REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 18 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

KADENGE KATANA KAZUNGU.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Michira for the accused person

JUDGMENT

The accused was charged and has been on trial for the offence of murder contrary to Section 203 of the Penal Code punishable as provided for in Section 204 of the Code. The indictment is based on the brief facts that on 14.10.2016 at Kwa Mwangari Village, Makongeni, Kilifi County accused jointly with others not before court murdered **Karisa Kayaa Ngari.** As the accused returned a verdict of not guilty the prosecution had an occasion to discharge the burden of proof to disapprove his innocence as stipulated in Section 107 (1) of the Evidence Act. **Mr. Michira** Learned counsel appeared for the accused whereas **Ms. Sombo**, prosecution counsel represented the state.

The summary of the prosecution evidence.

PW1 – Mary Kadu Charo, the wife to the deceased testified that on the fateful time and day of the 14.10.2016 at about 6.00 p.m. the deceased had taken their goats to the grazing fields. She further testified that surprisingly the goats came back home without the deceased. The likelihood of the deceased appearing even on the second day faded. Later, efforts were made to search and trace his whereabouts within the village. In the course of their search which led them to Galana River, (PW1) told this court that the deceased body was discovered floating at the edge of that river. She further confirmed to the court that a police officer telephoned them regarding the accused who had already surrendered to the station confessing to the murder. What followed was the preservation of the scene by the police and collection of the body of the deceased for further investigations.

PW2 – Joseph Sikubali Kayaa the witness who is a younger brother to the deceased. On account of his death, told the court on efforts made to search for his whereabouts since he went missing on 14.10.2016. As a result, in company of PW1 and other neighbours they found the deceased body floating at the edge of Galana River. In view of the information received from the police that accused had surrendered to the police, further action on the cause of death was taken over by the police.

According to his observations made by PW2 to the court the deceased body had injuries to the neck and head.

PW3 – Kamala Ngari Kombe under oath gave evidence that he had participated in witnessing the surrender of the accused to Lango Police Station and thereafter recovery of the body of the deceased from Galana River.

PW4 – PC Faida Katana Kahindi of Lango Police station explained to the court that on 16.10.2016, the accused being escorted by his father turned up at the police station as a shelter of safety from neighbours who were threatening to kill him on the basis that he had a hand in the death of the deceased. Following the discovery of the body, investigations on the incident was initiated by Malindi Investigation Agency.

PW5 – NO 47589 PC Thomas Simiyu's account gave a detailed witness statement on the investigations carried out and indictment of the accused as a suspect of the murder. He confirmed that the body was retrieved from Galana River with evidence of multiple injuries. It was therefore necessary for a post-mortem to be conducted to establish the cause of death. It was also PW5 evidence that the accused was later to confess to the murder in a confession statement recorded by **IP Getende** of Malindi Police Station.

A further evidence was from **Dr. Faisal Swaleh (PW5)** of Malindi Hospital who produced the post-mortem report exhibit1 on behalf of **Dr.**

Angote. On the post mortem examination conducted on the body of the deceased **Dr. Faisal** confirmed that there were visible multiple injuries to the head and cervical spine. In the report put together **Dr. Faisal** informed and the court that the deceased cause of death was multiple head injury, and depressed skull fracture with cervical spine.

PW7 – NO. 235637 IP Getende testified on the steps taken with regard to the recording of the confession statement from the accused. During the recording session the witness told the court that he explained the accused of his rights as provided for in out of court confessions (Rules) 2009. According to PW7 that criteria which in this case was properly administered occurred independently, fairly and the accused voluntarily agreed to record the confession statement without any duress, extortion, coercion or promise. It is at that stage PW7 told the court that the accused elected to invite the presence of **Katana Kazungu**, **Emmanuel Katana** and **Katana Kunga** to witness the recording of the confession. That the same confession having been read back to the accused it was duly signed, countersigned and endorsed by his witnesses. He produced it before court as an exhibit 2.

The prosecution closed its case and the accused was placed on his defence in terms of Section 306 (2) of the Criminal Procedure Code. In respect to the case, it was his defence that the goats owned by the deceased did trespass to his maize crop on 14.10.2016. He drove them out of the farm and incidentally the deceased emerged and took over possession. In a short while the deceased who was armed with a panga placed it down and started a fight. In the ensuing fight accused went on to state that the deceased picked the same panga and used it to cut his left hand. Having suffered injuries, he left the scene for hospital. He did not stop there but surrendered himself to Lango Baya Police Station where he reported the matter. In his defence accused also confirmed implicitly the contents of the confession statement recorded before PW7 and duly signed as admitted in court in support of how the deceased met his death. That is in so far as the whole trial went in its entirety.

Analysis and Determination

The issue here is whether on the whole evidence the prosecution presented before this court sufficient evidence to discharge the burden of proof under the imports of Section 107, 108 and 109 of the Evidence Act beyond reasonable doubt. The principle elements agitated by the prosecution are that:

(1). The death of the deceased Karisa Kayaa Ngari occurred on 14.10.2016 at Kwa Mwangari Village.

(2). That his death was unlawfully caused.

(3). That in causing death, the accused had malice aforethought.

That the prosecution has sufficient evidence on identification to place the accused at the scene of the crime.

The question here though, is whether the court would reasonably conclude beyond reasonable doubt that the accused caused the death of the deceased with malice aforethought?

In this regard before considering this critical question to enable me bring this verdict in perspective, it's necessary to lay down general principles on the burden and standard of proof expected of the prosecution.

Under Kenyan Law before an offender gets convicted of any crime more so in the model of our Penal Code, the unbroken tradition is for the prosecution to discharge both the legal and evidential burden. This goes in line with Article 50 (2) (a) of the Constitution which provides that everyone charged with a criminal offence shall be presumed innocent until the contrary is proved in accordance to the Law. Notably, it's the duty of the prosecution to prove that contrast of the right on presumption of innocence. Distinguishing the features between engagement of the legal and evidential burden certain key principles have been known to determine certain inferences.

> ***"These types of burden of proof sometimes known as the persuasive or probative burden is the obligation. The Law comprises on a party to prove a fact in issue."***

See commentary on the **Evidence Act Cap 80 (2nd Edition Law Africa by Steve Doma at page 50 paragraph 2.2.1).** In the case of **Rhesa Shipping v Edmonds {1985} 1WLR 948 Lord Baidan** said of the tribunal of fact:

> ***"The judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge the burden. No judge lives to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases however, in which, proving to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take."***

In the instant case, the state investigated the weightier allegations of murder against the deceased at Kwa Mwangari village. The accused was named as the probable suspect who had something to do with the death.

Thus in the ensuing criminal proceedings the legal burden is on the prosecution on behalf of the state to prove each of the elements of the offence charged, but also disapprove any affirmative defence raised by the accused. This legal burden which never shifts to the accused was succinctly stated by the **House of Lords** in the case of **Woolmington v DPP {1935} (MAC 462 (AC 462)** as follows:

> ***"Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecutions to***

prove the prisoners guilt subject to the defence of insanity and subject to any statutory exception. If, at the end of and on the whole of the case, there is reasonable doubt, by the evidence given by either the prosecution, or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or what the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained."

The rule as entrenched under Section 107 (1) of the Evidence Act provides as follows:

"Every party deserving any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists."

The quality of evidence the prosecution adduces invariably determines if that burden has been discharged. The standard of such proof is proof beyond reasonable doubt, in order to establish that an accused person had really committed the offence. This means that the prosecution evidence must relate to any of the ingredients of murder in order to discharge that burden in which case its beyond reasonable doubt.

In this regard the director of public prosecution has the obligation to prove the elements constituting this murder charge beyond reasonable doubt in order for the accused to be convicted as such of the offence. This is in contrast with the evidential burden, in relation to a case, means the burden of adducing evidence or pointing evidence that suggests a reasonable possibility that the facts exist or does not exist. Generally, in Law, the prosecution bears both the legal and evidential burden of proof.

In **R v DPP Ex-parte Kebilene {2000} AC 326 – 378 -79:**

"An evidential burden requires only that the prosecution must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in issue."

In a case like this one facing the accused it's the probative value to be attached to legal burden and evidential burden to the specific issues of evidence and its sufficiently as a whole aimed at to proof the elements of the offence against the accused person.

Turning now to other points directly connected with this trial is perhaps to establish whether the burden of persuasion and production has been properly grounded to rule in favour of the state by finding the accused guilt to justify a conviction.

The prosecution case is purely based on circumstantial evidence as to where and how the deceased was killed. The most compelling cautionary language on the relevance and application of circumstantial evidence is to be found in **Rex v Kipkereng Arap Koske & Another v R {1949} 16 EACA 135:**

"Where the court observed interalia that before a court can convict on the evidence in a case of purely circumstantial evidence. It must exclude every reasonable hypothesis consistent with the innocence of the accused and that if there is reasonable hypothesis consonant with his innocence then its the duty of the court not to so find him guilty."

In the case of **R v Taylor {1928} 21 CR Appeal R20** the nature and value of circumstantial evidence has been described as follows:

"Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, eliminating other possibilities, and has been likened to a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite sufficient strength. Thus it may be circumstantial evidence, there may be a continuation of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but the three taken together may create a strong conclusion of guilt with as much certainty as human affairs can require or admit of."

The nature of the evidence that would quickly move to sustain a conviction is not necessary that each piece of the strand standing separately and in the chain convince the court of the accused guilt beyond reasonable doubt.

Instead the irresistible inference is to be found when the accused guilt is cumulatively answered on all the pieces of strands on circumstantial evidence to lead to the conclusion that he committed the crime. In terms of comprehensibility and application of this doctrine, the strength of the inference, accuracy and the burden of proof of beyond reasonable doubt, plays a major role. See the further principles and threshold significant illustrations in the cases of **Sawe v R {2003} EKLR, Abanga alias Onyango v R CR Case No. 32 of 1990 (UR), Simon Musoke v R {1958} EA 715.**

The essentials of this case is the dictum in **Byamunga s/o Rusiliba v Rex {1951} 233,** where the court stated that:

"The question is not the truth or untruth of the defence but whether the case for the prosecution either by direct or circumstantial evidence beyond reasonable doubt. The presence of this cardinal guiding principles notwithstanding it is imperative to test the ingredients with the existence and non-existence of the facts relied upon to indict the accused:

Let me deal with the offence as provided for in Section 203 of the Penal Code.

(a). Death of the deceased.

According to (PW1) the deceased left home on 14.10.2016 for the fields to graze his goats. Later that day, she strangely noticed that the goats have appeared within the compound minus the deceased. Her first step was to wait and also inquire from the next neighbourhood. The deceased never surfaced but his body was to be discovered in river Galana, with multiple injuries.

The post-mortem performed by **Dr. Angote** on 21.10.2016 confirmed the death of the deceased. I take it therefore that no dispute there is to counter evidence by the prosecution on the death of the deceased.

(b). Let me say brief words on the element of the unlawful act or omission.

In making sense on some measure of culpability in this ingredient would be the acts that manifest wound(s) or blow(s) or ingestion of poison or by strangling or suffocation which directly causes another's death.

The conditioning of the offence of murder contrary to Section 203 of the Penal Code entails an intentional assault or some other dangerous act reflected in the fact of patterns of conduct in which the resultant outcome is the dead of another human being. In **Regina v Lee {1864} 176 English Reports 468,** one of the key elements attributable for the offence of murder is where:

> ***"a man in the committal of a felony uses violence to the person, which causes, death, even though he did not intend it."***

When conceptualizing the offence of murder contrary to Section 203 of the Code it is clear that the legislative had in mind the dual culpability of cognitive and normative dimension. A plausible implication of this two dimensional model of culpability is that of unlawfulness and malice aforethought to justify the aggravation for the offence.

In respect of this ingredient the prosecution led evidence that demonstrated that prior to the early hours of the 14.10.2016 the deceased was presumably in good health going about his chores within his farm. He had even taken the liberty as stated by (PW1) to take the goats in search of pastures. It is interesting to note that the deceased was never to return home alive.

Further, the prosecution's evidence was that PW1 and PW2 followed the footprints of the deceased up to Galana River. In a tragic encounter the deceased was found dead with multiple injuries. It is important to note that the forensic evidence by **Dr. Faisal (PW6)** revealed the sole pattern of injuries inflicted caused the deceased death. There is therefore sufficient medical evidence linking the injuries and inferential conclusion on the cause of death being unlawful. In the case of **Constance Wesonga v R {1948} 15 EACA 65:**

> ***"Every homicide is presumed to be unlawful except where the circumstances make it excusable or 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."***

A case built up by the accused in his defence as a whole revolved around cogency of the inference that his conduct to violently assault the deceased was excusable or justifiable in Law.

He further stated that a fight ensued as a result of the goats which had trespassed into the maize crop and when he drove them out of the farm his encounter with the deceased turned into a fight. That before the fatal blow against the deceased, there was substantial risk of serious injury on his limb when an attempt was made to cut him with a panga by the deceased.

That it was in retaliation to defend himself that the physical harm against the deceased did take effect. Therefore, the accused raised an interesting narrative of self-defence. The question is whether in Law, the relevance of it can be generally accepted as answer to the value circumstantial evidence by the prosecution.

In **Blacks Law Dictionary 9th Edition (West group) pg 1481** defines self-defence as:

> ***"the use of force to protect oneself, one's family or one's property from a real or threatened attack."***

Bearing this definition in mind is to move to examine whether the accused was provoked because the deceased goats had trespassed to his farm to temper with the maize crop. The pointers on provocation are to be weighed within the textual provisions under Section 207 as read in conjunction with Section 208 of the Penal Code.

In the text by **J Dressler**, why keep the provocations defence **Some reflections on a difficult subject {2002} 86 Minnesota Law Review Pg 959:**

> ***"The character direction of provocation must be so serious that we are prepared to say that an ordinary person in the actors' circumstances, even an ordinary Law abiding person of reasonable temperament, might be sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently."***

The criteria for granting an accused self-defence as set out in Section 17 is structured on the basis of the essential principles in the Landmark cases of **R v Palmer** where the Court stated that:

> ***"It is both good Law and good sense that a man who is attacked may defend himself. It is both good Law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. It may in some cases be only suitable and clearly possible to take some avoiding action. Some attacks may be***

serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction."

A basic tenet of the doctrine on self defence and the surrounding factual landscape is in accordance with the burden of proof expected of the prosecution to proof the charge beyond reasonable doubt.

In this context the evidence that there is and in the manner in which the crime was committed there is no sufficient circumstances to support self-defence on the part of the accused. A critical feature carried through the evidence of PW1 and PW2 and on the conditions specific to the confession statement by the accused ordains, it's case to the standard of proof of beyond reasonable doubt. This has been clarified in the case of **Joseph Kimanzi Musyoki v R {2006} eKLR** the Court of Appeal stated:

"I should here point out that like in all other criminal cases, where the accused raises the defence of self-defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. Where the accused raises defences of self-defence or provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove the accused was not provoked or that he did not act in self-defence. In other words, the prosecution must disapprove the defences of provocation and self-defence and it must discharge this burden beyond reasonable doubt."

This test which is always applied has to be weighed with the confession statement embodying the accused defence. In my view neither, words nor gestures nor injuries to property amount to provocation to accompany the intention and unlawful acts of use of excessive force upon the deceased. There does not appear to have been any evidence to the alleged loss and damage to the maize crop to deprive him of self-control. Again in **Manani v R {1942} the House of Lords** stated:

"To retort in the heat of passion induced provocation, by a simple blow is a very different thing from making use of a deadly instrument like dagger. In short the mode of retaliation must bear a reasonable relationship to provocation if the offence is to be reduced to manslaughter."

The accused chose to record a confession statement in accordance with Section 25 as read in conjunction with Section 25(A) of the Evidence Act. The test here is that of voluntariness for no one should be compelled to betray himself. The Court in **Tuwamoi v Uganda {1967} EA84** illustrated that statement with the following passage:

"We would attempt to amplify the position. First the onus of proof in any criminal case is on the prosecution to establish the guilt of an accused person. A conviction can be founded on a confession of guilt by an accused person. The prosecution must first prove that this confession has been properly and legally made. The main essential for the validity of a confession is that it is voluntarily, but the other legal requirements of each territory must also be established……"

The Evidence Act in pursuant to Section 17-24 defines an admission as:

"A statement, order or documentary, which suggests any reference as to a fact in issue or relevant fact and which is made by any of the persons and in the circumstances thereafter mentioned. This is distinguishable with a confession under Section 25 of the Act which an acknowledgement by a party in terms to express his guilt in a criminal case."

In the instant case **PW7 – IP Getende** recorded a confession from the accused in relation to the commission of the offence. During the trial that confession was proved to have been freely and voluntarily made in reference to the circumstances in which the deceased died. It is quiet clear from the confession that the accused was on site of the crime and the decisive factors prevailing at the time which formed the basis of the attack involved an initial trespass to his farm, the subsequent fight and the intended attack by the deceased which called for an immediate retaliation by use of the panga at the scene.

It is nonetheless the task of this Court to interpret the embodying fundamental principles on self-defence as far as it relates with this murder, it was permissible to use excessive force.

As pointed out above the Law of self-defence, as it is applied by the Courts, turns out on two requirements the force must have been necessary and it must have been reasonable. In the sphere of this case fortunately in my view the prosecution evidence can be brought within the ambit and guidelines set out in **Joseph Kimanzi Munyoki v R {2006} eKLR** where the Court succinctly stated:

"I should here point out that like in all other criminal cases, where accused raises the defence of self-defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. Where the accused raises defences of self defence on provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was not provoked or that he did not act in self-defence. In other words, the prosecution must disapprove the defence of provocation and self-defence and it must discharge this burden beyond reasonable doubt."

When considering the circumstances of the incident, I am of the conceded view that the acts done or said by the deceased to or in the presence of the accused could not have caused sudden loss of self-control to trigger the gravity of provocation for him to act the way he did with excessive force.

Traditionally, the onset of the trespass and grazing of the maize crop was of a characteristic to be referred to local chief for intervention and compensation for the loss and damage. It turns out that the accused had the means to escape the fight and to retreat from the scene altogether and to avoid in confronting the deceased with an offensive weapon. The important point to see here for our purposes is the means used to

inflict harm and parts of the body targeted.

I make three further observations, contrary to the accused defence that they fought with the deceased in light of the medical evidence his story is at variance to create a reasonable doubt.

Secondly as the facts and evidence from PW1, PW2, PW3 and PW5, it is clear that the alleged body of the deceased was recovered dumped at River Galana.

The danger with the accused defence is the discrepancies in his defence in regard to the gravity of his retaliation and his peculiar conduct of dumping the body at Galana River. It is at once obvious that unless this court gives another exposition to the test of a reasonable man, the accused in all respects unlawfully caused the death of the deceased. There is nothing which deprived him of the power of self-control and thereby inducing him to kill the deceased.

As the charge of murder shows definitely one central element to be proven is that of malice aforethought. In **S C Requests to charge Crim 2 -1 {2007}** jury instructions on murder gave the following instructive statement:

> ***"Malice, in its legal sense, signifies a general malalignment recklessness of the lives and safety of others, or a condition of the mind which shows, a heart regardless of social duty and fatally bent on mischief. Malice is the wrongful intent to injure another person. It indicates a wicked or deprived spirit intent on doing wrong. It is the doing of a wrongful act intentionally and without just cause or excuse."***

At the close of the prosecution case, all the evidence combined together must show that the accused had the necessary intention to commit the offence of murder against the deceased. The purpose of Section 206 of the Penal Code is to present the presumptions on circumstances that manifest malice aforethought.

It is conceivable that the prosecution establishes the circumstances of the offence on account of the following manifestations:

> ***(a) An intention to cause death or to do grievous harm to any person, whether such person is the person actually killed or not***
>
> ***(b) Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be accused.***

It is not always easy for the prosecution to proof intention so as to establish what a man thinketh which in the whole produced the unlawful acts of omission to cause death or to do grievous harm. As the definition goes, malice aforethought comprising of intention or knowledge has to be shown by way of evidence to be consistent with the cause and time of death of the deceased. The *mensrea* therefore required in murder is the intention to unlawfully cause death or to do grievous harm.

The celebrated case of **Tubere s/o Ochen {1945} 12 EACA 63** emphasizes the principles as to the circumstances in which an accused person may be deemed to have committed the murder with malice aforethought by considering, the weapon used, the manner in which it was used, part of the body targeted and injured, the conduct of the accused before, during after the murder.

In **Ernest Asami Bwire Abanga alias Onyango v R CR Appeal No. 32 of 1990** in deciding the presence of malice aforethought in a particular case it may also be inferred from the manner of the killing and gravity of injuries calculated to cause the death of another human being.

However, this element is not absolute. Sometimes Law has created exceptions that there occasions likely to present itself as a murder committed with malice aforethought but on deeper analysis is true manslaughter.

In the case of **Nzuki v R {1993} KLR 171** the Court of Appeal pronounced itself as follows:

> ***"The test of which is always subjective to the actual accused:***
>
> ***(a) Intention to cause death***
>
> ***(b) Intention to cause grievous bodily harm where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them lawful excuse.***
>
> ***It does not matter whether the accused desires those to ensue or are the mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder."***

In the present case **Dr. Faisal** know **Dr. Angote's** handwriting from the firsthand experience to give evidence on his behalf on the post-mortem report exhibit 1. According to the Evidence Act Section 33 (b) reports of such medical examinations can be made available and produced by another medical officer acquainted with the handwriting and signature of the maker of the report or post-mortem for that matter. The post-mortem report which was duly admitted showed a vital link between the injuries suffered and the cause of death.

In the case of **Benson Ngunyi v R CR Appeal No. 171 of 1984:**

> ***"It was pointed out that medical evidence is not only usually required to prove the cause of death, but also to relate the injuries if possible to the evidence led by the prosecutions."***

The nature of the assault pertains to multiple injuries to the skull to give definitive conclusion as to the intention of the assault, taking all other circumstances into consideration. The events that followed at that fatal moment of having the body dumped into Galana River immediately after the incident support manifestation of malice aforethought.

It must immediately be said that the accused defence largely found in his confession statement given pursuant to Section 25A of the Evidence Act does not dislodge the prosecution case on intention to cause death or to do grievous harm. The assertion that he retaliated with force after being hit by the deceased does not squarely fall within the defence of self as articulated elsewhere in this Judgment.

In my view, the mental element ordinarily referred to as malice aforethought under Section 206 of the Penal Code which bears on the *actus reus* of the murder committed by the accused on the part of the prosecution has been proved beyond reasonable doubt. To hold otherwise in accordance with Article 50 (2) (a) of the Constitution would violate the presumption of innocence as the contrary has been proved by the prosecution.

For the foregoing reasons, I come to the conclusion that the accused guilt of the offence of murder contrary to Section 203 of the Penal Code and as a consequence I duly convict him and further the sentence to be passed in terms of Section 204 of the Penal Code.

Sentence

I have considered the formidable submissions by both Learned Counsels on mitigation and aggravating factors. I fully agree with the guidelines and principles set out in the case of **Francis Karioko Muruatetu v Republic (2017) EKLR**. In which one of the factors considered was that mandatory death Sentence is unconstitutional. I think in broader sense of the predominant principle in that case the unfettered discretion for the trial court to leverage and mainstream various factors on sentencing before passing an appropriate sentence. On factor is clear death penalty is still legal punishment only reserved for the worst of the offenders convicted under **section 203** or **Section 296 (2**) of the Penal Code. The philosophy behind the death sentence as I said is to avoid punishing convicted offenders to retributively so as to give a chance to reform or improve the offender at the end of incarceration. All in all, from the mitigation and aggravating factors this is not one such case. Striking a balance within these two variables I sentence the accused person to twenty-five (25) years imprisonment.

14 days Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEB, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mwaura for the accused person.

Mr. Alenga for the state

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. (dpp@odpp.go.ke)