



**Republic v Muthoni (Criminal Case 102 of 2013)  
[2022] KEHC 14332 (KLR) (Crim) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14332 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL**

**CRIMINAL CASE 102 OF 2013**

**J WAKIAGA, J**

**OCTOBER 24, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LEAH IKENYE MUTHONI ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The deceased Adrian Ochingwa Kabala was the new generation of alpha men, who seems to have their way with all women around them. Though not on trial, he had just completed some course and was between jobs as they say, but could not stay at home with the old folk. He had briefly worked for African Safaris and hometown Bakers and while awaiting to join some college, he met the accused person and they started what she believed was the romantic journey of their life, for which she invited him into her life and parts. The accused fully supported the deceased as she believed that he was her husband.
2. Unknown to the accused, the deceased, was not a one-woman man and set up on the mission to conquer as many women as possible, as if he was in competition with the biblical King Solomon. In the neighbourhood Kinoo 87 Ucommon Flats where he was living in the house of the accused person, he set his sight on PW4 Sarah Njoki Wahome, who was gifted on the looks and colour side, as she was of the light complexion with appropriate assets at the right places, in addition to owning a car, all three assets which the accused was not adequately compensated with by God.
3. The accused and PW4 were living on the same floor in the Flat which the new generation romantically calls “apartment” and were just one door apart from each other, which closeness the deceased did not see as a barrier but as an advantage, for as the evidence will shows, he decided to have the best of both worlds and played both women either assuming that the accused will not know or to show them that



he was the king of the game of seduction and as they say might be his only strong point is what he was offering “between the sheets” and as the bible says in 2<sup>nd</sup> Samuel 3: 33 like Abner he ended up dying as fools die.

4. The October 6, 2013 started as any day to the accused person, she had the deceased in her house and was living with her in what this court has in the past called a “woman eater” kind of arrangement, where she was providing for all that he needed for his upkeep including paying for his college education but like in any marriage in this sinful world, theirs also had a fair share of marital problems, which she attempted to solve in the best way possible and on this material night the deceased failed to come back home.
5. This action led the accused to make inquiries from the night guard on whether he had seen the deceased and the information she was given led to a series of actions which ended up with the death of the deceased and the accused facing trial for the said death, having been charged with his murder, which she denied.

## **Proceedings**

### **Prosecution case**

6. The prosecution case was that on the October 5, 2013 PW1 Jefferson Ombaeta then a security guard at the flat where the accused, the deceased and PW4 were staying at, reported on duty and took his position and at 1.30 am the accused who was then living at house number 3 approached him and asked whether he had seen the deceased and he told her that he had seen the same come into the compound driving the motor vehicle belonging to PW4 she went back to her house.  
  
At 3.00am he heard PW4 crying for help, while running towards the caretaker’s house, who opened for her the door and she dashed into the house, which the caretaker locked from outside.
7. Shortly thereafter, the accused came with a knife in her hand, saying that she wanted to kill someone and thereafter the deceased followed her with blood covering his entire body, they then told the accused to leave the scene and go back to her house, which she did, leaving the deceased with them, who pleaded with her not to stab him again. The care taker who knew the telephone contact of the deceased father called him to the scene and when he came, he suggested that the police be called before taking him to the hospital.
8. It was his further evidence that when the police from Kinoo came to the scene, they said that it was homicide and therefore called the police from Kabete Station, who came with the scene of crime officers who processed the scene and took the body away after arresting the accused, who had gone to the house of Sarah Njoki (PW4) from the scene and destroyed her household items.
9. He stated that Sarah Njoki who had also been stabbed at the neck was thereafter assisted to go to the hospital by a taxi driver, who had been called by the caretaker. It was his further evidence that when the deceased came into the compound, he was dressed in a grey suit, but when he came out of the house of PW4, he was dressed in a black T shirt and blue shorts.
10. In cross examination, he said that the incidence occurred in house No 1 and at that time he was in the sentry box and did not see the accused stab the deceased and that the accused and the deceased were living together in house No 3 and when the deceased came into the compound with Sarah Njoki, he presumed that he was going to house number 3 until the accused came looking for him at 1.30 am and that both houses were on the ground floor.
11. It was his evidence that when the accused came out looking for assistance from the caretaker, she was not in her usual character and was harsher than he had seen her before.



- He stated that during the time he had known the accused, he had not seen her fight anybody.
12. PW2 Edwin Raruiru Thombi was called on phone to take a customer of his to hospital, he proceeded to the place and took her to Thogoto Hospital at about 5.00am and after she had been attended to, he asked her what had happened to her and she told him to go ask the care taker whom they knew as “Baba Joy”, he then took her to her friend at Ngara where he left her.
  13. On his way from Ngara, he passed through her house and was informed by the caretaker that the accused had stabbed Njoki and the deceased. He then proceeded back to his place and was later on called by Njoki to take her to go and record her statement and passed through her house, which was in a state of disorder and total mess. There were blood stains everywhere in the bed room and her shoes hand bags cut into pieces as well as television
  14. In cross examination, he stated that he had known Njoki for many years but did not know whether she was married and that when he was called by Zachariah Kimani his former driver, whom he had given to Njoki when she bought her car, he found them at Kinoo Global Hospital and that when he went with her to her flat, he saw blood everywhere in the room.
  15. PW3 Leon Ochinga Kabari stated that on October 6, 2013 at 3 am he received a phone call from the accused, who told him that she had killed the deceased and when he inquired from her on how she had killed him, she told him that she had stabbed him and was laying somewhere on the ground floor and that when he inquired again from her whether it was true, and wanted to talk to the deceased to confirm , she told him that there was no need to confirm, since it was either her or the deceased who had to die and that she was sorry.
  16. He therefore decided to proceed to the scene and at the gate he saw police motor vehicle and when he moved into the compound he found the body of the deceased lying in a pool of blood. They then took it to the city mortuary. He stated that he had known the accused as a girlfriend of the deceased who was living together with her and that sometimes the deceased had told him that they were having problems in their relationship and the accused had told him to leave her house.
  17. In cross examination, he stated that he had known the accused and the deceased for about one year and that he used to live with the father of the deceased while he was living with the accused since the year 2012 and that the deceased told him that the accused was angry at him since he had cheated on her and that he later told him that they had reconciled and moved back together. He further stated that the name of Sarah (PW4) had come up from the deceased who did not want to tell him whom she was.
  18. When the deceased died, the caretaker at the flat told him, that Sarah and the accused were living in the same flat and he got to see the proximity of the two houses and that the deceased had a girlfriend one door next to the woman he had lived with for one year.
  19. PW4 Sarah Njoki Wahome testified that she had an on and off romantic relationship with the deceased for a period of eight months and that on 4<sup>th</sup> October, he sent her a text and told her that he would not be going to work and wanted them to meet to discuss something, having called off their relationship in the month of July, so they agreed that he will come to her house at 5.00pm.
  20. On the 5<sup>th</sup> as agreed the deceased went to her house at about 6.00 pm and they slept together until 11am when they took breakfast and stayed together until lunch time when they took fruits, which they cut using the murder weapon. They were in the house until 4.00 pm when they left for Thika road through the Eastern bypass where they were before proceeding to a pub on Langata road between 7-8 pm. They were on Langata road until 10pm when they went back to the flat through Westlands where they bought a take-away dinner.



21. Instead of the deceased proceeding to the flat which he shared with the accused, the same stayed in her flat and went straight into bed, since he had said that he was feeling low having lost his job and wanted to cool his head. At 2.00 am she noticed a movement through her bed room window, which she assumed was the watchman, only for the accused to respond that she was looking for the deceased.
22. In response she told her that the deceased was not in her house, but the accused used her phone torch to shine into the bed room and called out the deceased, who told her to give him a minute to get to their house, to which she responded that it was not necessary as she will talk to him at the scene. Since she was creating a scene, the deceased instructed her to open the door and when she opened the door, the deceased switched on the light and sat on the sofa set in the sitting, while she went into the bed room and locked the door, from where she could hear the accused shouting at the deceased asking him why he had lied to her and shortly thereafter she heard items being moved in the kitchen.
23. She then heard commotion towards the bed room with the deceased telling the accused not to do it while holding each other. The accused then responded that she was going to kill her while holding a knife which she had picked from the table and held her by the neck. She then asked the deceased who was stand there confused to help and he started to straggle with the accused to get the knife away from her and at that stage she escaped into the second bed room to get a trouser, since all this time she only had atop on and when she looked at herself in the mirror, she notice that she was bleeding from her neck and her fingers which were cut.
24. She then ran away from the room leaving the duo stragglng and heard the deceased say “you are stabbing me “she then ran into the caretaker house and looked herself in, with the accused in hot pursuit threatening to kill her and the watch man and the caretaker trying to calm her down. She then turned against the deceased who shouted that she was stabbing him again.  
  
She then heard the deceased fall down and the accused saying that he could now go to her, if he loved her so much.
25. She then requested the caretaker to go into her house and pick the car key but was told that the accused had moved therein in rage and was destroying household items. She then requested for the guards cell phone to enable her call for a driver to take him away to the hospital and before he came she heard the sound of motor vehicle into the compound, who turned out to be the father of the deceased and the brother of the accused who confirmed that he was dead.
26. Her driver then came and took her to hospital and later on to Ngara at her friend’s place and on the third day she went back to her apartment which she found had been cleaned. She found her home theatre missing and the TV, sofa set, shoes and hand bags cut.
27. In cross examination she stated that when she talked to the accused, she noticed that she was in rage and not very happy. She confirmed that she did not come to her house with the knife and that in the month of June the accused had talked to her on their relationship and she had agreed to end the same and that the incidence happen quickly and in a short span.
28. PW5 Charles Kimani the caretaker confirmed that the accused and the deceased were living together in room no 3 while PW4 was living in room no 1 both on the ground floor of Uncommon Flats. On the 6<sup>th</sup> the accused found him at the gate and inquired from him the procedure for terminating the tenancy agreement and he told her that she only need to give a one month’s notice. She also wanted to know whether she could get a cheap school for her child.



29. He did not see her thereafter until the 2.30 a.m when she called him to find out whether he had slept, to which he replied in the negative, he then saw her move from PW4' s bed room window, who, he shortly thereafter heard raising an alarm before running into his house.
- The accused came to the scene holding a knife in her hand and looking agitated and very aggressive unlike her usual self. She told him that she wanted the deceased to tell her why he had lied to her before he dies.
30. The deceased then followed her to the scene bleeding and vomiting blood and the watch man joined them as they tried to calm the accused. PW4 then called him and requested that he gets her car keys from her house to take the deceased to the hospital but was told that the accused had moved into her house in rage so he decided to call the father of the deceased to take him to hospital.
31. He reported the incident to the police who came and processed the scene , took away the body and arrested the accused from her house and that there was a time before the incidence when the deceased physically assaulted the accused and her house helper called him to go and assist her, which he did and further there was a time when both the accused and PW4 approached him on the conduct of the deceased who was double dealing with them and instructed him not to allow him into the compound, only for the accused to later tell him that they had ironed out the issue.
32. In cross examination, he confirmed that the accused was the one who was paying the rent and that for almost the three years she had stayed in the flat, he found her to be a calm person and that he had known that despite the fact that the deceased was living with the accused, he was also moving with PW4 and that he was very charming and persuasive when it came to ladies. He stated that the accused on the material day was not in charge of her emotions and that she ended up stabbing a car which was next to her and the caretaker's door and that he later learned that she had found the deceased in bed with PW4.
33. PW6 Dr Johansen Oduor conducted post-mortem examination on the body of the deceased who had stabbed injuries all over the body and as a result formed the opinion that the cause of death was multiple injuries due to penetrating trauma.
34. PW7 SGT Silas Kubai revisited the scene on the 12<sup>th</sup> and drew the sketch plan thereof and recorded the witness statement and further referred the accused who had injuries to the hospital for treatment and mental assessment.
35. PW8 Elizabeth Waithera Onyiego an analyst with the Government Chemist confirmed that the DNA profile generated from the blood sample of the deceased matched those generate from the knife recovered from the scene.
36. PW9 Ins Nicholsas Mucheru visited the scene on 6<sup>th</sup> of October and found the body lying down, he searched for the evidence and took photographs and that there were several places where the blood stains were found.
37. PW10 PC Leonard Kiptoo went to the scene where he found the body of the deceased lying down. They followed the footsteps of the deceased up to room No 1 belonging to PW4 and up to room No 3 belonging to the accused. In room No 1, there seemed to had been commotion with blood stains all over. The sofa set was chipped and the TV smashed while in the house of the accused there were drops of blood and he recovered the knife from the house of the accused.
38. In cross examination, he stated that the accused was informed that her husband was in house No 1 belonging to PW4 by the watch man and found him in bed with her while his shoes were outside the door and that when the accused was let into the house the deceased started the scuffle and that when he arrested the accused, she was very remorseful. He stated that the accused became suicidal thereafter



and stabbed herself in the stomach and that what the deceased did was not acceptable as he was having an affair next to the accused which made her upset.

### **Defence Case**

39. When put on her defence, the accused gave a sworn statement, that she was a nurse by profession. She started living with the deceased in the year 2011 and moved together at the flat in October having lost his job and she was the one who was taking care of the bills and at that time she was expecting another child being nine weeks pregnant and that on the 5<sup>th</sup> she was working on night duty while the deceased was working from home and when she came back to the compound the watch man told her that he had seen him with PW4 and she noticed that her bed room window was opened she called the deceased and PW4 said that he was not in only for the deceased to confirm that he was in the house.
40. She then got into the house and PW4 wanted to push her out of the house while the deceased joined her in roughing her up which led into a fight and since she was unhappy with the turn of events, she could not remember what happened thereafter since she felt betrayed and could not remember where she got the knife from.
41. She stated that she loved the deceased very much and helped him with his school fee and that had it not been for his action, she would not have acted the way she did and that she was provoked beyond her capacity to contain.
42. In cross examination, she stated that they had at the time of the incidence agreed to register their marriage at Sheria House (Civil Registry) and that she was informed by PW1 that he was in Njokis house having seen his shoe outside and that in the commotion created she ended up stabbing the deceased without an intention to do so.

### **Submissions**

43. On behalf of the accused, Mr Wandugi submitted that there was no sufficient evidence that the accused committed the offence and that the deceased lost his life as a result of his illicit involvement with PW4 whom he was sleeping with and when the accused sought to find out what was happening, the deceased was not apologetic and did not attempt to cover up for his adultery and that the accused when arrested had attempted to stab herself to death and was one month pregnant at the time and was extremely provoked by her husband committing adultery in the next room.
44. On behalf of the state, Mr Okeyo submitted that the accused was not entitled to the benefit of provocation since the deceased and PW4 were not with her in the same room and that it is the accused who followed the deceased and PW4 to the house where they were and kept watch over them and therefore the same had formed the intention in her mind by waiting for them to appear so as to attack them.

### **Determination**

45. To sustain a conviction on a charge of murder, the prosecution is required to prove beyond reasonable doubt, the following elements of the offence:
  - a. Cause and fact of death.
  - b. That the death was caused by unlawful act on the part of the accused person.
  - c. That the accused had malice aforethought.



46. The fact and the cause of death of the deceased was proved beyond reasonable doubt through the evidence of most of the prosecution witnesses and confirmed by the accused in her defence. PW1 a security guard at the flat, PW2 a friend and driver of PW4, all confirmed that the deceased died as a result of injuries sustained on the material day. The cause of death was scientifically confirmed by Dr Johansen Oduor who produced the post mortem report in which the cause of death was stated as multiple injuries due to penetrating trauma. I therefore find and hold that the cause and fact of death were proved.
47. On whether the said death was caused by the accused person, the evidence tendered before me clearly placed the same at the scene. She first asked PW1 whether he had seen the deceased and was told that he had been seen with PW4 and was seen by PW 5 looking through the window of PW4's house only for her to come running into his house followed by the accused holding a kitchen knife and the deceased who was bleeding all over the body before he collapsed by his door.
48. The accused then called PW3 whom she informed that she had killed the deceased and in her defence the accused testified that she could not remember what actually happened on the material day and that she had been provoked beyond her capacity by both the deceased and PW4 who were having an affair right next door despite the fact that she had given her all to the deceased and had also spoken to PW4 as a fellow girl and she had agreed to end the affairs. The investigating officer found the killer weapon in the house of the accused. And the DNA profile generated from the said knife matched that generated from the blood sample of the deceased, thereby positively holding the accused to the death of the deceased.
49. The fact that the death was caused by the accused is therefore a proven fact. The only issue for determination is whether the defence of provocation was disapproved by the prosecution.
50. The defence of provocation is provided for under section 208 of the *Penal Code* and the Court of Appeal in the case of *Lucy Muieni Mitara v Republic* [2019] eKLR had this to say on the same:

“9. Provocation is a defence available to a person who by his/her actions causes the death of another and is faced with a charge of murder. Provocation was succinctly 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 ...”

See also section 208 of the Penal Code. The person relying on the defence simply states that at the time he committed the offence he was under a diminished capacity and acted in the heat of anger or passion. See *Elphas Fwamba Toili v R* [2009] eKLR.

10. It therefore follows that for such a defence to suffice two conditions must be satisfied as deduced by this court in *Peter King'ori Mwangi & 2 others v R* [2014] eKLR namely:-

“The “subjective” condition that the accused was actually provoked so as to lose his self-control; and



The “objective” condition that a reasonable man would have been so provoked.”

51. The High Court on the other hand in the case of *R v Daniel Okello Rapuch* [2017] eKLR added its voice on the same as follows: “The real point of this case turns up whether or not legal provocation as defined under section 208 (1) of the *Penal Code* was disclosed to trigger the actions taken by the accused. In order to answer this question, it is appropriate at this stage to set out the law relating to provocation. Section 207 of the *Penal Code* provides:

“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 he is guilty of manslaughter.”

Section 208 (1) of the Penal Code defines the term provocation as follows:

“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 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.”

This question on provocation and provisions of section 208 (1) of the *Penal Code* have been a subject of interpretation and discussion in our courts in several cases. In the earlier case of *Republic v Hussein S/O Mohamed* [1942] EACA at pg. 66 the Eastern Court of Appeal held as follows:

“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defense of provocation.”

In the case of *Peter Kingori Mwangi & 2 others v Republic* [2014] eKLR the court stated that, “for provocation to exist the following two conditions must be established:

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

In deciding a similar situation on provocation the Court of Appeal in the case of *Elphas Fwambatok v Republic* [2009] eKLR held thus:

“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga –



we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims.....”

In *Mabanga v Republic* [1974] EA 176 the court further held inter alia on this subject as follows:

“The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the court was in the particular circumstances of this case provocation sufficient to have rendered the offence of murder to manslaughter.....

We have on our own revisited the content of section 208 of the Penal Code and construed it. To us content of provocation means any wrongful act of insult of such a nature as to be likely when done to an ordinary person.....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.”

52. I am persuaded by the above cases to be the correct legal position and have nothing useful to add and shall now apply the same to the circumstances of this case, where the uncontroverted evidence is that the deceased who was living with the accused in her flat as a husband and who rather than sex added no premium into her life, started an affair with PW4, who was her next door neighbour and continued with the said affair even after the accused had warned both the deceased and his “side chic” to stop the affairs.
53. On the material night not only had the deceased spent the better part of the day with PW4 he ended up sleeping in her house and as if to spite the accused left his shoe just right outside her door and when she inquired from her of his where about, despite the fact that she had seen them in bed together, she lied to her that he was not in only for the deceased as a “fake total man” to confirm to confirmed to her that indeed he was therein and ordered her to go and wait for him in her house so as to discuss the issue.
54. At this time the accused was pregnant with the deceased child and was therefore not in total control of her hormones. She had set out to harm the deceased but as per her evidence. When he together with PW4 roughed her up, she decided to eliminate PW4 her competitor only for the deceased to side with her in this war of the ladies. I have taken into account her conducted before and immediately after and to the extent at which she directed her anger at the items which were in the house of PW4 and thereafter her attempt to take her own life, I therefore find and hold that the accused was provoked by both the deceased and his side chic causing her to lose control of her faculty and find and hold that the defence of provocation was proved.
55. Both the deceased and PW4 were the authors of this misfortune as whereas they had a constitutional right to engage in their illicit love affair, to do so just one room away from the accused was a mark of disrespect and as stated by the investigating officer, any reasonable person in the shoes of the accused would have been expected to act as she did thereby satisfying the objective test of provocation. The fact that she was expectant with the child of a man who had decided to sleep with her next door neighbour satisfied the subjective test.
56. In finding the accused guilty of manslaughter I have taken note of the fact that when the watchman informed her that he had seen the deceased with PW4, she did not take immediate action to go fetch him from her house but waited until the wee hours of the morning.

I have further noted from the evidence that having stabbed PW4 on the neck, she proceeded to stab the deceased several times as shown from the post mortem report and she attempted thereafter to take away her life in shame.



57. Having satisfied all the elements of the defence of prosecution, and whereas her action seems to have been extreme as stated in 1883 by Chief Justice Tindal. I have considered that the mortal word was given by the accused while something under prosecution so recent and so strong that she might not be considered at the moment. The mistake of her own understanding in which case the law is compassion to human infirmity would hold the offence crying to man slaughter only.
58. To hold otherwise would amount to reducing the accused to the status of a rude animal to see the man you have spent your life time with in bed with another woman in the same compound which act she had not condemned as she had made an attempt to stop it including talking to PW4 directly and attempting to evict the deceased from her house only for him to find his way back into her life but without stopping the confirmed act of adultery. This act was so close in time and I find and hold that the accused lost her self control as a result of the act of the deceased and PW4 who had shown her total disrespect.
59. It therefore follows that the accused did not intend to kill the deceased and therefore find and hold that the charge of murder was not proved and is accordingly acquitted and instead found guilty of manslaughter as provided for under section 202 as read with section 204 of the *Penal Code* and is convicted thereof.
60. And it is accordingly ordered.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF OCTOBER 2022**

**J. WAKIAGA**

**JUDGE**

In the presence of:-

