



**Republic v Nanto & another (Criminal Case 85 of 2019)
[2022] KEHC 12788 (KLR) (31 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 85 OF 2019
EM MURIITHI, J
AUGUST 31, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

ROSALIAH NANTO 1ST ACCUSED

JANE MWENDWA 2ND ACCUSED

JUDGMENT

Introduction

1. Rosaliah Nanto and Jane Mwendwa, respectively mother and daughter, were charged with the offence of murder c/s 203 as read with 204 of the Penal Code on November 14, 2019. The particulars of the offence were that they had “ on the November 3, 2019at Kitharia village, Munithu Sub location, Miriga Mieru East Division Imenti North Sub- County within Meru County jointly murdered Samuel Mutua Mugambi.”
2. The Prosecution called seven witnesses and the 2nd accused when put on her defence testified on oath in her defence raising the defence of self –defence.
3. The 1st accused was on December 15, 2021 acquitted on a finding of no case to answer whose reasons are given in this judgment.

The Evidence

4. PW1 Julius Kubabia testified that on 3/11/2019 at 6:00am while at his shamba at Kitheria to get fodder for his sheep, he heard noise coming for the home of his neighbor Rosaliah (1st Accused). He was able



to look into the 1st accused's home through the fence between the shamba and the home made up of shrubs. His eye-witness account was as follows:-

“When I looked into the home of Rosaliah, I saw Rosalia holding the legs of one Mutua, the deceased, Jane, the 2nd accused was holding the shoulders pushing him out of the house. It was through the front door of the house.

When they took him out of the house Mutua was able to stand and Jane went back into the house and came back with a piece of timber. It was about 3 (Three) feet. Jane hit Mutua on the head three times. Mutua fell down. At this point Rosalia told Jane not to hit Mutua again, when I saw Mutua fall I took the fodder crop I had cut and went back to my home.”

5. PW1 further testified that later on at 11:00 am, Rosalia had gone to his home and when asked about the person who was hit by her daughter and whether they had taken him to hospital and reported to the police, she had said that she feared to be arrested by the police and went away. PW1 then borrowed a phone from his wife and called Karimi, a relative of Mutua and told her that Mutua had been beaten at Jane's place. He went to the police at 6:00pm and found many people including the Chief of Kambiti Location and the victim of the beating was now at the back of the house, “lying on his back with-blood oozing from his ears.”
6. On cross-examination, PW1 said Rosaliah and Jane were his neighbours but he did not know whether Mutua lived with Jane as husband and wife at Rosaliah's home. He confirmed. However, that “Mutua used to come to Jane's home. The noise I heard was from home. The noise I heard was from a fight. The two were pushing Mutua out of the house. One of them held the legs and the other the shoulders of Mutua while taking him out. It was Jane who hit Mutua. Rosalia told Jane to stop beating Mutua after she had hit him for three (3) times, “ He explained had he did not call the police because he did not know that Mutua had died and only knew what had happened when Rosaliah went to his place and he told her what he had seen,
7. PW2 Samson Murera, a brother to the deceased received a telephone call from his sister-widow, wife to the brother Stephen Kathurima, informing him that his brother Stephen Mutua Mugambi had been beaten at Kitheria area On proceeding to the area so that he could take his brother to hospital, he was directed to Rosaliah's home. He testified that he knew Rosalia as the mother of Jane who lived with his said brother:-

“Jane and my brother had a relationship, and my brother even lived at Jane's house. At the time, I asked Jane where my brother was she did not respond to my question. The people there told me that the person was at the back. It was at the back of Rosaliah's house. When I made enquiry I was at the front of the house. I was told he was at the back of the house. It is the people I found there who told me that he was at the back. When I got there, I found him lying on his back facing up. I started carrying him and I saw that he was not alive... I went to Kienderu Police Post and reported the matter.
8. PW2 said that while at the Police Post as he tried to call the area Chief Jane Mutethia of Munithu location, the Assistant Chief and the area manager brought in Rosaliah and Jane riding on the Assistant's Chief motor bike and the Area Manager motor bike, respectively. The witnesses later helped the police in recovering the body and taking it to Meru Hospital Mortuary and on November 11, 2019 attended post mortem examination together with is sister Gladys and he identified his brother for purpose of the post mortem.



9. On cross-examination, PW2 said Mutua's home at Kambiti was 2 Kilometres from Rosaliah's home at Kambiti was 2 Kilometres from Rosaliah's home at Katheria and that Mutua and Jane were living as husband and wife although not officially married. He said that he did not know that his brother and Jane had disagreed and that she had gone back to her mother's home, where Mutua was found, or why he had gone there or during cause of disagreement between Mutua and Jane.
10. PW 3, Zaverio Mbugua, the Area Manager from Kahiro village testified that on 3/11/2019 at about 4:00 pm, on the invitation of the Chief James Mutethia he went to the scene to establish what had happened.

“On 3/11/2019, at about 4.00p.m. I received a call by the chief asking me to confirm information of an incident at Kahuro. The chief is James Mutethia. The area of the incident is at Kahuro. I went to the scene and I found there were many people at the gate. The scene is at Jane's house. Jane is the 2nd accused and the 1st accused is the mother.

I found many people at the gate and on inquiring I was told they had been refused to enter. Because I am area manager I was allowed in. The people had been refused by Rosalia and Jane to enter the home. I went inside the home. I called Rosalia and asked her what was happening. She told me Mutua was there and she pointed him to me. Mutua was outside the house at the back. It was Rosalia who showed me where the body was. We were with the (2) the mother accused (1) and the daughter accused (2).

When I saw Mutua was dead, I asked her what happened but they did not tell me. I went to pick the chief and we went back together. I used a motorbike to go and pick him at his place. We came with the chief and he saw the body and we took the (2) to the police station. We went with (2) motorbikes and took the two to the police station.

We took them to Kienderu police post. We left them there and went back to the home. I knew the 1st accused as a member of my area. I knew her for around 10 years. I knew the 2nd accused for long. We went to school together.”

11. PW3 explained that they took the two accused by motor bikes separately as follows:-

“I hired a motorbike and went up to the chief. When we came back with the chief we used the same motorbike. When we got to the home, I took the chief to where body was. At the time, I was with Jane. Rosalia had gone out of the home. When the chief came he did not find Rosalia.

The chief went to look for Rosalia as we had hired another motorbike and we took Rosalia and Jane to the police station. When the chief went looking for Rosalia the chief came with Rosalia and another motorbike which he hired. The chief rode with the chief and I rode with Rosalia.”

12. On cross examination PW3 said he knew Jane, Rosaliah and Mutua and that “Mutua used to live with Jane as husband and wife. Mutua lived in Kambati at Kaguma area. It is about 2 Kilometres from Rosaliah's home. I know Mutua was found at Rosaliah's home [while] Mutua's place is at Kambiti.” he further said that Rosaliah had left [when he came back with the Chief] she was searched for by the chief and she was brought back”.
13. PW4, the Chief Ngiine Location testified that he had been informed by an informer on 3/11/2019 at 3:00 pm that Mutua had died. He then called the Area Manager (PW3) to establish what happened.



He confirmed knowing the 2nd accused Jane who was his classmate and the 1st accused her mother as well as Mutua. He testified further that:-

“The area manager told me that it appeared that Mutua appeared to have been hit. The area manager said this by telephone. I went by motorbike to the place. I found Mutua on the back of Rosalia’s house. I called police officers at Kianderu police station and asked them to get a vehicle from Meru police station for a vehicle to recover the body. Before the vehicle came I found that the people had gathered and they started to agitate to burn the house or lynch the two suspects. I told the area manager that we should rescue them two by taking them to the police station. I hired (2) motorbikes one carried Jane and the other Rosalia.

Saverio Mbugua rode with Rosalia. The other bike I took carried Jane with me behind her. We were guarding them.

We went with the (2) to Kianderu police station and I handed them over to the police. After booking we took the (2) motor bikes back to the home of Rosalia. I was with the area manager. We tried to calm people as we guarded Mutua’s body as we waited for the police. It rained and the police struggled to negotiate from the road and they succeeded at about 10.00p.m. and took the body to Meru hospital mortuary.”

14. On cross examination PW4 confirmed that he knew the 2nd accused and Mutua very well having been class-mates at Kambiti Primary School and wife. About their relationship he said:

“Jane, Mutua are persons of my area. I knew that Jane and Mutua were a husband and wife.

Mutua’s place is at Munithu girls school about 2 kilometres away from Jane’s home. The two started quarrel and once Jane asked that Mutua should be taken away from her place because if she continued to live with him she could kill him.

I cannot tell the reason why. But all that we did was to take Mutua from Jane’s place to his place and after a short while we heard that Mutua had gone back to Jane’s place.

Jane had asked me to get Mutua out of her place. She had sent an elder tome. I told the elder to get Mutua back to his place. May be because of their love, Mutua went back to Jane’s place at Rosalia’s home.”

15. PW5, Mercy Kendi, the deceased’s niece testified that on 3/11/2019 at about -5:00 pm she had upon information by her sister Edith Kanyiri gone to the scene and found Jane and Rosalia together with 3 other women outside Jane’s house. She was directed to the place where the body of Mutua was at the back of the house and she found Mutua dead.
16. On cross examination PW5 said she had known the 2nd accused for 5 years when she lived with Mutua as husband and wife. She did not know Jane’s mother before that date. She said Mutua had been hit on the top of the head and that Mutua was at the time living with Jane together at Jane’s place.
17. PW6 Dr.Seth Mwenda Maore testified on behalf of the post mortem examination Dr. Ninnie Kiragu pursuant to section 77 of the *evidence Act* and said the body of the deceased had blood in his right ear, both nostrils and abrasions on the right posterior shoulder and at the back of the head, and internally there was “bleeding inside the skull just above the barain matter extending from the front towards the back, and on the left and right of skull. The cause of death was given as severe head injury. Secondary the bilateral sub dural hematoma due to blunt force injury. On cross examination, PW6 said the head injury were on the areas of the brain [and] the abrasions were on the back of the head.”



18. PW7, P.C Gabriel Leparaso of DCI Imenti North testified that he had gone to the scene on 8/11/2019 with DCIO Chief Inspector Ojwang with a view to see the house the deceased was allegedly killed but the houses were locked and we were not able to get inside because the suspect had already been arrested.
19. On cross examination, PW7 said “the incident took place in the house of Rosaliah. The houses of Rosaliah and her daughter Jane Mwendwa were together and at the same place. They lived together.”
20. The 2nd accused testified in her defence raised the issue of self-defense that she was defending herself from a violent assault from her deceased husband as follows:

Proceedings

21. On cross examination, the accused maintained that she had not killed the deceased and that they had been involved in a fight and were struggling against each other and that she did not know that he had died.
22. In her defence, the 2nd accused testified that her deceased was married to her for 5 years and that they lived together at their home at Kambiti; Muthuii location before they separated and started to live with her parents at Kitharia village of Munithu Sub-Location. She described the circumstances surrounding the death of the deceased.

“At my parents home. I lived with my mother, our father is deceased. My mother is Rosaria Naito. We separated with my husband because of beating me while drunk. I used to report to the police and we would be referred to the chief. The chief is Peter Ndegwa. He was the one who told us to separate. I went back to my parents home and we never got back together again.

On November 3, 2019, a Sunday in the morning, the deceased came home, our home at 05.00 a.m. in the morning. He came violently and shouting knocking on my bedroom’s window asking me to get up. I asked him why he came violently. I refused to open the door for him. He said he will set the house on fire. At hearing this, my mother was at her own house which is in the same compound but separate buildings. She was unwell.

He threatened to burn my house if I did not open. I went out through the back door trying to run away. He was knocking on the front door. As I was running away, he heard me opening the back door and he came round and started beating me. I was running away and he ran after me while beating me. He was carrying a piece of timber. He got a hold of me and hit me with the timber and when he tried to hit me again, I got a hold of a piece of timber and we struggled on the ground. It had rained and he slipped on the muddy ground and I was left holding the timber. He went on beating me. He was kicking me on the body. I defended myself by throwing the timber at him. It was dark in the morning. The house had security lights. I could see the piece of timber. I ran away leaving him on... where we were fighting.

I ran towards my mother’s house and when my mother opened the door. I think he heard my mother opening the door and he went away. He did not come back again. We couldn’t sleep as we feared he could come back again.

In the morning, we went out and as we were going on with our normal chores, it was my mother who while going about her houses saw him lying on the ground near her back door of her house. At this time, he is asleep and snoring. It is about 10.00a.m. I did not go near him. He was asleep and snoring.



My mother called the chief and sub-area and told him that there was a person who was lying about at her home.

When the sub-area manager came, we realized that he was dead. All this time, we were at home. We did not leave home. It was about 12.20 p.m. Other people from the area came to see what was happening. There was no noise or disturbance at the home until the chief came and he told us to go with him to station at Kiendelu police station. The neighbours did not cause any disturbance at the home. I was defending myself so that the deceased does not kill me.”

23. It the prosecution PW1’s word against the 2nd accused’s as to the events leading to the death of deceased.

a) PW1 saw the 2nd accused hit the deceased three times on the head.

The 2nd accused agreed to hitting the deceased while defending herself “so that the deceased doesn’t kill me” when she threw the piece of timber which she had got hold of from the deceased.

Medical evidence indicated trauma on at least three places of the deceased’s body-

-“right posterior shoulder”

-Bilateral blunt force trauma evidenced by the internal appearance on the head as noted in the post mortem report of November 11, 2019.

(i) “Right frontal and occipital hematoma (subscapular)

(2) Right temporalis muscle hematoma

3. Massive right sub-dural hematoma –frontal to occipital; and

(a) Left subscapular hematoma.”

The material evidence supports the testimony by PW1 on the three hits with 3 foot stick, or piece of timber as stated by the Accused. The court finding that the death was caused by the several hits on the head by the 2nd accused as testified to by PW1 and corroborated by the medical evidence as the appearance of the body on execution and cause of death opinion of Dr. Winnie.

Circumstances of killing

24. The post mortem examination report dated November 11, 2019 indicated on general observations on Body “as to clothing. “Present ; mud-stained this supports the defence evidence that the deceased may have slipped and fell in the mud as it had rained, DW1 saying;

“ He got hold of me and hit me with the timber.....and he slipped on the muddy ground.”

25. On cross examination, the accused further said that the mother1st accused had on finding the deceased the following morning at 10:00am, she had reported to the Chief and Sub-area manager that “there was a person who was lying about at her home,” and that it was when the Sub-area came that they realized that he was dead. She said they had earlier not known that he was dead as he was asleep and snoring, when he was found by the mother lying on the ground near the back of her house.



Submissions of Counsel

26. Counsel for the Prosecution and the accused made written submissions on their respective contentions that the Prosecution had proven the charge of murder beyond reasonable doubt and the defence of self-defence was applicable to the circumstances of the case. Counsel cited the of *Guzambizi Wesonga v. R* [1948] IJEACA 65; *Ahmed Mohammed Omar & 5 others v. R* [2014] e KLR (CA); *Nyambura & Others v. R* [2001] KLR 355; *Antony Ndegwa Ngeri v. R* [2014] e KLR; *VMK v. R* [20115] e KLR *Rv. Daniel Okello Rapuch* [2017] eKLR and *Mokwa v. R* [1976-80] KLR 1337.

Issues for Determination

27. Overall, the determination by the court that must positively finds as proved the ingredients of the offence of murder c/s 203 of the Penal Code as observed by Etyang J. in *R.v Nyambura & 4 others* [2002] KLR 355:
- the death of the deceased, and cause of that death;
 - that the accused committed the unlawful act which cause the deceased's death and
 - that the accused had malice aforethought.

This test has been approved by the court of Appeal in *Antony Ndegwa Ngari v.R* [2014] e KLR.

28. With regard to the defence and submissions of the 2nd Accused, who was placed on her defence, the issue arises whether the 2nd accused hit and killed the deceased in self-defence as to amount to excusable homicide? Or, in the words of the Court of Appeal in *Ahmed Mohammed Omar & 5 others v.R* and *Wesonga v.R*,supra, was the killing unlawful?

Determination

29. As consented in *Okethi Okale v. R* [1965] EA 555, the court shall look at the evidence presented by the prosecution and the defence as a whole. The prosecution's evidence seeking to prove killing with malice aforethought and the accused self-defence.

The 1st Accused

30. The 1st Accused was only shown on the evidence of PW1 to have carried the deceased out of the house together with the 2nd accused. At the time the deceased was left standing outside the house. It was alleged that the 2nd accused then went inside the house and came back with a stick with which she hit the deceased thrice on the head before the 1st accused asked the 2nd accused to stop hitting the deceased.
31. There was no evidence of common intention within the measuring of section 21 of the Penal Code to ascribe the act of the 2nd accused hitting the deceased jon the 1st accused. The mere allegation that she did not ask the 2nd accused to stop hitting the deceased until the third hit is not sufficient to show concurrence with the hitting of the deceased and or malice aforethought.
32. The 2nd accused's mother was only alleged to have, together with the 2nd accused, carried the deceased and thrown him outside her house. There was no evidence to indicate that in hitting the deceased after they had thrown him out of the mother's house, the 2nd accused was carrying out a common purpose of the mother and herself. The court therefore acquitted the 1st accused at the no case to answer stage pursuant to section 306 (1) of the *Criminal Procedure Code*.



The 2nd Accused

33. Although the 2nd Accused raised the defence of self-defence only, the court shall for completeness consider whether there is evidence of provocation as would render the act of killing in this case to be manslaughter in accordance with section 207 of the Penal Code. The court must consider the disjunctive and subjective test as set out in *VMK v. R* [2015] CKLR (C.A) as follows:

“To sustain an information of murder, however, the prosecution’s case must satisfy the twin requirements of actus reus or guilty act and mens rea and or malice aforethought. Whereas there is no dispute that the deceased died at the appellant’s hands, the question is what was the appellant’s state of mind at the time? According to the appellant, the deceased had raped his wife and robbed her of a suit case of clothes the previous night. Accordingly, it is the appellant’s case that this served to provoke him into killing the deceased.

Provocation was defined in the case of *Duffy* [1949] I ALL ER 932 as:-

“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”

As deduced by this Court in *Peter King’ori Mwangi & 2 others v Republic* [2014] eKLR, the above definition requires that two conditions be satisfied for the defence to be made out, namely:-

- a) The “subjective” condition that the accused was actually provoked so as to lose his self-control; and
- b) The “objective” condition that a reasonable man would have been so provoked.

Indeed, Section 209(1) of the *Penal Code* also defines “provocation” to mean and include ‘...except hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered ...’ Whether the accused was provoked to lose his self-control is a question of fact which the trial court has to determine based on the evidence presented. See *Criminal Law* by J.C. Smith and Brian Hogan, 7th Edn. Pg.352.

Looking at the facts of this case, PW1, PW3, PW4 & PW5 attested to the appellant having reported a theft and the rape of his wife, one CN, with a P3 Form being issued to that effect. The P3 report confirmed sexual assault having been committed on the said CN. While producing the report in evidence, PW1 appeared to be ill informed about the circumstances surrounding the rape. Nonetheless, PW4 confirmed that it is not the first time such allegations of ‘.....petty theft and moving with other mens’ wives’ were being levelled against the deceased. Coupled with this, is the testimony of PW2, the sole eye witness to the crime, who stated that he and the deceased had gone to the appellant’s home and that when he saw them, the appellant was incensed and repeatedly ordered the deceased to leave his homestead. On his part, the appellant alleged that his wife had identified the



deceased as the rapist. The arrival of the deceased and PW2 at the scene came barely an hour after the deceased had learnt of the theft from and rape of his wife. This evidence, albeit circumstantial, points to the provocation of the appellant by the deceased. Suffice it to say, that the mind of an ordinary man in such circumstances would be saddled with anger as to interfere with his logic and or thinking and enure sudden and temporary loss of self control. Worth noting as well, is that no other motive was established by the prosecution as to why the appellant would want the deceased dead, though motive perse is not a legal requirement. In view of the foregoing, once evidence is laid capable of supporting a finding that the accused was provoked, the burden is shifted to the prosecution to prove beyond reasonable doubt that the case was not one of provocation. See *R v Cascoe* [1970] 2 ALL ER 833 and *Doto s/o Mataka v R* [1959] E.A. 860. Given the foregoing, we find that the learned Judge erred when she disregarded the prosecution's self damning evidence on provocation and instead held in part that:-

“.....Suffice it to say that PW7 Dr. Allan Cherop who produced the P3 form allegedly filled in respect of this 'rape' cast some doubt on both the P3 form as well as the supporting medical notes. In my view, nothing would have been easier to persuade this court that such a rape did actually occur (or even prove that the accused had reasonable cause to believe that his wife had been raped), than for the accused to call his wife as a defense witness on his behalf. It is curious that accused chose not to call the one person who could have supported his defence. Failure to call his wife leads to legitimate doubts as to whether this alleged rape actually occurred...”

This statement has serious flaws and or misdirections. An accused person is under no duty to prove his innocence nor is he required to call evidence to spruce up his defence. Indeed, as established in the Doto case (supra), the burden of proof never shifts to an accused person to establish the defence of provocation. The appellant did not have any duty to prove provocation. It is for the prosecution nonetheless to prove malice aforethought. This is a position that was also captured by this court in the case of *Benson Mbugua Kariuki v. Republic* [1979] eKLR thus:

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

Once the facts pointed to the provocation of the accused person, the onus lay upon the prosecution to rebut that provocation. Having failed to do so, the defence should have thus



succeeded and the charge of murder reduced to manslaughter. In other words, we think that in the particular circumstances of this case the defence of provocation enure to the benefit of the appellant and that the information of murder should be reduced to manslaughter. As stated earlier in this judgement, there can be no doubt that the circumstances prevailing at the material time would have provoked a reasonable person. Barely an hour after learning of his wife's alleged rape and robbery by the deceased, the appellant found the deceased seated comfortably in his compound. This was more than sufficient to cause the appellant's temper to flare up. To add insult to injury, the deceased appears to have been reluctant to leave the premises despite having been ordered by the appellant to do so. The altercation that followed left no time for the appellant's temper to cool off. Such is the essence of provocation, and the learned trial Judge erred in failing to hold as much."

34. There was evidence from the prosecution and the defence of the deceased's violent relation like the 2nd accused which caused them to be separated with her returning to her parents home where she lived with the mother, the 1st accused herein.
35. The deceased and the 2nd accused had lived for 5 years as husband and wife according to PW5, the deceased's niece Mercy Kendi. The area Chief PW4 James Mutethia Kirigia whi was a classmate of both the deceased and the 2nd accused also knew them as husband and wife, On cross examination, the Chief said that the two had once quarreled and the 2nd accused asked him to get the deceased out of the 2nd Accused's house.

"Mutua's place is at Munithu Girls School about 2 km away from Jane's home. The two started quarrel and one Jane asked that Mutua should be taken away from her place because if she continued to live with him she could kill him. I cannot tell the reason why. But all what we did was to take Mutua from Jane's place to his place and after a short while we heard that Mutua had gone back to Jane's place. Jane asked me to get Mutua out of her place. She had sent an elder to me. I told the elder to get Mutua back to his place. May be because of their lie Mutua went back to Jane's place at Rosalia's home."

36. The 2nd accused herself confirmed that she and the deceased were married and later separated as follows:

"We had married for 5 years... I went back to my parents' home and we never got back together again."

37. The 2nd accused described the events of the fateful day of the killing of the deceased as follows:

"On November 3, 2019, a Sunday in the morning, the deceased came home, our home at 05.00 a.m. in the morning. He came violently and shouting knocking on my bedroom's window asking me to get up. I asked him why he came violently. I refused to open the door for him. He said he will set the house on fire. At hearing this, my mother was at her own house which is in the same compound but separate buildings. She was unwell.

He threatened to burn my house if I dire not open. I went out through the back door trying to run away. He was knocking on the front door. As I was running away, he heard me opening the back door and he came round and started beating me. I was running away and he ran after me while beating me. He was carrying a piece of timber. He got a hold of me and hit me with the timber and when he tried to hit me again, I got a hold of a piece of timber and we struggled on the ground. It had rained and he slipped on the muddy ground and I was left holding the timber. He went on beating me. He was kicking me on the body. I defended



myself by throwing the timber at him. It was dark in the morning. The house had security lights. I could see the piece of timber. I run away leaving him on... where we were fighting.

I ran towards my mother's house and when my mother opened the door. I think he heard my mother opening the door and he went away. He did not come back again. We couldn't sleep as we feared he could come back again.

In the morning, we went out and as we were going on with our normal chores, it was my mother who while going about her houses saw him lying on the ground near her back door of her house. At this time, he is asleep and snoring. It is about 10.00a.m. I did not go near him. He was asleep and snoring.

My mother called the chief and sub-area and told him that there was a person who was lying about at her home.

When the sub-area manager came, we realized that he was dead. All this time, we were at home. We did not leave home. It was about 12.20 p.m. Other people from the area came to see what was happening. There was no noise or disturbance at the home until the chief came and he told us to go with him to station at Kiendelu police station. The neighbours did not cause any disturbance at the home. I was defending myself so that the deceased does not kill me.”

38. On the evidence, the court finds the events of the 3.11.2019 related by the defence (DW1) to be part of the disagreements in the marital relationship between the deceased and 2nd accused that had led to the separation of the two by intervention of the Chief PW4, these were in the view of this court sufficient acts or series of acts of provocation by beatings on the 2nd accused by the deceased while drunk as would take together cause ordinary person to lose their power of self-control upon the test immediate act of beating as testified by the 2nd Accused (DW1). On the subjective test as to whether the 2nd accused was herself provoked so as to lose her self-control, the evidence of the eye-witness PW1 appear to suggest loss of control in that despite the 1st and 2nd accused having successfully removed the deceased from the house, the 2nd accused went back into the house and emerged with a stick which she in three successive blows hit the deceased before the 1st accused asked her to stop.
39. The court finds that the 2nd accused was provoked in her attack on the deceased, if the defence of self-defence fails, and the killing may only amount to manslaughter in terms of Section 207 of the Penal Code.

Malice aforethought

40. Save for the finding of provocation, the court would have found that the 2nd accused had malice aforethought. The 2nd accused had effected three fatal blows on the deceased with the knowledge that the assault would cause at least grievous harm. If not death. Even under the least of the definitions of malice aforethought in Section 206 (c) of the Penal Code by “an intent to commit a felony”. The act of beating the deceased being the felony of grievous harm, the act of hitting the accused on the head would amount to malice aforethought.



Self -Defence

41. Did the 2nd Accused act in self-defence as urged by the Counsel for the Defence in her Submissions? In *Ahmed Mohamed Omar 5 Others v. R* (supra) the Court of Appeal held as follows:-

“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in *DPP v Morgan*(Supra) it was held that:

“.....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants’ belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

In *Beckford v R* (Supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

In *R v Williams*[1987] 3 ALL ER 411, Lord Lane, C.J. held:

““In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant’s alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

It is acknowledged that the case of *DPP v MORGAN* (Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also *Smith And Hogan’s Criminal Law*, 13th Edition, Page 331.

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants’ defence because it applied an objective test.

The learned Judge’s attention was not drawn to the current position of the English Common Law as regards the defence of self-defence. We believe that had the Judge’s attention been drawn to the case of *DPP v Morgan*(Supra), his decision would have been different.



Just as the Privy Council did in *Beckford v R* (Supra), we must also dispel the fear that “the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence.” Each case will have to be determined on its own merit and peculiar circumstances. Section 28 of the Police Act as well as the Kenya Police Manual of 1980 set out explicitly the circumstances under which a police officer may use a firearm. One of them is when the officer has reasonable grounds to believe that he or she or any other person is in danger of grievous bodily harm. See this Court’s decision in *Anthony Njue Njeru V Republic* [2006] eKLR.”

42. This Court has also discussed the issues of provocation and Self-defence in Meru HCCr.C No. 86 of 2015, *R.v Doris Mwari Ikiao & Another* [2021] e KLR as follows:

“Provocation

44. Section 207 and 208 of the Penal Code, Cap 63 provides for the defence of provocation as follows: -

207. Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

208. Provocation defined

- (1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
- (2) When an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- (3) A lawful act is not provocation to any person for an assault.
- (4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.



- (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

Self-Defense

45. Authorities have held that self-defense will only to be admitted if done within the bounds of reasonable force. This issue was dealt with by the Court of Appeal in the case of *Lucy Mueni Mutava v Republic*, Criminal Appeal No. 52 of 2013 [2019] eKLR where A. Visram J, W. Karanja J and M. K. Koome J (as she then was) held as follows when addressing the defence of self-defense: -

“...the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed, in our view, was way excessive and negated any defence of self defence, if any, in light of the surrounding circumstances. See *Racho Kuno Hameso vs. R* [2014] eKLR.

Our position is further fortified by the case of *Victor Nthiga Kiruthu & another vs. R* [2017] eKLR wherein this Court while discussing self defence stated:

“The principles that have emerged from these and other authorities are as follows:-

- (i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.
 - (ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
 - (iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.
 - (iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
 - (v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.
15. All in all, we, like the trial court are satisfied that the appellant’s actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of malice aforethought on her part as defined under Section 206 of the Penal Code...”
43. I would also respectively agree with Nyakundi, J, in *R.v Daniel Okello Rapuch* citing *Mokwa v.R* [1978-80] KLR 1337 that:

“Self defence is an absolute defence even on a charge of murder, unless in the circumstances of the case the accused applies excessive force.”



44. In this case, the court must reject the evidence by the 2nd accused that she only “defended myself by throwing the timber at him” because at this time according to the story by the 2nd accused, the deceased was no threat having slipped on the muddy ground and she was left holding the timber. If it were true, she could have then ran off and avoided the beating which she alleged continued as follows:-

“He went on beating me. He was kicking me on the body. I defended myself by throwing the timber at him.”

45. The Prosecution evidence that the 2nd accused hit the deceased on the head is corroborated by the medical of PW6 who testified that the cause of death was severe head injury secondary to bilateral Subdural hematoma due to blunt force trauma. The 2nd accused did not throw the timber at the deceased in self-defence as she testified; she actively hit the deceased on the head three times as testified by PW1 and corroborated by medical evidence of PW6.

Conclusion

46. The Court finds that the prosecution has by its evidence disproved the accused’s defence of self - defence. The defence of self-defence fails. The 2nd accused used excessive force to ward off any perceived threat to her.

47. However, having found the death of the deceased at the hand of the 2nd accused to have been proved but the 2nd accused to have been provoked by a series of acts of violent beating by the deceased in the cause of their marriage culminating with the events of 3/11/2019 when the deceased while drunk violently went to the 2nd accused’s home and started assaulting her, the Court finds in accordance with Section 207 of the Penal Code that the 2nd accused is guilty of manslaughter only.

48. The 1st Accused was, for the reasons given above, acquitted at the stage of no case to answer.

Orders

49. Accordingly, for the reasons set out above, the Court convicts the 2nd accused for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code.

50. The 2nd Accused’s presentence hearing is set for September 22, 2022.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF AUGUST 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Nandwa for DPP

Ms. Mwilaria for the Accused.

