



REPUBLIC OF KENYA



**KENYA LAW**  
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**State v Magamu (Criminal Case 17 of 2017)  
[2023] KEHC 1108 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1108 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE 17 OF 2017  
RE ABURILI, J  
FEBRUARY 22, 2023**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**WALTER MAGAMU ..... ACCUSED**

**JUDGMENT**

1. The accused person herein Walter Magamu is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 28<sup>th</sup> August 2017 at the District Commissioner's residence in Gem Sub County within Siaya County, the accused person murdered one Mercy Angu Muhenje. The accused pleaded not guilty to the charge against him and the matter proceeded to full trial. The prosecution called a total of nine (9) witnesses in support of its case which is summarised below.

**The Prosecution's Case**

2. PW1 No. 2017029553 AP Rick Bidali Imbaya testified that on the 28/8/2017 at about 6pm, he was at Yala District Commissioner's residence with AP Mercy Muhenye Angu, where they officially booked on duty at 1800hrs (at 6pm). He testified that he was armed with a G3A3 Rifle body number 03063 loaded with one Magazine of 20 rounds while his colleague Mercy was armed with G3FMP Rifle body number 389134 loaded with a magazine at 20 rounds of ammunition. He testified that he knew the serial number of his colleague's rifle because they booked together and he was the one who recorded its particulars in the Occurrence Book.
3. PW1 testified that at about 9.30pm, whilst at their place of duty at the DC's residence at Yala, the accused, who was well known to him, arrived. He testified that the accused was Mercy's husband and his relative and had come to visit her and they had previously met severally. It was his testimony that



- the accused came to where they were seated and spoke to him. PW1 testified that there were no lights on that night as the lights had gone off.
4. PW1 testified that the accused spoke to him and introduced himself saying I am Walter. I want to talk to my wife. It was his testimony that he heard and knew the voice of the accused which he recognized as the two had been together since PW1 was posted to Yala in March 2017 although they did not work in the same station and were colleagues.
  5. PW1 testified that the accused asked him for permission to speak to his wife and he, PW1, went to the other side of the office to give the accused time to speak to his wife. He testified that after some 3 - 4 minutes and about 20 metres away, he heard a gunshot from the front side of the office. He returned to where he had left his colleague Mercy but she was not there so he proceeded to the AP line where his colleague police officers resided and on approaching the 1<sup>st</sup> block of the AP line, he saw something lying down. PW1 switched on his phone light and saw the body of Mercy Muhenje lying on the ground and facing down in a pool of blood. He called his colleagues who responded and together they started looking for the rifle that Mercy had when they went to work as there was no rifle where she lay. PW1 alerted Kevin Kadenge and Alex Mukua who lived next to where Mercy's body was. The accused was not at the scene.
  6. It was his testimony that he saw the rifle lying about 10 metres from where Mercy lay. He further testified that Sergeant Alex Mukua called their AP boss Mr. Wafula who went to the scene and called the DCIO Chief Inspector James, who collected the rifle and they moved near the body of Mercy. They then saw and identified spent cartridges about 2 metres from where Mercy lay. They also secured the scene which was about 10 metres from where PW1 had sat with Mercy. He identified the rifle which Mercy had and which he saw on the ground after Mercy's body was found, the Rifle with serial number G3FMP 389135 as well as the extract of the OB where he booked his rifle. PW1 identified the accused before court and reiterated that the accused came to the place where he worked with Mercy on that fateful night.
  7. In cross-examination, PW1 stated that he had known Mercy for five months at Yala. He stated that the accused was her husband and that she had introduced the accused to him. He stated that he had no knowledge of her having a boyfriend. PW1 stated that when the accused went to where he was sited with Mercy and requested to talk to her, PW1 left the two and that he did not hear what they were conversing about. He reiterated that he heard gunshots although he could not tell how many shots they were. He also never heard any screams. PW1 stated that the Rifle was both semi-automatic and automatic. He further stated that he knew that three cartridges were recovered from the scene.
  8. It was his testimony that the DCI took over the case for investigations. He stated that from where he had moved, which was the front side of the office, he could not see the rear part where he heard the gunshots. He stated that he rushed to where he had left Mercy in the company of her husband just seconds back but that he did not see her. He testified that he saw her when he went towards the residence for Administration Police Officers. PW1 stated that it took him 2-5 minutes to locate Mercy as he moved towards the Police Lines. He further stated that there were people living at that block where he found Mercy's body. He stated that he was the first person to arrive where Mercy lay. PW1 stated that he could not tell if Mercy had any issues.
  9. PW2 Henry Ilavonga Angu the father to the deceased Mercy Angu testified that the deceased was a police officer attached to Yala after her training and that in December 2016, she returned home with the accused who said that he wanted to marry his daughter, Mercy. PW2 testified that later in the same month of December 2016 the accused paid him part of dowry comprising three cows and Kshs. 10,000.



10. PW2 testified that from June 2017, Mercy started complaining to him that the accused was troubling her and that PW2 assured her that he would speak to the accused which he did. He testified that the accused then started calling him and telling him that since his daughter Mercy did not love him, he would do something terrible to her that would make PW2 and his family not to forget him. PW2 testified that he told the accused to arrange for a meeting to discuss the issue but the accused told him that he had no time for that. He testified that he called Mercy and told her to be careful because the accused was a threat to her life.
11. It was his testimony that on the 29/8/2017, at about 8am, he received a call from someone who informed him that they were police officers at Yala and who asked him if he knew Mercy and told him that she had been shot dead so he should go to Yala. It was his testimony that he left Serem for Yala Police Station where he learnt that Mercy's body had been taken to Yala Sub County Mortuary. PW2 went to the Mortuary and identified her body. He testified that the postmortem was carried out in his presence and in the presence of his brother James who followed him to the Morgue after getting information that he had left for Yala.
12. PW2 testified that from what he saw on Mercy, she was shot from her back as she ran and the exit was her breast. He confirmed that the body he saw was his daughter's. He testified that the last time he spoke to Mercy was on 28/8/2017 at 9.00pm when he called her and told her to find time and go home so that they discuss the issue of Walter's threats. He testified that Mercy told him that she had issues with Walter but she never told him what specific issue they had. PW2 identified the accused in court. He testified that after Walter paid dowry in December 2016, they met again twice and never met again until he heard that Mercy had been shot dead.
13. In cross-examination, PW2 stated that Mercy told him that her husband was harassing her. He stated that the two had a child together who was about two years at the time of Mercy's demise. He denied a suggestion that Mercy told him that she had found another husband or man. He reiterated that on the 27/8/2017, Walter called him saying Mercy was undermining him and that he would do something terrible to her and he in return called Mercy at 9.00pm on 28/8/2017 and told her to find time and go home so that they discuss the issues which were causing Walter to threaten her life.
14. PW3 Dr. Shirachi David Ikura, a Consultant Physician working for Bungoma County Government testified that he did a postmortem on the body of Mercy Angu Muhenje on 29/8/2017 at Yala Sub County Hospital Mortuary in the presence of PC Fredrick Omondi, Henry Ilavonga Angu and Rose Ayieta Angu. He testified that the exercise was done at 4:30pm.
15. PW3 testified that the body was of a female African lady of 27 years' old, in good nutrition and well-built of a height of 5.8 ft. He testified that her clothing comprised of a torn brazier, AP uniform consisting of a trouser and coat which were heavily blood stained. On the Postmortem changes, PW3 testified that rigor mortis was presented with a cold body with dilated pupils and with a distended abdomen. (enlarged).
16. He testified that externally, she was pale, had 2 small torn openings at the chest at the left breast of less than 1cm. PW3 testified that the openings extended to the internal thoracic cavity. He further testified that there was another laceration on the lateral left labia majora extending to the pelvic cavity and one large laceration of about 7 cm diameter on the right thigh medial side. He testified that he observed the small openings on the chest having circumferential soot around them and burnt tissues.
17. In the Respiratory System, PW3 testified that there was fractured 8<sup>th</sup> and 9<sup>th</sup> left Anterior ribs with contused left lung, ruptured heart at the right ventricles. he also found massive hemothorax and pneumothorax (lungs) and that the right lung was collapsed. The digestive system had disintegrated.



- intestines while the liver, stomach and spleen were normal although there was a bruise on the ascending (large) intestine.
18. PW3 testified that in the genitourinary system, there was tear of the left vaginal wall extending to the cervix of the uterus and that the pelvic bones were fractured with evidence of secondary missiles in the whole pelvic area. He testified that the head, Nervous System, Spinal Cord and Spinal Column were all normal.
  19. PW3 testified that as a result of his examination, he found the cause of death was unnatural and as a result of massive haemorrhage due to pelvic injury and rupture of the heart due to gunshot wounds. He testified that he issued Death Notification No.0056518. He further testified that a piece of bullet was recovered from the pelvis which was taken for further ballistic examination. PW3 testified that he signed the report on 29/8/2017 at 4.30pm at Yala Sub County Hospital Mortuary. He produced the Postmortem Report as PEX 1.
  20. PW3 further testified that the death was unnatural because the person had no prior illness history. He further testified that he could not tell how many times the deceased was shot but there were chest and pelvic injuries as a result of gun shots.
  21. In cross-examination, PW3 stated that there were no injuries at the back so the shots were fired from the front, left chest area, but exited through the pelvis and that is why the bullet was found inside the pelvis which was completely fractured.
  22. PW4 Kevin Okoyo Otieno, a Pharmaceutical Technologist and working and residing in Lamu testified that in 2017, he used to work at Green Life Chemist in Yala and would sell medicine to customers/patients. He testified that the deceased was his very frequent customer and also used to bring her other customers so the two got intimate leading to a love affair until 28/8/2017 when she died. He testified that they knew each other for long but become close in January 2017 when they developed a love affair.
  23. It was his testimony that in the course of their relationship, he established that she had a son. He further testified that she told him that she bore her son with a man whom she realized was married and that she did not want to be a second wife so she cut off that relationship and that that was the last relationship that she had. He further testified that he knew where she lived at Yala AP Camp and that he visited her at her house severally and that he at times could visit her over the weekend when he was off duty. He testified that he had met her son and she also took him to PW4's Chemist.
  24. PW4 testified that on a Saturday in the month of August 2017, he spent at the house of Mercy at the Yala AP camp then he travelled to his home in Rachuonyo and did an interview on a Monday. It was his testimony that he reached Yala late past 7pm and that it was raining heavily and as he alighted at the bus stop and waited for the rain, he called Mercy to tell her that he had arrived and she requested him to go and stay with her son that night because she was on night duty and her sister had reported back to school so her son was alone. PW4 testified that he agreed and took a motor bike to her place.
  25. PW4 testified that on arrival, Mercy was cooking dinner and her son lay on a sofa. He testified that they ate together and he went to rest on her bed as she attended to her son and prepared herself to go on duty. It was his testimony that she left a few minutes to 9.00pm, dressed up in her police uniform.
  26. It was his testimony that he later woke up upon receiving a hot slap on his face and saw a man asking him "What are you doing on my bed? Do you know that I paid for this lady? PW4 testified that the man then dashed out calling the name Mercy! Mercy! PW4 testified that he was confused because he had no idea that Mercy had another man. He further testified that he got out of the bed and on reaching the door, he heard a gunshot. He testified that he heard another gunshot the second time before he



- escaped through the backside of the house. He testified that it took him less than 10 minutes after the man left before he heard the gunshots.
27. PW4 testified that Mercy's house had 2 bedrooms and a sitting room. He testified that Mercy's son was still lying on the sofa. It was his testimony that there was blackout but they had candles in the room. He testified that he saw and identified the man who slapped him. PW4 testified that he only wore a trouser and escaped to his house through the back of the AP Camp. He ran on foot up to his house which was about 500 metres away. He testified that the people he met on his way asked him about the gunshots but he could not explain.
  28. It was his testimony that he slept and the following day at 8 am, he heard people saying that Mercy had been shot dead so he went to the Yala AP Camp sometime between 9 - 10 am to find out what had transpired and he was escorted to the head of the camp who recorded his statement and then took him to the DCIO Yala who also recorded his statement.
  29. He testified that he later learnt that the man who slapped him from the house intercepted Mercy and shot her dead. He further testified that Thereafter, he learnt that the man who slapped him was arrested. He testified that when he was taken to an identification parade at Siaya Police Station, he identified the man out of a parade of about 10 people.
  30. PW4 testified that the man slapped him about 15 minutes after Mercy had left and that he spoke to him as he was being slapped. He testified that there was light in the house and that he recognized the man who resembled Mercy's son and who wore a civilian jacket. PW4 testified that the man was not masked. He testified that he had no issue with Mercy and had a cordial relationship with her. It was his testimony that he had planned to meet her parents for introduction. PW4 identified the person who slapped him as the accused in court and that he had also identified him at a police identification parade. He testified that he went to the mortuary at Yala and confirmed that Mercy was dead.
  31. In cross-examination, PW4 stated that he was in a love relationship with Mercy for 7 months and that he had met her colleagues and friends and none of them told him that Mercy had a husband. He stated that he used to visit Mercy automatically on weekends but if she was off duty, she would visit him during the week days.
  32. PW4 further stated that there was a candle in the bedroom where he lay on the bed and that there was another candle light in the sitting room. He stated that Mercy's son was lying on a chair. He stated that the door was not locked because Mercy was to come back and that the door to the room where he was sleeping was also open. It was his testimony that the man slapped him once and asked him who he was and what he was doing in Mercy's house and if he knew that he had paid dowry for Mercy. PW4 testified that the person then went out before PW4 had the opportunity to respond to his questions.
  33. He stated that he got out of the bed and dressed up then he went to the door to find out what this was all about and 15 minutes later, he heard gun shots. He stated that all his phones were in his bag so he did not reach out to Mercy. He stated that he knew where Mercy was going that night, on duty but not exactly where she was guarding. He testified that the man was tall, slightly light skinned and he saw his face very well. PW4 told the court that he relocated to his present work station in Lamu in 2021.
  34. PW5 No. 256358 PC(W) Dorine Khisa testified that in 2016, she was at Yala Police Station. She testified that on the 28/8/2017 at 9 pm she was in her house within Yala AP Camp when she heard a baby crying so she got out to check. It was her testimony that she saw baby Nelvin, her colleague, Mercy Muhenje's son who was outside the house, to their house and passed by the Assistant County Commissioner's office since she knew that Mercy was on guard.



35. PW5 testified that as she proceeded on, at the main gate of the AP line, she heard Mercy talking to someone whom she heard her call Walter. It was her testimony that although she could not see Mercy, the two were having a loud conversation and she did not want to get into their conversation so she returned to her house with the baby but before reaching her house, she heard the gunshots.
36. She testified that she entered the house and locked the door because there was a black out but 20 - 30 minutes later, lights came back. She then opened the door, got out and walked towards where her colleagues were gathered and saw Mercy lying in a pool of blood near Sergeant Mokuu's house.
37. PW5 testified that she confirmed that Mercy was dead and as she was with mercy's baby, she returned to her house with the baby. It was her testimony that she had known Mercy for about 8 months as they were neighbours. PW5 testified that Mercy used to tell her about her husband but she had never met him. She testified that she found Mercy in Yala. It was her testimony that she had never met the accused before and that Mercy told her that her husband was called Walter.
38. In cross-examination, PW5 stated there was blackout on that night so it was dark. She testified that she could not see well and that she heard a baby crying so she got out and took him as he was outside their house. She testified that she never reached Mercy's house. She reiterated that she knew Mercy was on duty at Assistant County Commissioner's office so she went there with the child.
39. PW5 reiterated that she heard Mercy talking with someone and heard her call him Walter. She stated that she knew Mercy's voice very well. She further stated that it took like 7 - 10 minutes from the Assistant County Commissioner's office towards her house before she heard gunshots.
40. It was her testimony that Mercy's body was found not far from the Assistant County Commissioner's office. She stated that for the 8 months she knew Mercy, she had never met her husband or any other person said to be her husband or boyfriend. When questioned by court, PW5 stated that Mercy's baby was three years old.
41. PW6 No. 241619 Police Constable Kevin Kadenge who worked with Mercy Muhenje at Yala AP Camp testified that on the 28/8/2017 at about 9 pm, he was in his house at AP lines next to the entrance to the AP line when he heard an argument of two familiar voices of Mercy and Walter Magamu. He testified that he knew that the two had a child together and that the accused used to visit Mercy at the AP line to see the child. PW6 testified that he knew Walter from 2012 when he was deployed to Yala. It was his testimony that Mercy joined them in 2013.
42. PW6 testified that Walter used to be a police officer and used to visit and they could meet and exchange greetings. Further, that Walter used to sit outside and chat with Mercy and that he could also be seen walking with Mercy and their child. He testified that he had not seen Walter coming to see Mercy for some time.
43. PW6 testified that his house was near the entry to AP line and next to the Assistant County Commissioner's office gate. He testified that the conversation he heard was an argument between Walter and Mercy and that shortly thereafter, he heard a gunshot. He testified that he took cover then heard another gunshot which came through his wooden door and hit the 2 sides of the wall to his house. He testified that he remained under cover until the gun went silent then he opened the door and saw Mercy's lifeless body lying at his door step.
44. He testified that ASP Wafula who is now deceased and other officers gathered and engaged on a manhunt for the accused within the compound of the Assistant County Commissioner and found the gun abandoned there, about 10 metres from where Mercy's body lay. It was his testimony that the DCIO arrived at the scene and took possession of the gun, a G3 FMB gun and that the deceased's



body was taken to the morgue by the Officer Commanding Station (OCS) Yala Police Station. PW6 identified the accused in court.

45. In cross-examination, PW6 stated that he had known Mercy and Walter for some time. He stated that in 2017, he saw the accused visit Mercy at least once. He further stated that the accused used to come during the day, pass by and say hi to him and go to Mercy's house.
46. He stated that he heard a gunshot when he was next to his window and that he heard the two-gun shots in intervals but never heard anybody scream. He reiterated that he knew the accused Walter Magamu as an Administration Police Officer. PW6 stated that it was not easy to miss a target with a G3 gun as it has accuracy. He stated that at the scene, he saw three spent cartridges but heard only two shots. He stated that he was alone in his house at that time.
47. PW7 No. 231165 Alex Mudindi Mwandawiro, a Senior Superintendent of Police attached to the Forensic Laboratories Ballistics at the DCI National Forensic Laboratory and a firearms Examiner with twenty years' experience testified that he was the author of the Firearms Ballistics Report dated 11/9/2017 following a response to a request made by Yala Police Station in response to a Charge Register No. 633/93/2017 vide an Exhibit Memo form accompanied by the following exhibits:
  - i. GSC('A') a Rifle Serial No. FMP389135 (shows court Rifle).
  - ii. GSC('B1'- 'B17') being 17 rounds of ammunition.
  - iii. GSC('C1'- 'C3) being 3 spent cartridges.
  - iv. GSC('D') a bullet fragment in the Memo form which I have (MF15).
48. It was his testimony that on the GSC 'A' G3 Rifle, (MF1) he found that it was manufactured in Germany by Hackler & Koch, the caliber was 7.62 mm and by design, it uses chambers caliber 7.62 x 51mm of ammunition which are exhibits GSC (B1 - B17).
49. He testified that the general and mechanical condition of the G3 Rifle was good and that it was well maintained and was capable of firing. He testified that he carried out physical examination of four particular areas of the G3 Rifle; the breach face, the Chamber, the bore and the muzzle. He further testified that these four areas revealed some blackish soot like deposits and this was an indication of gunshot residue. However, that there was no technology to discover when the gunshots were fired. He then proceeded and test fired exhibits GSC ('A') using 3 rounds of ammunition so as to carry out comparative analysis and from the examination, he formed the opinion that Exhibit GSC 'A' and GSC B1-B7 were all capable of being fired and that they were firearm and ammunitions respectively as defined under the [Firearms Act](#), Chapter 114 Laws of Kenya.
50. He testified that he then examined exhibits GSC C1-C3, spent cartridges of calibre 7.62 x 51mm, compared them against each other and found out that they were fired in the same firearm. He then compared C1-C3 in conjunction with the 3 test cartridges which he personally test fired in the GSC 'A' G3 Rifle and found that C1-C3 were fired in the G3 Rifle GSC ('A').
51. It was his testimony that the basis of his opinion was that when he looked at the breach face markings, the ejector markings and firing pin markings found in exhibit C1-C3 were also observable (repeated) in the test cartridge cases fired in the G3 Rifle GSC ('A'), using microscopic view. He testified that even if 3 different types of Rifles were manufactured on the same day by the same person (company), each of the 3 Rifles would have their own unique characteristic markings on cartridge cases.
52. He testified that he examined Exhibit GSC D 9 lead bullet fragment 0.32 grams and its calibre was not determinable because it was so minute leading him to form the opinion that the fragment had



- disintegrated from its parent Bullet after encountering a hard surface or surfaces during its trajectory (the path the bullet was travelling). He further observed that the surface of that fragment did not bear 'situations' - hence it would not be suitable for comparative analysis. PW7 testified that upon completion of the examination process, he prepared a Report No. CID/Firearms/Lab/517/2017 dated 11/9/2017 and signed it. He produced the report as PEX2.
53. In cross-examination, PW7 stated that the firing range of the G3 Rifle was well over 1000 ft. and that one could fire a single shot or rapid fire in G3 Rifle. He further stated that there are three levels of firing settings and that he could not tell at what setting it was when it fired. He stated that it could fire 600 rounds of ammunition per minute if set. PW7 stated that the 3 spent cartridges were given to him and 17 live ammunitions were also given to him. He stated that where there were diser fragments, the bullet must have hit a hard surface.
  54. PW8 Sgt Ng'eno only testified to tell the court that the investigating officer in the case had retired and that he was not willing to attend court but the court declined to allow him to testify on behalf of the investigating officer who later attended court and testified as PW9.
  55. PW9 Mr. Kirwa Tarus a retired Chief Inspector of Police & former DCIO Gem Sub County testified that he was the investigations officer in this matter. He testified that on 28/8/2017 at about 10 pm, while he was in his residence he was called on a mobile by the DAPC Gem, the late Mr. Wafula, who informed him of a shooting incident within the AP Camp at Yala.
  56. He testified that he organized the OCS Yala with his personnel and they all moved to Yala AP Camp / DO's office, where they found the late Mr. Wafula with his personnel having combed the entire area in search of a firearm which had been used by a suspect who shot one, police woman Mercy Muhenje totally injuring her.
  57. PW9 testified that the late APC Wafula had recovered a G3 Rifle firearm serial number G3 FM P389135 (confirmed by Mr. Were Advocate for the accused and Mr. Kadenyo Prosecution Counsel), loaded with 17 rounds of ammunition of 7.62mm. That they then removed the body of the late Mercy Muhenje to Yala Sub County Hospital Mortuary and thereafter went back to her residence where they found a bag containing some documents and clothes which the neighboring officers could identify the owner. PW9 produced the Rifle with serial number G3 FM MP 389135 as PEx 3, The Daily Arms Issue Book Register showing that the Rifle PEx3 which was issued to Mercy Muhenje as PEx 4 and the OB extract for 28/8/2017 as PEx5.
  58. He testified that on the 29/8/2017, he began recording statements from witnesses and one suspect emerged who was later on apprehended within Kericho County after communication through the police network. He testified that on the 30/8/2017, together with his officers, they proceeded to Kericho where they found the suspect detained at Kericho Regional Office at their Sub County Police Division. PW9 testified that they brought the suspect to Siaya Police Station as there was tension at Yala Police Station from Police Officers and friends of the deceased Mercy.
  59. PW9 testified that he continued with his investigations and on 4/9/2017 subjected the suspect to an identification parade which was conducted by Inspector Ayubu Gadi at Siaya Police Station where one witness identified the suspect positively and the suspect had no objection to the identification. It was his testimony that after analyzing the evidence received, he was convinced that the suspect was involved in the murder of Mercy Muhenje so he arraigned him for murder. He produced the identification parade as exhibit PEx6.
  60. PW9 produced the scene sketch plan as PEx7, the Exhibit Memo dated 28/8/2017 as PEx8, the Mashauri Book extract form Kericho West Sub County AP as PEx9, the magazine which held 17



unused bullets as PEx10, 3 spent cartridges produced as PEx11 a, b and c, 3 test cartridges as PEx12 a, b, c and 14 rounds of amination which were unused not fired as PEx13 a-n.

61. PW9 testified that from the Mashauri Book, the suspect was working at Belgut in Kericho West Sub County and was supposed to have resumed duty by the date of the incident. He testified that he had not known the suspect prior to the investigations. He identified him in court as the accused. He further testified that he picked the accused from Kericho and took him to court.
62. In cross-examination PW9 reiterated his testimony. He further stated that he established that the accused and the deceased were a couple who started cohabiting while in college and that they had a child together. He stated that he could not establish how often the suspect visited the victim but he was told that it was once in a while.
63. PW9 further stated that the officer who was deployed together with the deceased heard the number of shots but he did not know what number of shots were heard. He further stated that he found the Rifle in the possession of APC Wafula who did not interfere with the settings of the Rifle but only did the safety precautions.

### **The Defence Case**

64. The accused gave a sworn testimony as DW1. He testified that prior to his arrest, he was a footballer. He testified that he used to be a police officer from 12/11/2012 and graduated in 2014 April. It was his testimony that he was arrested on 29/8/2017.
65. He testified that he was assigned to man Belgut Polling station and that he made a request to his boss to allow him to go and see his sick father and was allowed an off from 18/8/2017. He testified that he went to his home in Hamisi which leave was to end on 25/8/2017 and he was to report on duty on 26/8/2017. He testified that during the same month, doctors were on strike and it was hard taking his father and brother who had an accident to hospital so he took them to Jumuia Hospital in Kaimosi for further treatment on 27/8/2017 at around 8 pm. He testified that he made a call to his corporal and informed him of the issue of his father and brothers' sickness.
66. He testified that Mercy Muhenje Angu and his son Levis Magamu lived in Yala and that he went to Yala to meet them as he wanted to give them food and other needs. He testified that he called and informed Mercy on 18/8/2017 that he had taken an off to go take his father and brother for treatment but on the 28/8/2017, he never informed her that he was going to see her. It was his testimony that he arrived at Yala Shopping Centre at 7.30 pm, when it was raining heavily so he took shelter at the nearby Yala Shopping Centre and arrived at Mercy's house at around 9 pm.
67. DW1 testified that he found the door to Mercy's house locked from inside. He testified that the door was opened and he got in and found a candle lit. He testified that he interacted with his son who told him that uncle was in the bedroom. He then went to the bedroom where a candle was and found a man sleeping on his bed naked. He testified that he interrogated the man and found that he was unknown to him. The accused testified that the man did not answer any of his questions so he slapped him once as he thought the man must have been insane to get into his bed. It was his testimony that his wife was not in the house and so out of emotions, he called his wife who did not pick his 2 calls but received his 3<sup>rd</sup> call and told him she was on duty and asked him to go to where she was.
68. He further testified that he found his wife and Erick Imbaya, PW1, who excused himself and left them. It was his testimony that after Eric excused himself, he asked Mercy who the guy in his house was but she started abusing him obscenely attacking his character and profession. The accused testified that Mercy was very temperamental. He testified that he tried to cool her down but she was ruthless. He



- testified that the Mercy had a rifle, a G3 Rifle which she cocked. He further testified that he knew that it was dangerous as she was short tempered and that they were in darkness because of the power blackout. The accused testified that they were near each other and that he tried to disarm her and to avoid injuring any one of them. It was his testimony that she was masculine and despite the struggle, she could not release the gun. He testified that he had the intention of disarming her.
69. It was his testimony that they struggled for about 8 metres and in the process, he heard a gunshot. He testified that he could not recall how many gunshots he heard but that it was the deceased who had the gun during the struggle and that she had cocked it ready to fire. He testified that after the gunshot, he fell back because of blow back. He testified that he could not tell where the Rifle and his wife was as it was dark. He testified that he then saw her lying down. The accused testified that he did not call for help and Mercy did not scream.
70. The accused testified that it was within the police lines and that he knew the police would respond and that his life was in danger so he left the scene and went to Luanda Shopping Centre, spent the night and the following morning, proceeded to Kericho by road. He testified that he was not arrested but presented himself to his station because Superintendent Kemboi, his Station Commander, called him after receiving information which he had also received via social media. The accused testified that he voluntarily presented himself to his bosses in Kericho and was then put behind bars.
71. It was his testimony that in 2017, he had visited his wife 5 times. He testified that he spent his night at her residence. He further testified that he was very familiar with her colleagues having met them severally and even involved them in payment of dowry. He testified that he did not know that Mercy had an extra marital affair. It was his testimony that he did not plan to execute his wife and that if he had planned to kill her, he could have gone to the house armed or he could have disappeared after the incident.
72. The accused denied calling his father in law and telling him that he was going to harm Mercy. He testified that he only used to call him and discuss business as he was a businessman and about dowry balance and about his young sister in law at Kaimosi. He testified that if he had called his father in law, call logs from Safaricom could have been availed to court. The accused testified that he loved his wife Mercy. He testified that he paid her dowry to her parents. He restated that he could not have planned to kill her as he loved his family and son. It was his testimony that they had planned for a good future. The accused testified that if she had not cocked the gun, they could not have been in court.
73. In cross-examination, the accused reiterated his testimony in chief. He further stated that it was not true that to shoot, the muzzle must be pointed at a person. He testified that he could not tell if bullets were discharged and went through the deceased's body. He stated that he did not have possession of the Rifle but that Mercy was in control of the gun. He testified that if he had aimed at her, there would have been an exit point but there was none and that it could have hit a wall and hit her. The accused stated that there was blow-back because of the tussle he had with Mercy. He further stated that if one is not holding the firearm firmly, one experiences blowback. He further stated that a ricochet can also give a blow back. He stated that he did not pull a trigger and that he was confused so he could not remember how long he was at the scene. He further stated that he did not report to the nearest police station. The accused told the court that he did not know that his wife had died.
74. In re-examination, the accused stated that he did not take possession of the gun and he never pointed it at his wife.



## Submissions

75. Only the accused person through his counsel Mr. Were filed written submissions. On whether the prosecution proved all the elements of murder against the accused person beyond reasonable doubt, it was submitted that there was proof of death and the cause of that death. However, it was submitted that there was no proof that it was the accused who unlawfully killed the deceased as the death was accidental when the accused tried to disarm the deceased as a result of which the rifle fired and killed her, as per the evidence of PW3 and PW7. It was further submitted that the accused had no malice aforethought and that the same was not proved beyond reasonable doubt as the shooting was accidental after a struggle to disarm the deceased and that had the accused intended to kill the deceased, as a trained police officer, he could have armed himself when he went to the house of the deceased that night. Further, that he could not have surrendered himself to his bosses at Kericho after learning of the death of the deceased. Counsel urged the court to acquit the accused person.

## Analysis and Determination

76. I have considered the evidence for the prosecution and the defence. The main issue for determination is whether the prosecution have proved all the elements of the charge of murder against the accused person and the standard of proof require dis that of beyond reasonable doubt.
77. To sustain a conviction on a charge of murder under Section 203 of the Penal Code the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:
- a. The fact and the cause of death of the deceased.
  - b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - “actus reus.”
  - c. That the said unlawful act of omission or commission was committed with malice aforethought - “mens rea.”
78. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. *Miller v Minister of Pensions* [1947] All. E.R 372. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.
79. The fact of death of the deceased was proved through the testimony of PW1, PW4, PW5 and PW6 all who saw the deceased’s body at the scene of crime. PW2, the deceased’s father, testified that he identified the deceased’s body to the pathologist who carried out the postmortem and also witnessed the said postmortem. where it was recovered by the police.
80. The postmortem report on the examination of the body of the deceased produced by PW3 has not been objected to nor controverted. The Doctor who conducted the autopsy formed the opinion that the cause of death was massive haemorrhage due to pelvic injury and rupture of the heart due to gunshot wounds. Accordingly, this ingredient of the offence was duly proved by the prosecution.
81. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2016]



eKLR that referred to the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held that:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”

82. The deceased in this case was found to have died from massive bleeding as a result of massive pelvic injury as well as rupture of the heart all caused by gunshot wounds. PW3, the pathologist who examined the deceased's body further testified that the deceased's death was unnatural because she had no prior illness history. From the foregoing, it is clear that the evidence before court points to an unlawful act that led to the death of the deceased. In cross-examination, PW3 stated that there were no injuries at the back so the shots were fired from the front, left chest area, but exited through the pelvis and that is why the bullet was found inside the pelvis which was completely fractured.
83. From the above evidence. I am satisfied that the prosecution proved beyond reasonable doubt that the deceased was unlawfully killed as there is no evidence that she shot herself.
84. As to whether it was the accused person who was positively identified to have unlawfully killed the deceased, PW1 testified that the accused approached him and the deceased where they were carrying out their duties and sought some space to speak to the deceased. He testified that some minutes later, he heard gunshots and when he went to check where he had left her with the accused, he found them missing. He went back to their residence at the AP line and there is where he saw the deceased lying in a pool of blood with the accused nowhere to be found.
85. PW2 the father to the deceased testified of how the deceased had expressed the accused's troublesome nature in their relationship and further how the accused called him and threatened to harm the deceased since the deceased did not love him.
86. PW4, the deceased's lover testified how the accused whom he had not met but who found PW4 sleeping on the deceased's bed and slapped PW4 before confronting PW4 then the accused whom he described as looking exactly like the deceased's son ran out calling while calling the deceased's name and that a few minutes later, PW4 heard gunshots so he escaped from the deceased's house and the following day, he learnt that the deceased had been killed. He identified the accused at a police identification parade carried out as the person who slapped him.
87. PW5 a colleague of the deceased at work heard the deceased and the accused having a loud conversation on her way to where the deceased was posted. She testified that she knew it was the accused because she heard the deceased call out "Walter." She testified that she wanted to avoid the conversation so she did not approach them but, on her way, back to the house and before she got there, she heard gunshots and about 30 minutes later, she opened her door only to find the deceased lying in a pool of blood.
88. PW6 who lives near the scene of the incident also testified that he heard an argument between the accused, whom he was familiar with, and the deceased and shortly thereafter, heard gunshots and after everything had gone silent, he opened the door to find the deceased's lifeless body lying at his doorstep.
89. PW7 confirmed after ballistics forensic examination of the firearm and the spent cartridges GSC C1 -C3 recovered as well as the that the firearm which the deceased was issued with were fired from the firearm Rifle GSC A, a G3 Rifle. All were produced as exhibits 11 a, b and c and 3 respectively.
90. From the evidence adduced above, it is evident that none of the prosecution witnesses saw the accused pull the trigger and kill the deceased. However, the evidence points at the accused as the last person to be seen with the deceased. This is admitted by the accused in his testimony who stated that he struggled



with the deceased when they had an argument over who the man was in the house and she uttered obscenities at him then she cocked the gun. He stated that the deceased was very temperamental so he realized that she could shoot upon which he held her trying to disarm her as she was furious and masculine. That he heard a gunshot.

91. He testified that he could not recall how many gunshots he heard but that it was the deceased who had the gun during the struggle and that she had cocked it ready to fire. He testified that after the gunshot, he fell back because of blow back. He denied that he killed the deceased saying that he loved her and her son and that had he intended to kill her, he would have come with a gun from his workplace. The accused further stated in cross-examination that if he had aimed at the deceased, there would have been an exit point but there was none.
92. I have considered the evidence by the prosecution witnesses and weighed it against the defence by the accused, which he was not obliged to tender as he could have remained silent and left it to the prosecution to prove their case against him beyond reasonable doubt. PW3 testified that the deceased had several gunshot wounds, this contradicts the accused's testimony that the deceased pulled the trigger because it would have been impossible for the deceased to continue shooting herself after pulling the trigger the first time. The ballistics report produced as PExhibit 2 shows that the G3 Rifle which Mercy was issued with is the one that discharged the fatal bullets. The accused too testified that he heard gunshots during the scuffle that he had with the deceased while trying to disarm her.
93. Further, the accused testified that he experienced blowback after the gunshot. As a police officer, the accused ought to have known that blowback is experienced by the shooter or the person who presses the trigger of a gun. This is because the literature that I have read reveals that a blowback system is generally defined as an operating system in which energy to operate the firearm's various mechanisms, and automate the loading of another cartridge, is derived from the inertia of the spent cartridge case being pushed out the rear of the chamber by rapidly expanding gases produced by a burning propellant, typically gunpowder or in simpler form, an application of Newton's 3rd Law; that for every action, there is an equal and opposite reaction. As the bullet moves forward down the barrel, the slide or bolt of the gun moves backwards. The two move with the same energy, meaning that the light and very fast bullet is balanced out by the heavy and slow bolt or slide. (See Chinn, George M. (1955). *The Machine Gun, Volume IV: Design Analysis of Automatic Firing Mechanisms and Related Components*. Washington, D.C.: Bureau of Ordnance, Department of the Navy.)
94. I have also considered the doctrine of last seen that is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene of the incident as the person who was last seen with the deceased before she died, the accused herein has a duty to explain how the deceased met her death.
95. Sections 111(1) and 119 of the [Evidence Act](#) provides as follows:

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given



by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

96. In the case of State v F.O.O [2021] eKLR, it was held inter alia that:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death, thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

97. In the instant case, the evidence adduced by the accused failed to offer any explanation as to how the deceased might have met her death. The explanation by the accused in my view does not add up when weighed against the evidence adduced by the prosecution. The chain of circumstances emanating from the prosecution evidence point at the accused solely as the one who committed the unlawful act that led to the deceased’s death. I find his defence to amount to a mere denial. My finding is that although the accused and the deceased had a scuffle, from the evidence on record, the accused snatched the rifle from the deceased and used it to shoot at her whether directly or indirectly, upon which the bullet found itself in her body, rupturing her heart and landing in the pelvis area.

98. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person herein who unlawfully caused the deceased’s death by shooting her.

99. As to whether the prosecution has proved beyond reasonable doubt that the accused unlawfully killed the deceased with malice aforethought, Section 206 of the Penal Code provides as follows:

“206. Malice Aforethought shall be deemed to be established by evidence proving any one or more of the Following circumstances-

- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) An intent to commit a felony;



- (d) An intention by the act or omission to facilitate the flight or escape of any person who has committed or attempted to commit a felony

100. In *Republic v Stephen Sila Wambua Matheka* [2017] eKLR it was held that:

“The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In the *Ogelo v Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of *Ernest Bwire Abanga Onyango v Republic* [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

101. The deceased was died as a result of the injuries sustained in her assault by the accused person herein using the G3 Rifle produced as Exhibit 3. Although motive is immaterial as provided for under section 9(3) of the Penal Code and as was stated by the Court of Appeal in the case of *Samuel Karanja Kuria V Republic Criminal Appeal No. 459 of 2007*:

“According to section 9(3) of the Penal Code, motive was generally irrelevant as regards criminal responsibility. The prosecution did not have to prove motive for the commission of any crime and evidence of motive was not sufficient by itself to have proved the commission of a crime by the person who possesses the motive.”

102. In the instant case, however, it is clear from the evidence on record that the accused person unlawfully killed the deceased who was his wife for the reason that he had found another man PW4 an interloper in his bed that he shared with his now deceased wife on that material night. The man who was found in bed, commonly known as an interloper, escaped after he heard gunshots. The interloper testified and admitted that he was found sleeping in the deceased’s bed. According to him, the deceased had told him that she was unmarried hence the intimacy between the two when they met as she was his frequent customer at his chemist at Yala.

103. There is evidence that the deceased and the accused person had matrimonial problems and that is why the accused had called out on the deceased’s father and told him of what they were going through. The deceased had also told her father the same and before he could intervene, the unfortunate incident took place leading to the demise of the deceased.

104. The deceased’s father testified that a day before this incident, the accused had called him and warned that because Mercy did not love him, he would do something that they would remember him for and that although the deceased’s father told him that they meet, the accused said that he had no time for that. However, in my view, if the prosecution wanted that piece of evidence by the deceased’s father to be used to prove malice aforethought on the part of the accused, noting prevented them from availing to court the call logs between the accused and his father in law, to corroborate his testimony.



105. The deceased's father also stated that he then called the deceased and told her to be careful because her life was in danger. That call log was also not produced. In addition, the deceased being a police officer, and knowing that the accused too was a police officer, could not have taken lightly any threats to her life because the accused had at his disposal, the necessary ammunition to strike her in the twinkling of an eye, if he wanted to do so. The deceased could have easily reported to the police and entered that threat in the Occurrence Book even in her own work station.
106. The accused person testified that he struggled with the deceased who was more built than himself. Both accused and the deceased were police officers who were trained in the defence mechanisms and the use of a rifle to the boot. The deceased is the person who had the rifle as she was at work when she was approached by the accused. The accused testified that he had left his work place to attend to his sick father.
107. The MASHAURI BOOK for Kericho West Sub County Administration Police, the work station for the accused person was produced as PExhibit 9. It shows that he sought and was granted permission by his boss at Belgut Subcounty to travel to his home and attend to his sick brother. Permission was sought on 18/8/2017 seven days off duty. In his testimony, he stated that his father was sick and that his brother had also been involved in an accident so he was to attend to them. There is no evidence that the accused had any gun on him in preparation for the offensive. The deceased's colleague testified that she heard an argument between the two, with the deceased calling out on the accused WALTER! before she heard the gunshot. I have no doubt in my mind that the accused and the deceased had an argument over the interloper man who was found sleeping in bed at the deceased's official residence.
108. The question is, did the accused person travel from his work place with the intention of killing the deceased? or did the gun explode accidentally during the struggle between the accused and the deceased? Since the first question cannot be answered with clear affirmation as discussed above, and considering the entry point of the fatal shot, I am persuaded that the deceased and the accused were engaged in a physical strife when the accused pulled the trigger that fatally injured her. I have no doubt in my mind that the accused was not happy when he found a man in the bed that he shared with the deceased and no man, though not justified to react violently, would, in his ego, tolerate that. There was no evidence that the deceased and the accused were legally separated after he paid dowry to her father in 2016 as testified by her father and or that each one of them had moved on. The two had a child together who was in that house on that material night.
109. In Republic v S K M [2009] eKLR, Emukule J sitting in Meru High Court (as he then was) had this to say in similar circumstances:

“... Lord Diplock delivering his speech in the case of DPP v CAMPLAIN [1978] ALL 168 at 17 (f) said:-

“The reasonable man” was comparatively late arrival in the law of provocation. As the law of negligence emerged in the field in the 19th Century he became the anthropological embodiment of the standard of care required by the law. Keating J in the Case of R. Vs. Welsh (1969) 11 Cocc 336 was the first to make use of the reasonable man as the embodiment of the standard of self-control required by the criminal law of persons exposed to provocation, and not merely as a criteria by which to check the credibility of a claim to have been provoked to lose self-control made by an accused who at the time was not permitted to defend himself.

Since R. V. LESPIN [1914] 3 K.B. 1116 the test of whether the defence of provocation is entitled to succeed has been a dual one: the conduct of the deceased to the accused must be such as (1) might cause in any reasonable or ordinary person and (2) actually caused in the



accused a sudden and temporary loss of self-control as the result of which he commits the unlawful act that kills the deceased. However, for purposes of the law of provocation, the “reasonable man”, has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today. A crucial factor in the defence of provocation being the relationship between the gravity of provocation and the way in which the accused retaliated both being judged by the social standards of the day.

In the matter at hand, the Meru society and the Kenya society today, as in the past, and despite modern day promiscuity as evidenced by the large number of single parents, and currently street children, does not approve of adultery. Any self-respecting married man or woman will experience a sudden and extreme temporary loss of self-control as a result of which he or she will commit the unlawful act that kills the deceased – whether the other spouse, or the interloper.

The accused, upon returning from a hard week’s job away from home, knocks at his door, and instead of his wife opening, a stranger comes out, knocks him down, and bolts into the night. What does he find when he eventually gains entry into his house? He finds him under his bed his wife in Adam’s skin, her birth suit that is, – stark naked, and holding a plank of timber ready to do battle with him. So what does he do?” He wrestles the plank of timber from the wife, and proceeds to use it against the offending or unfaithful spouse. Was he provoked.” In Africa as I believe in every human society, it is said you can share everything with your brother, but cannot share “your sleeping skin”- “your sheets”. or bluntly, your wife, unless you first die, in which event a young woman/wife will be liberated to enter into a levirate marriage with a brother or other relative of the deceased, and of her choice.

In the circumstances of this case, the accused was so provoked to the extreme as his small son was perplexed with his mother’s activities of sending them away to their grandmother and welcoming a stranger into their father’s house. The Swahili proverb says that a “thief has forty-days”, and the forty days may just be one or two occasions, but the second time may be the fortieth day. For the deceased wife, C G K, the fortieth day was the 29th April 2008. She was found out and by caught her husband, by the accused. Did the accused act like the “reasonable man”, the “reasonable” person, “the ordinary”, average or normal person – the other sobriquets by which the “reasonable man” has been referred to on this subject.”

I think he did. It would, I think be abnormal, unusual, unmanly, (unwomanly), to expect a (young man, a father of two who no doubt was still very much in love with his wife) to say, “darling, since you prefer the other guy to me and for whatever reason, follow him.” This would require unusual courage and supreme sobriety and self-control of heavenly hosts and not mortal man.

The sense of betrayal was so intense that the accused rained blows and kicks upon the deceased that proved fatal to her. The intention was not to kill, but to punish for the betrayal, the unfaithfulness. Any reasonable man in today’s Kenyan society will most probably act as the accused did. He was so provoked that he lost his self-control, and beat the deceased so intensely that she succumbed to her injuries arising from the beatings. The accused would probably have done the same to the interloper if he had caught him. He did not. The killing of his wife was still unlawful, and he pleaded guilty to the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.”



110. In the instant case, whoever was in bed that the accused shared with the deceased as a married couple, that in my view, affords the accused the mitigation of provocation, thus reducing the offence of Murder to that of Manslaughter. For that reason, I give the Accused person the benefit of doubt that he was not actuated by malice aforethought in the commission of the offence of unlawfully killing the deceased. I invoke the provisions of section 179 of the Criminal Procedure Code and reduce the charge of murder to one of unlawful killing and find the accused person herein Walter Magamu Not guilty of the offence of murder. I however find the accused person herein Walter MAGAMU GUILTY of the offence of Manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict him accordingly, under section 215 of the Criminal Procedure Code.

111. Sentence to be pronounced after records and mitigation.

**Dated, Signed and Delivered at Siaya this 22<sup>nd</sup> Day of February, 2023**

**R.E. ABURILI**

**JUDGE**

