



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO. 2 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DAVIS MURIUKI KINYUA.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Gekanana advocate for the accused person

J U D G M E N T

The accused person **Davis Muriuki Kinyua**, is herein facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. In relation to the charge, the state alleges that on the 21.6.2015 at Witu Police Station, the accused murdered **Joseph Mwita Rioba**. The accused who is being represented by Learned counsel **Mr. Gekanana** pleaded not guilty to the charge. By this plea of not guilty, it placed the task of proving the charge upon the prosecution by calling the necessary evidence to disapprove the innocence of the accused.

Regarding the latter obligation, **Mr. Mwangi** for the state had the evidence of the prosecution case. The burden of proof which rest with the prosecution throughout the trial requires proof of the following elements beyond reasonable doubt in order for conviction and Judgment for the offence to be obtained against the accused person that is:

- (a). The death of the deceased.*
- (b). That his death was unlawfully caused.*
- (c). That in causing death the accused was actuated with malice aforethought.*
- (d). That the accused in Court through direct or indirect evidence was the one who committed the crime.*

At this initial trial to discharge that burden, the following witnesses gave evidence to proof the element of the offence: **(PW1) Masudi Sabur** testified that on 21.5.2015 he was working as a gardener at Witu Police Station. On that particular day, he happened to be at the police canteen in company of the accused. In the course of time, they were joined by the deceased who came from the neighbourhood. It is at that moment accused person who was armed with a G3 rifle ordered the deceased person to stop, but he could not hold to that order of the accused without any further conversation, the deceased entered the reception desk and started to make entries in the occurrence book. With that conduct of the deceased, accused demanded to know from him whether he was the only man. The witness stated that thereafter, he heard gun shots apparently targeted at the deceased who was rendered motionless. That is when **(PW1)** saw the deceased bleeding from the stomach and lay on the ground unconscious. As for **(PW1)** he saw the accused holding the gun and it is at that moment he must have shot at the deceased.

It was also the evidence of **(PW2) – Esau Baraza** to the effect that on 21.6.2015 he happened to have visited his father at Witu Police Station canteen. According to **(PW2)**, the accused asked for a bottle of Tusker beer but before finishing the drink the deceased entered into the canteen. That is when he heard the accused calling for the deceased three times but unfortunately there was no response. The deceased walked straight to the room known as the occurrence book. The accused followed him immediately to that occurrence book room. In the testimony of **(PW2)**, all he could hear immediately was a gun shot. Having heard so, on observation **(PW2)**, the deceased body lying on the ground. It followed from that incident the accused dropped the gun down and one **Major Mary** effected an arrest of the accused.

(PW3) – Mathew Baraza, who runs the canteen where the incident occurred testified that on 21.6.2015 he sold Guinness beer to the accused. As he served him with the drink, he observed that his face was swollen. On inquiry, **(PW3)** told the Court that accused informed him that the deceased had inflicted the injury with a bottle. According to **(PW3)**, he left the can beer and in a little while he was informed that a police officer has been killed. He decided to return back to that scene where he saw streams of blood at the occurrence book area but the deceased body had been carried away.

(PW4) – No. 577950 Sgt. Stephen Meli a police officer attached to Witu Police Station testified and recalled that on 21.6.2015 he left the deceased at the report office. While **(PW4)** reached at the gate he saw the accused armed with a gun running away followed by another person's voice ordering him to stop with an explanation that he has killed someone. In a quick action **(PW4)** testified that he effected an arrest upon the accused and took him back to the report office. He repossessed the gun from the accused which he identified as **G3 Serial Number 96083455**.

Further **(PW4)** stated in Court that he was the officer who issued the gun with sixty (60) rounds and three magazines. However, at the time of arrest, the accused had in possession only nineteen (19) rounds of ammunition with one magazine. He produced the arms movement register as **Exhibit – 2**.

(PW5) – NO. 63790 Cpl. John Wambua a gazette scenes of crime officer gave evidence on the documentation of the scene at Witu Police Station. As part of his duties he went to Malindi Hospital Mortuary where he was able to take photographs of the deceased marked as **MFI – 3** and admitted as a set representing various views of the body marked as **Exhibit 3 (i) – (vii)** respectively.

(PW6) – Patrick Kimathi a businessmen based at Witu testified that on 21.6.2015 he was at Witu Police Station in his pub on that particular day he had customers in attendance whom he identified as the accused and the deceased. According to **(PW6)** in the course of their drinking he witnessed a quarrel had ensued between them but the other police officers in the pub continued drinking. As the quarrel escalated **(PW6)** decided to go to their table where he inquired why the heated arguments. That is when he heard the accused call the deceased 'Kehee' in Kikuyu meaning an uncircumcised man. That upshot the deceased in retaliation **(PW6)** saw the deceased pour contents of beer on the accused's head. That provoked a physical fight but the other police officers intervened and stopped the conflict. That fight occasioned an injury to the accused but at the same time both of them left the pub.

At around 6 a.m. **(PW6)** received information that the deceased had been killed by the accused person.

(PW7) – No. 85949 PC. Peter Muchai a police officer attached to DCI office Witu told the Court that on 21.6.2015 while in his house he heard gun shots. He peeped through his window and saw **Cpl. Golompo** running towards the police canteen while the accused was also running away from the direction of the canteen armed with his G3 rifle. It was **(PW7)** testimony that he rushed to the scene where he assisted to rush the deceased to Mpeketoni Sub-County Hospital where he was declared dead.

(PW8) – Dr. Gombe Ramadhan, a medical officer based at Malindi Hospital gave evidence with regard to the postmortem examination report on behalf of **Dr. Stephen Chireah**. The ample evidence deduced from **(PW8)** testimony was to the effect that the deceased was found to have sustained extensive injuries to the digestive system which ruptured the lower part of the stomach, with complete detachment of the intestines. It followed therefore that the pathologist opined that the deceased death was due to cardiopulmonary arrest secondary to penetrating abdominal injury with severe hemorrhage. The postmortem examination report was admitted as part of the documentary evidence in support of the charge.

(PW9) – George Ogunda testified as a principal chemist based at Mombasa government laboratory. His evidence was an analysis of the exhibits forwarded to him by **Cpl. Kenneth Ngeiywa** namely: - deceased blood swab, shirt, vest, blood swab from accused hair follicles, blood swab, finger nail and his T-shirt. In his testimony **(PW9)** subjected the exhibits to forensic analysts which generated the following DNA profile to the effect that the shirt, vest of the deceased and blood swab from the scene respectively marked the DNA profile of the deceased whereas the accused T-shirt matched the profile generated from the reference blood swab of the accused. The analyst report was admitted in evidence as **Exhibit 6**.

(PW10) No. 231710 Alex Chirchir, testified as the ballistic expert with knowledge and experience on firearm and ammunition examinations. His evidence found on the G3 rifle exhibit recovered from the accused, one fired cartridge, one rifle bullet and nineteen (19) rounds of ammunition. In his examination, **(PW10)** concluded that the G3 rifle and ammunitions were in good working conditions capable of firing and being fired within the definition of the Firearms Act Cap 114 of the Laws of Kenya.

(PW11) – No. 78778 Sgt. Kenneth Ngeiywa formerly of Mpeketoni Police Station testified that he received a report on the murder incident involving the deceased. He visited the scene at Witu, recorded witness statements, recovered the exhibits, G3 rifle, magazine, cartridge, allegedly relevant to the occurrence of the crime. In the course of investigations, he forwarded the ammunitions, cartridge, and G3 rifle to the ballistic examiner. The body of the deceased was also subjected to a postmortem examination at Malindi Hospital Mortuary. **(PW11)** explained that on evaluation of the evidence he recommended a charge of murder be preferred against the accused person.

At the close of the prosecution case, both counsels filed brief skeleton written submissions on the matters ensuing on the charge. The duty of this Court is to rule whether the prosecution so far has discharged the burden of proof in terms of Section 306 of the Criminal Procedure Code to warrant accused persons to be placed on his defence.

Determination

The relevant statutory provision in making a determination of whether the prosecution has made out a *prima facie* case or whether the defence discharged the burden of rebutting the prosecution case to prove non-existence of the state affairs as explained by the witnesses. The burden of proof as earlier alluded to is tightly connected with the maxim – of a *prima facie* case clearly determined under the foregoing principles.

The analogy of the provisions is that if the close of the evidence in support of the charge. It appears to the Court that the prosecution has availed sufficient evidence to prove the elements of the offence, then a *prima facie* case exists against the accused to be called upon to answer in rebuttal; whereas on the other hand if at the close of the prosecution case, there is not sufficient evidence to establish any of the elements, the Court will be required to discharge the accused of the charge or and have him acquitted all together.

The test on the applications of these two phrases *prima facie* and a no case to answer was explicitly stated by **Niki Tobi JCA in Onagoruwa v State {1993} 7 NWLR C49** where he stated as follows:

“The overall burden of proof in criminal cases is beyond reasonable doubt whereas the burden at the level of invoking existence of a prima facie case is not as high as at the final closure of the entire evidence. The Judge went on to state that the terms no case submission and prima facie go together in the administration of criminal justice. They do not however go together like Siamese twins. As a matter of Law, there is no blood relationship between them. They are rather enemies, fighting each other in opposing directions, with a view to devouring each other. They are enemies perpetually at war with each other. They never see eye to eye. They speak two different and distinct languages in opposition of each other. As a matter of Law and fact, two different persons in the criminal justice system are involved in calling the Court’s attention to them while the accused person submits to the Court that he has no case to answer, the prosecution makes the contrary submission that a prima facie case is made out against the accused and that he should be called upon to make his defence. Hence the suggestion is that whereas no case submission is a weapon of defence, prima facie case is a weapon of attack.”

Lord Parker C. J. Practice directions held inter alia as follows on this issue:

“For a person to be convicted of a criminal offence, the prosecution must prove their case beyond reasonable doubt. This degree of proof, is however, not required where a submission of no case has been made because justice at the stage, as a rule, only heard the prosecution case.”

Similarly, in **Abacha v State {2002} 7 SC at 12**, The Court observed that:

“For the Court to dispassionately attend and rule on the two twin issues, the best way to do this is to read all the dispositions made by the potential witnesses and accused persons so as to find if there is a prima facie case for the accused to answer.”

Essentially, a *prima facie* case is an early screening of the evidence at the close of the prosecution case to determine whether the prosecution can proceed to call upon the accused to offer his defence. In this regard all what is required of the prosecution is credible evidence in support of each element of the same preferred in the information against the accused person. The burden of rebutting the *prima facie* case this made out by the prosecution shifts upon the person charged with the criminal offence. Notwithstanding that legal position, there is no attempt in Law to shift the burden of proof to the accused person. As **Roger Salhany in Comba {1938} 70 CCC 205** and in **Walker {1939} 71 CCC SCC** observed:

“If the Judge is satisfied, as a matter of Law, that the crown has failed to establish a prima facie case, he or she must direct the jury to return a verdict of not guilty, if the Judge is the trier of fact, he or she must acquit the accused. The Judge must rule immediately on the question of whether there is a prima facie case. It is improper for the Judge to reserve his or her decision and put the accused to his or her election as to whether the accused intends to call evidence.” (See **Seamans {1978} 41 CCC 2d 446 CA**).

In the instant case, the prosecution to prove culpability of the accused person summoned the eleven witnesses to support each of the elements of murder as premised under Section 203 of the Penal Code. The defence counsel **Mr. Gekanana** argued and submitted for a no case to answer while **Mr. Mwangi**, the prosecution counsel canvassed and urged the Court to find existence of a *prima facie* case and to that extent accused person was called upon to state his defence.

In this regard, I have had the advantage of reviewing and evaluating the evidence on record as well as the principles governing the threshold of the twin issues of a *prima facie* case the duty by the defence to fulfil the evidential burden of contrasting the elements of the crime being actus reus and the mensrea. It is a cardinal principle of Criminal Law that one who claims must prove, every allegation due to that accusations to convince the Court that the claims are true. These findings were in consonant with the guidelines set out in **R. T. Bhatt v R {1957} EA 332**; with a rider that

“a prima facie case does not mean a case proved beyond any reasonable doubt since at this stage, the Court has not heard the evidence for the defence.” (See **Uganda v Mulwo Aramathan CR Case No. 103 of 2008**).

Defence case

The accused in his defence places primary reliance on the events of 21.6.2015 when he engaged in several social evenings one significant aspect was in respect of the engagement he had with his colleague – Ndegwa. On joining them accused gave evidence that he also ordered his own beer. In the same venue he also made an order for chips, which the deceased questioned why the servicing plate was different from his set. It is at that moment stated the accused that the deceased acted derogative by calling him an uncircumcised man in Kikuyu language – *kehee*.

Further, the accused told the Court that on inquiring why the insult he was hit with a bottle of beer on the head. That attack triggered a fight between them broke out but the owner of the club managed to separate them.

In the prevailing circumstances, accused confirmed to the Court that he decided to exit the club for the police canteen. However, the deceased also followed him to the canteen escalating the conflict once again. These arguments accompanied with acts of assault stated the accused necessitated him to use his firearm to fire at the lower limbs of the deceased.

In essence, the accused explained that the action taken in retaliation was substantially due to the provocation of the deceased. Having appraised the evidence, the questions to ponder about this case are:

(1). Whether the prosecution discharged the burden and standard of proof of beyond reasonable doubt on the following elements:

(a). That the deceased is dead.

(b). That his death was unlawfully caused.

(c). That if, it was unlawful, the acts or omission happened to actuated with malice aforethought.

(d). That the accused can be said to be positively identified as the perpetrator of the crime.

Issue No. 1

As a way of background.

It may well be stated that the presumption of innocence is fixed in our Constitution in accordance to Article 50 (2) (a). The presumption has found expression in many criminal statutes books and case Law. The right on the presumption of innocence until the contrary is proved forms the bedrock of criminal justice system. The term does convey a special and perhaps useful hint over and above the conceptual framework about the burden of proof of beyond reasonable doubt.

Let there remain any doubt about the constitutional statute on the presumption of innocence and the explicit rule that in the due process claims under Article 50 an accused conviction can only be ascertained upon proof of his or her guilt beyond reasonable doubt. There is no such a thing as conjecture or proof in the air so to speak, will not do. The Courts in **Miller v Minister of Pensions {1947} 2 ALL ER 372, and Woolmington v DPP {1935} AC 462** concerns the definition and characteristic of the phrase beyond reasonable doubt which onus rests with the prosecution and never shifts to the accused at any one time except in exceptional statutory provisions. The demanding level of certainty talked about by **Lord Denning in Miller case** requires that the prosecution proves that the accused is guilty by introducing strong and overwhelming evidence of guilt that meets the stated standard of proof beyond a reasonable doubt. The proof expected of the prosecution must detail sufficient believability and substitute to rebut the strong constitutional presumption of innocence that the accused possesses throughout the trial.

The issue became a relevant consideration before the **United States Supreme Court** in dealing with the guidelines and fundamentals of the doctrine of beyond reasonable doubt in re **Winship 397 U.S. 358 {1970} IN RE WINSHIP NO. 778, Supreme Court of United States, 1970:**

*“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure, it is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.” Coffin v United States, supra at 453. As the dissenters in the New York Court of Appeals observed, and we agree, “a person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case. “24 N. Y. 2d, at 205, 247 N. E. 2d, at 259. The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. According, a society 364*364 that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in Speiser v Randall, supra, at 525-526: “There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of Persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of Convincing the factfinder of his guilt.” To this end, the reasonable doubt standard is indispensable, for it “impression on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.” Dorsen & Reznick, in Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967). Moreover, the use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In Miller (supra): “Proof beyond a reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favour the case is proved beyond reasonable doubt but nothing short of that will suffice.”*

I combine this discussion from the American Criminal Justice System and our recent contributions in the burden of proof literature to revamp the doctrine to achieve fundamental premise of certainty. The reasonable doubt standard remains an important canon under Criminal Law and transcends intercontinental jurisprudence. The full instruction given in **Webster by the Massachusetts Court** is as follows:

“What is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of the law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and Judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt.”

At all material times the Court should not hesitate or decline not to convict where the state has dutifully failed to prove beyond reasonable doubt all the elements of the offence charged against an accused person. The **Davis Kariuki** case, shall be determined against the backdrop of this concept of beyond reasonable doubt.

The notion is that for the Court to decide that all elements, or that a single element of the crime exist permissible evidentially effect must establish the allegations beyond reasonable doubt. There is therefore no conviction of an accused person unless the prosecution has proved each element of the offence beyond a reasonable doubt.

In dealing with the term beyond reasonable doubt, sometimes one finds it difficult enough to comprehend as a concept to breakthrough, this everyday behavioral pattern of decision making standards.

What the prosecution bears is the evidential burden to demonstrate, that sufficient evidence exists in support of an assertion of a fact of unlawful death of the deceased with malice aforethought. In the sense of this case, the emphasis now turns on the nature of the evidence and consideration on proof of each of the elements constituting the offence of murder.

This leads to the question of the evidential material surrounding the ingredients set to be proven:

(a). The death of a human being.

In every charge of murder, the fact of killing of another human being first as a conditional precedent must be proved by the state, and all other circumstances of accident, excuse, justification or infirmity are to be satisfactorily proved by the accused, unless they arise out of the evidence produced against him.

At the start of a murder charge, the prosecution has the obligation to produce evidences that another human being had died. This is a way of saying there is an identifiable human being who is dead as a result of the unlawful acts of the accused. Demonstrative of this evidence of a pathologist or qualified medical officer, who can allude to the contents of the postmortem report.

Fortunately for this case, there is no legal contest from both the prosecution and the defence as to the extermination of the right to life of the deceased.

In this respect the photographs by **(PW5) CPL. Wambua** a gazetted scenes of crime officer documents the deceased body at the mortuary. **(PW5)** as produced the photographs duly admitted as exhibit 3 (i) – (vii). The postmortem examination report produced as exhibit 5 by **(PW8) Dr. Kombe** proclaims that the deceased **Joseph Rioba** is dead. It is therefore not disputed even by the accused who also happened to be a police officer, like the deceased accepts that following the gun shot from his firearm he did inflict fatal injuries.

(b). The death was caused unlawful acts or omissions

It is well accepted in criminal Law that all homicides are unlawful unless justified or excusable in circumstances contemplated under Article 26 (4) of the Constitution or in self defence of self or property in terms of Section 17 of the Penal Code. In our criminal system to establish unlawful act the prosecution must show that the accused committed both an unlawful and a dangerous act. The meaning of dangerous was explained in **Church {1965}** thus:

“The unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting albeit in murder to serious harm.”

A murder charge encapsulates the act of causing serious injury which amounts to extreme indifference to human life which is not justified or excusable in Law. In proving this element, the prosecution adduced evidence of **(PW1) – Ali Masudi** to the effect that on 21.5.2015. The accused was drinking beer in the police canteen. While armed with his G3 rifle. Further, in a little while the deceased also a police officer joined them, and soon thereafter proceeded to the report office to make entries in the Occurrence Book.

According to **(PW1)**, the accused stood up in haste and followed the deceased. As far as what transpired **(PW1)** saw the accused standing facing the deceased and in the spur of the moment heard a gunshot and the immediate fall of the deceased to the ground. **(PW1)** confirmed that the deceased suffered injuries to the stomach and the accused left the scene. **(PW2) Esau**, testified that while at the canteen with the

accused in a little while, the deceased also passed by going towards the canteen. It was at that moment the accused called the deceased three times but did not answer. (PW2), in his observation saw the accused continuing ordering for beer even as he was armed with his G3 rifle. Arguably (PW2) gave evidence that when the deceased entered the report office, he was followed by the accused who for no good reason did use his firearm to shoot at the deceased. It was at that situation, (PW2) show the deceased having suffered serious bodily harm. This evidence by (PW1), (PW2) on the gun shot by the accused against the deceased was also corroborated by (PW3) – Mathew Baracha, (PW4) No. 577950 – Stephen Meli, (PW5) – Cpl. Wambua; of scene of crime, (PW6) Patrick Kimathi and (PW7) PC Peter Muchai.

In addition to the above the prosecution summoned the evidence of Dr. Kombe Ramadhan (PW8) who stood on behalf of Dr. Chirau who conducted the postmortem examination on the body of the deceased. The autopsy dated 26.6.2015 showed the deceased aged 47 years to have suffered fatal firearms wounds to the right hypochondriac region, back midway between the posterior ilial spines, carotid artery, the abdomen, rupture of the ilium, complete attachment from the mesentry, rupture of the large intestines perforation of the spleen, and liver. In the opinion of the medical Doctor, as recorded in the postmortem report exhibit 5, the deceased cause of death was cardiopulmonary arrest, secondary to penetrating abdominal injury with severe haemorrhage.

In the defence of the accused, he urged this Court to take into account the act of provocation from the deceased as defined under Section 207 and 208 of the Penal Code. With this defence, accused told the Court that the defamatory of 'kehee' Kikuyu word for uncircumcised man diminished his responsibility necessitating the use of force in self-defence. The essentials of provocation as provided in Section 207 and 208 of the Penal Code entails the following requirements:

(a). *There had to have provocative conduct by the deceased.*

(b). *This had to have caused the accused to respond in anger.*

(c). *And that there had to have been a reasonable relationship between the provocation and the response.*

Two fundamentals conditions must fulfilled in order for the accused to take refuge in that defence that may reduce it to manslaughter which would otherwise be murder. First, the provocation must be gross and must be such as might cause a reasonable man to lose his self-control and use violence with fatal results. Secondly, the accused must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime whilst still so deprived."

It is clear that by using the phrase provocation, the accused is referring to an unlawful act caused in absence of the necessary mensrea to commit the crime. The application of this doctrine thrives within the following rubric as exemplified in the case of **R v Hussein s/o Mohamed {1942} EACA** thus:

"When once legal provocation as defined in our Court has been established and death is caused in the heat of the 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. This defence by the accused leads to the question of guidelines propounded under Section 17 on self defence before an accused is entitled to a defence of self the following circumstances must seen to exist:

(1). *That he was repelling an unlawful attack that posed danger of serious assault or grievous harm to him.*

(2). *That the force he employed was commensurate to the danger he was repelling.*

(3). *That the means he employed were the only reasonable available means in the circumstances (See Ahmed Mohammed Omar & 5 others v R {2014} eKLR Palmer v R {1971} AC 814, R V McInnes (55 CR App R Elphas Fwambor v {2009} eKLR)*

This dichotomy in the above cases set out twin trajectories, first is the subjective approach. Second is the objective approach. These approaches have come to shape our jurisprudence and the problems of self-defence Law.

Interesting enough to these approaches delve into the issue of imminence danger to mean a significant gap between the threat and the killing. With regard to imminence, it has been stated that the use of force can only be necessitated if the attack is imminent and or immediate in defence of self or property. The use of force can only be applied against the background of the duty to avoid a conflict, the duty to retreat and the right to defend must be proportionate to the apprehension or behavior of the opponent. Self-defence as coined in the Law involves the protection of private rights such as life, physical or security or property.

"The applicability of self-defence was first judicially put into practice in the case of R v Palmer, where the English House of Lords held: "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 sensible and clearly possible to take some simple 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."

This hallmark principle in **Palmer** case has been incorporated in various decisions of our Courts to set the scope and ambit of the doctrine of self-defence. Cases in point are **Joseph Kimanzi Munywoki v R Cr. App. No. 31 of 2003 CA Nairobi {2006} eKLR:**

“I should here point out that like in all other criminal cases, where accused raises the defences 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 that the accused was not provoked or that he did not act in self-defence and it must discharge this burden beyond reasonable doubt.”

In addition, **R v Andrew Mueche Omwenga Cr. Case No. 11 of 2008 {2009} eKLR:**

“The law generally abhors the use of force or violence. There are, however, instances where the use of reasonable force is justified. For instance, an accused charged with an offence may seek to plead that he acted as he did to protect himself, or his property or others from attack or to prevent a crime or to affect a lawful arrest. Such pleas when successfully raised provide a justification for the accused conduct thereby rendering his act lawful. Since the use of lawful force is not an offence, the accused will be acquitted of the offence as the element of actus reus (the unlawful act) will be missing.”

From the above case law in the first instance, there is a fundamental requirement of necessity to use defensive force. The Law envisages that the act must be necessary in order to achieve the legitimate goal of the private defence of self. There are two fundamental requirements of necessity and proportion and the duty to retreat that is imposed upon the person taking refuge in the defence of self seems to be safely lacking in the material facts of this case. Using extracts and examples of the key prosecution cases rests the case for the prosecution case as having been proved beyond reasonable doubt and the defence of self fails to distort that trajectory.

In furtherance of this goal the prosecution has a duty to prove beyond reasonable doubt that the crime of murder was committed unlawfully and with malice aforethought as a requirement to dismantle the defence of provocation and self-defence. In view of this, the common facts paints a different picture incapable of withholding the defence of self and provocation as urged by the accused. Why do I say so?

First, from the prosecution evidence of **(PW1), (PW2), (PW3), (PW4)** the accused on that material day started drinking alcohol during the earlier hours of the day. In the same surrounding, apparently he was armed with his G3 rifle alongside the continuum of his social activities. Besides the initial basic confrontation between the accused and the deceased there is no evidence of both real and reasonable danger to the accused from the deceased whom the quarrel arose between the accused and the deceased, **(PW1), (PW2), (PW3), (PW4)** and **(PW6)** evidence is categorical. The deceased was never armed with any dangerous weapon targeted at the accused. The nature of the aggression being referred to by the accused was based on ordinary exchange of words not meant to be an insult word ‘kehee’ is conceptually clear that it does not merit punishment when life is at stake. It is also unlikely that such a word represents imminent danger to life of the accused to trigger violent force. Giving effect to the case at bar the legality of provocation and self-defence is not available to the accused for failure to satisfy the following conditions. The accused failed to reasonably establish that he was in imminent danger from the danger of the deceased. Therefore, the use of lethal force was absolutely necessary and appropriate to ward off the alleged illegal threat.

Lethal force used of a firearm was not the only alternative available to the accused to avoid the unlawful attack. The accused failed to show evidence to that effect. In reviewing the events of 21.6.2015, the accused did not demonstrate that he did not have a chance to retreat. This goes hand in hand with the proportionately criterion which requires the balancing of the interests of both the accused and the deceased. Therefore, the use of defensive force by the accused must not have been excessive or disproportionate to the perceived threat from the deceased.

By virtue of the accused action of being armed with a G3 rifle, in the course of intoxicating himself, he broke the Law and became an enemy of the Law in the broad sense of the word.

Of course, at the trial the evidence came forth from the accused that he suffered no bodily harm associated with the attack from the deceased. Self-defence as known in Law in such a situation was neither justified nor necessary. As a police officer enforcing the Law, the accused would have acted differently and thus act in the public interest in the deterrence and preservation of life under Article 26 of the Constitution. Precisely, the prosecution has discharged the burden of proof of beyond reasonable doubt that the death of the deceased was unlawfully caused.

The other ingredient to nourish this charge against the accused by the prosecution is that of malice aforethought. In determining the elements of malice aforethought applicability to particular facts a consideration of Section 206 of the Penal Code is necessary. The Section defines malice aforethought inter alia as an intention to cause the death of another human being or intention to do grievous harm to that other person or knowledge that the act or omission will cause death.

Take the illustration given in the case of **Tubere s/o Ochen v Rex {1945} 12 EACA 63** There are some hints that may help the Court to draw an inference of malice aforethought, the nature and multiple injuries and their gravity, the type of weapon used, the parts of the body targeted and the conduct of the assailants before, during, and after committing the crime. Once again it is all a question of facts and fair Judgment always, keeping in mind, the complexity of reading the intention of man. Intent of course cannot be seen directly by witnesses. It eludes all the five senses, it is known only to the accused and even here, only sometimes, because some definitions of intent allow the accused to readily believe that there is no intent, even where there is such a feature.

It is however a fact that in order to convict an accused for murder, malice aforethought ought to be proved beyond reasonable doubt. The prosecution in this case tendered circumstantial evidence on malice aforethought from **(PW1), (PW2), (PW3), (PW4)** and **(PW5)** conforming thereto manifestation of an intention to cause death. Essentially, the witnesses attest to an accused armed with a G3 rifle. He proceeded to the report office pursuing the deceased who had gone to make entries in the occurrence book. It is on record that the accused made attempts to ‘provoke’ the deceased, but that chance was thwarted by the silence of the deceased.

Incidentally, the evidence shows that the silence by the deceased did not deter the accused from prosecuting his intention of going after him at the report office. With that brief encounter, the accused armed with a loaded G3 shot at the deceased occasioning fatal injuries with

immediate effect. I also find that (PW5) as a scenes of crimes officer documented the scene which corroborated the credible evidence given by the eye witnesses (PW1), (PW2), (PW3), (PW4) and (PW6). The accused must have known that hitting the deceased on the stomach and other limbs with force of an ammunition, it would cause grievous harm let alone death. It is not disputed that when one strikes so hard or causes serious or grave injury to vital or sensitive parts of another human being, like the spinal column, posterior iliac spine, the abdomen rupturing the intestines, he should have foreseen that probably death would result or grievous harm. That was indeed the case here between the accused and the deceased.

It goes without saying that from the evidence of (PW10) Alex Chirchir – a Ballistic examiner, the G3 rifle, magazine, ammunitions, and cartridges were subjected to microscopic, and or forensic examination and virtually every component was positively identified to be that of the firearm and ammunitions issued to the accused. Further, the testimony by (PW10) confirmed that the G3 and magazine were in good working conditions capable of being fired as envisaged in the Firearms Act. There was also no question by implication that the ammunition which killed the deceased came from that G3 rifle in possession of the accused as at 21.6.2015. The Court is therefore definitive, that the amount of force came from this rifle and since a force killed the deceased. The accused here pointed a loaded gun at the deceased in broad daylight, pulled the trigger to dis-member his body parts. There is no evidence of accident, or of mistake or justification to exonerate the accused from culpability. The intention to kill the deceased is further corroborated by the evidence captured in the postmortem report produced as exhibit by Dr. Kombe Ramadhan. The gunshot wounds inflicted to the spine and abdomen are self-telling that the execution of the deceased was in cold blood and with one objective to exterminate his life from the face of the earth. This results flowing from the evidence by the prosecution is consistent with the principles in Ernest Asami Bwire Abanga alias Onyango v R CR Appeal No. 32 of 1990, Morris Aluoch v R CACRA No. 47 of 1997, Karani & 3 others v R {1991} KLR 622. To say that the accused was provoked and acting in self-defence would be over stretching the guiding principles outside the known preamble statutory guidelines and settled case Law.

In my conceded view this is a case, where the prosecution tendered both direct and circumstantial evidence against the accused to overwhelmingly discharge the burden of proof beyond reasonable doubt for the existence of malice aforethought for the offence of murder contrary to Section 203 of the Penal Code.

The argument advanced by the accused is that his action of pulling the trigger was entirely justified for reason that the deceased words of referring to him as 'kehee', was wrong and defamatory in the first place. Perhaps most significantly is to ask the question in reference to this assault hereinafter referred to by the accused whether the insult of 'kehee', was wrong and defamatory to call for use of excessive force. Perhaps most significantly is to ask the question in reference to this assault hereinafter referred to by the accused whether the insult of 'kehee' was of a nature to attract such excessive and reasonable force of a gunshot against his colleague and compatriot police officer. The test to be applied is that of the effect of provocation on a reasonable man, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did.

In my view there is a presumptions assumptions that referring to a circumcised man as 'kehee' it reduces his self-esteem and reputation, or making him a child of a lesser God. The word 'kehee' amongst peers is not derogatory or an insult. Whether looked at from the perspective of equality, culturally, legally, there is nothing like a superman who has undergone circumcision and a lesser being for reason of electing not to be circumcised. Both men are creatures of the most high God in his own image. For one to act unlawfully under the guise that 'kehee' is an insult to kill another human being suddenly stretches the canon of provocation beyond the limits of Section 207 as defined in Section 208 of the Penal Code.

As a starting point, all men are created equal enjoying natural rights and the ritual of circumcision should not be misunderstood as conferring overriding legal rights/status in their bearing against the uncircumcised. We the people of Kenya shall treat each other equally irrespective of the social/cultural rights entitlement. It goes without saying that all men, rich, poor, gifted, or stupid, strong or weak circumcised or uncircumcised, are equal before the Law and other fellow men.

It's not a word to provoke the intention of killing in the heat of passion particularly from a fellow colleague. In the circumstances of this case, **The High Court in Stingei v The Queen {1990} 171 CLR 312:**

“The central question posed by the objective i.e. of such a nature as to be sufficient, obviously cannot be answered without identification of the content and relevant implications of the wrongful act or insult and an objective assessment of its gravity in the circumstances of the particular case. Conduct which may in some circumstances be quite unprovocative may be intensely so in other circumstances. Particular acts or words which may, if viewed in isolation, be insignificant may be extremely provocative when viewed cumulatively.”

Even more important, the content and the extent of the provocative conduct must be assessed from the view point of the particular accused. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult. Consequently, a claim of self-control which seats at the center of every provocation was wantonly exploited by the accused for his own selfish ends.

There is one further point in regard to the identification of the accused. I reiterate that (PW1), (PW2), (PW3), (PW4) and (PW6) positively recognized the accused person as the perpetrator of the crime of murder against the deceased. I am satisfied that the circumstances on the identification and or recognition were favourable and free from the possibility of error to safely form as a basis of conviction. (See **Cleophas Otieno Wamunga v R Kisumu Court of Appeal No. 20 of 1989**).

It follows from the above, that in my opinion, the prosecution case falls within the scope of beyond reasonable doubt for the offence of murder contrary to Section 203 of the Penal Code against the accused person. For this reasons, I find the accused guilty and convict him of the offence as a consequence of that findings.

Sentence

In this case, the convict has been found guilty of homicide contrary to Section 203 as read with 204 providing for a maximum sentence to

suffer death. The convict however offered his mitigation that the Court has a discretion to impose a lesser sentence other than death. He contends that he is a family man desirous of reintegrating with the community so that he can offer support and maintenance to the nucleus dependants.

Having been the session Judge for the convict; at the time he committed the offence, he had been out drinking while armed with his G3 rifle loaded with ammunitions. In the course of that fateful day, he began arguing with the deceased. This forced members of the public at that club to intervene; with a view to de-escalate the conflict. However, that was a temporary ceasefire as the clash did escalate for the second time when both of them came into contact at the police canteen. It was at that scene without provocation, the convict while armed with his G3 rifle shot at pointblank the deceased in the course of making entries in the occurrence book. Bleeding profusely from the injured parts of the body, he died soon thereafter of infliction of the gunshot wounds. The convict took flight from the scene with full knowledge that his colleague is dead.

In a series of mitigation by the convict, nothing of weight was offered to unbalance the aggravating factors of culpability. The state pleaded for strict custodial punishment for the homicide committed against his fellow police officer, the deceased. Given those circumstances and bearing in mind the yardstick on sentencing in **Francis Muruatetu v R {2017} eKLR**, the individualized consideration calls for a deterrence sentence.

In that process, I sentence the convict to forty (40) years imprisonment.

It is so ordered.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 28TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for DPP
2. Mr. Gekanana advocate for the accused person