the supreme court's decision in Francis K. Muruatetu v Republic (2017) eKLR, the death penalty has the only sentence for the offence of murder was reconsidered and found to be unconstitutional as it was in contravention of Art. 25, 27, 28, 29 & 50 of *the Constitution*. This subjected any punishment to be imposed be determined by the trial court in compliance with the specific criteria set out in the dicta of the case, the sentencing policy guideline of the judiciary and other relevant factors designed towards imposing a fair and proportionate sentence.

2. With regard to this case, Learned Counsel Mr. Miyienda made the following submissions on mitigation, that the accused person has been in remand custody for the last years and 9 months. Learned counsel contended that the court should consider giving credit to any sentence likely to be passed against the accused person. On the other hand, learned senior prosecution counsel Mr. Mugun made oral submissions as well. That the accused person should be treated as first offender with a rider that this is a gender based violence, which has become rampant affecting the female gender like in the instant case.

3. The Supreme Court in its guidance in the Muruatetu case set out the following guidelines to be universally applied in deriving the appropriate sentence individualized to distinct facts for a particular case. The parameters thought through by the court include the underlying factors but should not be taken as an exhaustive list:

    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.

4. In addition, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

    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.

5. In the case of R vs Scott (2005) NSWCCA 152 Howie, Grove and Barr JJ stated:

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed.... One of the purposes of punishment is to ensure that an offender is adequately punished........... a further purpose of punishment is to denounce the conduct of the offender."

6. Imposing a sentence is an action that requires the trial court to objectively and purposively apply its mind underpinned on the well settled objectives and principles on sentencing, the provisions of the Penal Code in a manner which accords an accused person fair trial rights in Art. 50 of *the Constitution*. It is now trite through the various jurisprudential decisions which emphasize again and again that a sentence imposed by a trial court must always be individualized, considered and passed within the ambit of the laid down principles and relevant factors. Self-evident from the facts of this case is that it was a gender based violence which occurred within the matrimonial home. Domestic violence and femicide cases have become a serious evil of late with high incidences within the major cities of this Republic. The main victims being the female gender committed in a wide range of romantic relationships or within the matrimonial home. The country realizing that things are getting out of hand, a special legislation was enacted by Parliament in 2015; *Protection Against Domestic Violence Act* No. 2 of 2015 as a necessity to deal with gender based violence. It is appropriate at this stage to mention that from the facts of the case there seem to have been no compelling and substantial circumstances to justify the killing of the deceased by the accused person. This cruelty inflicted upon the deceased is

best described by the injuries from the post mortem report which indicated that the deceased's death was caused by a blunt trauma bleeding from raptured spleen. By this conduct, the accused has shown himself to be a man who has little regard for women even those who are intimate partners. The abuse and assault by the accused against the deceased ultimately occasions death.

7. I have taken all the traditional factors on sentencing into account as well as the basic principles in the Muruatetu dicta and the sentencing policy guidelines 2023. In addition, the nature and violent Acts of attack against the deceased from the very person she expected to protect and secure her right to life as espoused in Art. 26 of *the constitution*. In my judgement the aggravating factors outweigh the mitigation offered by learned counsel on behalf of the accused. It is also settled law that the court in sentencing an accused person must take into account matters arising under Section 333(2) of the CPC on presentence custody. In deciding the day on which the sentence is take to have commenced, the court must take into account any time to which the offender has been held in custody in relation to offence to which the sentence relates pending the hearing and determination of his trial. Where an offender is given credit for a period of pre-trial detention, this time should be reflected in both the total sentence and non-parole which is usually exercised by the president under Article 133 of *the constitution*.

8. The upshot of it allis that the accused person whom I have already found culpable for the murder of the deceased is hereby sentenced to 25 years custodial sentence with a credit period of 9 years and 4 months spent in custody before the final judgement of this court and must therefore be deducted from the whole of the sentence herein ordered to be served.

43. 14 days Right of Appeal

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

..

R. NYAKUNDI

JUDGE