



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CRIMINAL CASE NO. 9 OF 2017**

**LESIT J**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**FATMA MOHAMED OKOTH.....ACCUSED**

**JUDGMENT**

1. The accused **FATMA MOHAMED OKOTH** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal code**. The particulars of the charge are:

**“On the night of 5<sup>th</sup> February 2017 at about 8.30 p.m. at Golden Gate, at South B in Industrial Area within Nairobi County murdered JOHN FLUGENCE MWAKIDUA”**

2. The facts of the case are that the deceased lived in an apartment of bedsitters along Sore Drive, South B, which had 3 houses downstairs and 3 houses upstairs. The house of the deceased was downstairs. He lived next to one, Daniel. The third house was unoccupied. Of the 3 houses upstairs, Jane PW1 and Jacqueline, DW4 occupied two of them. The third one was unoccupied.

3. The facts are that on the material day, the deceased who had been living with the accused was with his friends including PW4 and others, in South C. It was the custom of the accused, PW4, PW6 and many other members of their group to meet every Sunday evening and enjoy goat eating.

4. On 5<sup>th</sup> February, 2017, a Sunday, PW4 and the deceased roasted a goat which the deceased had bought. PW4 said that the deceased had spent the weekend with him in his house in South C, which was not unusual. PW4 stated that that evening the deceased told him that his girlfriend, the accused whom he knew, was travelling back from Mombasa that Sunday evening and so he needed to go and give her the house keys. The deceased left between 7:30 and 8pm promising to return either alone or accompanied by the accused. PW4 testified that half an hour later he received a call from the accused. The accused told him that she had stabbed the deceased and that he was not responding and she needed his help.

5. PW3 in his testimony stated that the accused called him few minutes to 8pm and told him that she thought she had just killed her boyfriend and that calls she made to his friends went unanswered. She was requesting him to go to South B to assist her. PW3 said that he could not go because he was at work.

6. From the evidence of PW4 and 6, the two of them went to the deceased house and found him dead, lying at his door with the legs on the outside and the rest of the body inside the house. The two of them said that they saw a trail of blood leading from the deceased all the way to the small gate which led into the ground floor apartments. There was blood all over the walls of the house with finger prints marks. The accused was also there shaken. Also noted by PW4 and 6 was a knife on the floor between the deceased and the fridge.

7. Eventually the body was removed from the scene. A post mortem examination revealed that the deceased died of exsanguination due to sharp force trauma to the chest.

8. The defence case comprised the accused sworn statement in defence and three witnesses. The accused denied the charge. She said that she had arrived from Mombasa the same day and had kept communicating with the deceased because he had her set of the house keys. She said that she let herself into the house after picking the keys from a sink outside. She said that the deceased arrived at his house at 6:10pm while drunk. She said that he slept up to 8pm. On waking up, the deceased could not get his phone and so he asked the accused to give him hers so that he could call his phone. The accused stated that when the deceased took her phone, he saw Jesse's name in the call log and he became

enraged accusing her of cheating on him with Jesse. The quarrel deteriorated into a fight. The accused said that the deceased started strangling her with his right hand as he held a knife with the other.

9. The accused stated that in the ensuing pushing and shoving, she noted that the deceased was bleeding. That is when they both fell down. She then frantically called PW4 who was not picking her calls. She then called PW3 and told him what had happened. She was later able to reach PW4 and also told him what had transpired. PW4 went to her in company of PW6. They called an ambulance but since deceased was already dead, he could not be carried away. Later police took the body away.

10. The other defence witnesses were, DW2, a Clinician who said he treated the accused on 23<sup>rd</sup> February, 2017 for pains on the chest, back and hands. He testified that he noted scars on accused hands and chest. His report was D. Exh. 2, which had overwritings on the date of the document itself and on the date of treatment. The overwriting was not countersigned.

11. DW3 was a neighbor of the deceased living on the first floor of the apartment. She confirmed having heard a person crying at around 8pm on the night in question. She said that she could not tell whether the cries were of a man or woman. DW4 was a Government Chemist who produced a report showing that the deceased had taken an equivalent of 6 beer bottles or 12 tots of whisky.

12. That is a summary of the case.

13. I have considered the submissions made by the counsels in this case, Ms. Onunga, learned prosecution counsel and Mr. Chacha Mwita learned counsel for the defence. I will be dealing with the submissions later on in this judgment.

14. The accused faces a charge of murder contrary to **Section 203** of the **Penal Code**. Under that section murder is defined as follows:

**” Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

15. The accused faces a murder charge. The burden lies with the prosecution to prove three ingredients of murder beyond any reasonable doubt. The prosecution must prove that the accused person attacked and inflicted injuries on the deceased. It must also prove that the deceased died as a result of the injuries inflicted by the accused on him. The prosecution must prove that at the time the accused inflicted the injuries on the deceased she had formed an intention to either cause death or grievous harm to the deceased.

16. Malice aforethought is a very important ingredient for the offence of murder. The circumstances that constitute malice aforethought are set out under **Section 206** of the **Penal Code** thus:

**“206. Malice aforethought**

**Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

17. Having considered the evidence adduced in this case, and the submissions by counsels I find that there are facts which are not in dispute in this case. These are:

**i). There is no dispute that the accused was a girlfriend of the deceased and that the accused used to visit him on some occasions.**

**ii). There is no dispute that at the time the incident occurred, the accused had gone to the deceased house that day after an absence.**

**iii). There is no dispute that the accused was alone with the deceased in his house when he suffered the injury which led to his death.**

**iv). There is no dispute that there was no eye witness of the incident.**

18. The issues for determination are the following:

i). Whether the prosecution has adduced sufficient circumstantial evidence to establish that the deceased death resulted from the unlawful act or omission on the part of the accused.

ii). Whether the prosecution evidence was full of inconsistency, and if so, whether it affects the probative value of the prosecution evidence.

iii). Whether the prosecution has proved malice.

iv). Whether the defence the accused has raised can apply to this case and with what effect.

19. The first issue for determination is **whether the prosecution has adduced sufficient circumstantial evidence to establish that the death of the deceased resulted from the unlawful act or omission on the part of the accused.**

20. Mr. Mwita for the accused urged, and correctly so, that the prosecution case was dependent on circumstantial evidence. He submitted that the only person who could give primary and direct evidence of the events of that day is the accused. Counsel urged that the evidence presented by the accused not only cast doubt on the prosecution evidence but displaced it completely. He further urged that the accused evidence was perfectly corroborated by the evidence of PW1, DW2, 3 and 4. Mr. Mwita submitted that the prosecution evidence did not meet the threshold to establish that the accused intentionally caused injury to deceased or participated in causing injury to accused.

18. Ms. Onunga submitted for the prosecution that even though there was no direct evidence to link the accused to the deceased murder, the prosecution had established that the accused and deceased were alone together at the time of the incident. Ms. Onunga submitted that when PW4 and 6 arrived at the scene they found deceased lying at the door to his house with half the body inside and the legs outside. Counsel submitted that there was a trail of blood from his body to the main gate into the apartment, and that it was proof the accused had delayed to call for help leading to the deceased death. Counsel urged that PW8 a police officer who arrived at the scene confirmed evidence of PW4 and 6. Counsel urged that the circumstantial evidence adduced in the case had proved that this was a murder.

19. The prosecution is relying on circumstantial evidence in this case. The principles which apply to such cases are now well settled. In the Court of Appeal case of **CHARLES MATHENGE MWANGI & ANOTHER –V- REP CA NO. 72 OF 1997** (unreported), OMOLO, TUNOI JJA and RINGERA Ag. JA held in regard to circumstantial evidence:

**“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example REX vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.**

20. The case cited in **Mathenge**, supra, is **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135**, where the Court of Appeal held:

**“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”**

21. In a more recent case in **SAWE –V- REP [2003] KLR 354**, the Court of Appeal discussing the principles applicable to circumstantial evidence held:

**“1. In order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”**

22. The prosecution case is that the accused was picked up by her former boyfriend, PW3 at Sore Drive, South B, so as to spend the night with her in PW3's house in Riruta, Kawangware. They spent the night together. PW3 said that he could not remember the days clearly but was sure the day he picked her was the day before the incident. PW3 said that on the following day, he left for work in the morning, leaving the accused in his house to leave later in the day. He said that she called him minutes to 8pm to report to him that she had stabbed her boyfriend and that she thought she had killed him because he was not responding. PW3 testified that the accused told him that attempts to reach the friends of the deceased had failed and so she was asking him to go to South B to assist her, which he declined as he was at work.

23. The other person that the accused called was PW4 whose number, according to her testimony she got from the deceased phone. Communication with him was difficult to begin with. PW4 testified that eventually when they spoke, the accused told him that she had stabbed the deceased and that he was bleeding profusely and was not responding. PW4 was with PW6 and others. It is PW6 he pulled aside and gave him the tragic news and requested him to accompany him to South B to the deceased house. They found the deceased dead, lying down on his back with the legs outside the door and the rest of the body inside his house. When the accused lifted his shirt, both PW4 and 6 said that they were able to see the stab wound on his chest.

24. PW7 was the scene of crime officer who took photographs of the scene with the deceased body still at locus in quo. He stated that there was blood all over the wall and the door, some smeared by hand and on the floor of the house. He took 10 photos and made a certificate which he produced as P. Exh5 and 5A respectively. PW9 on the other hand was the officer who recovered from the scene a Knife P. Exh 1, a green handbag with blood stains P.Exh 6, a black top blood stained on the front side P.Exh 7, an orange brownish trouser P.Exh 8 and a pair of flat shoes with blood stains P.Exh 9. PW9 stated that all the exhibits were recovered with the help of the accused whom she picked up from industrial area police station where she was being detained.

25. PW10 was the investigating officer. He stated that he forwarded the exhibits handed over to him by PW9 to the Government Chemist for analysis. The results of the analysis were given by Dr.Onyiego of Government Chemist who was PW5. The results of the DNA analysis on all the exhibits established that all the items had blood that matched the DNA of the deceased sample, which meant that it was his blood on all the exhibits.

26. PW11 was Dr. Muturi, the Pathologist who performed Post Mortem examination on the deceased. External examination revealed a stab wound penetrating to the left mid-chest region anteriorly measuring 5 by 1.5 cm. Internal exam revealed that the cartilages joining the ribs to the sternum and the left side of the chest involving the 6<sup>th</sup> and 7<sup>th</sup> ribs were severed. There was bleeding into the chest cavity of 1 ½ litres of blood. The left lung had collapsed. There was perforation of the lobe above the heart (pericardium) and perforation of the apex of the heart with blood into the heart measuring 100 mls. He formed the opinion that the cause of death was exsanguination due to single stab wound to the chest. The post mortem Report was P.Exh.11. He also formed the opinion that the probable weapon used was a knife.

27. PW11 further stated that he ruled out suicide as the cause of injuries on the deceased. He explained that his conclusion was based on the fact that the injuries on the external aspect of the body was 5 by 1.5 cm which was a linear wound on the skin and was a single stab. Dr. Muturi testified that the fact the wound was linear, and going by the injuries to the cartilages which involved severing of two cartilages and ribs, it meant the injury was a stab from a third party going by the orientation of the wound which was perpendicular to the sternum as opposed to slanted.

28. PW11 further stated that had the case been suicidal, the wound was likely to have been along the length of the ribs. He explained that suicidal stabs would tend to be multiple superficial or hesitational wounds. He said that the force used in the injuries the deceased suffered was unlikely to have been self-inflicted by the deceased to the extent of fracturing the sternum and severing the cartilages.

29. The accused defence was that she and the deceased argued and as they pushed and shoved with the deceased, she realized he was injured and was bleeding. Accused explained that the argument was about her call log showing calls to PW3. That is in line with what PW1 heard, a man asking the other person to leave his place. The fact that there was an altercation that night between the deceased and accused is corroborated by PW1's and DW3's evidence.

30. The accused admits in her defence that she was in the company of the deceased alone in his house when the deceased met his death. She stated that the two had a confrontation and she only realized the deceased was stabbed after he stopped strangling her. The defence did not in cross-examination challenge the evidence of PW3 and PW4 in which each testified that the accused called them and told them that she had stabbed the deceased.

31. The accused has a statutory burden under **Section 111(1)** and **119** of the **Evidence Act** which provide thus:

**“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.’**

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

31. The rebuttable presumption is that since the accused and deceased were the only occupants in the house at the time the deceased got stabbed, the accused therefore either knew how the deceased met his death or was a perpetrator of that death. The accused has a statutory burden to give an explanation or adduce evidence to rebut the presumption created by the stated facts.

32. Whether the accused was being chased away or not is controversial. However, it is clear that the deceased was injured soon after the altercation, the cries of a woman and the shouts of a man ordering another to leave his house. I find that such a person could not have turned around to stab himself to death. The accused admissions to PW3 and 4 are the correct version of the incident. That the accused stabbed the deceased following which he suffered fatal injuries to which he succumbed and died. Accused evidence that the deceased smashed her phone to the ground was not true as she used her phone to call PW3 &4. PW3 recognized her number. Besides no witness testified seeing a smashed phone at the scene and the scene of crime photos did not capture such an item.

33. It is clear from the facts of the prosecution that the deceased met his death from a stab wound. PW11 has ruled out that the stab wound could have been self-inflicted. PW11 explained first that self-inflicted injuries tended to be slanted, secondly PW11 explained that the nature of the injury which included fracturing the sternum and piercing between ribs was a strong force which could not have been by the deceased.

Thirdly the injury on the deceased was perpendicular only caused by a third party.

34. I have also considered the evidence of DW4, the Government Chemist. He said deceased had taken 12 tots of whiskey. This was controversial as PW4 who had been with the deceased for 2 days contested it. It is however likely the deceased may have taken alcohol as the accused and DW4 alleged. The Government Chemist has no interest in the matter and there would be no incentive for him to lie. Going by his evidence, the level of alcohol in the deceased blood, it is doubtful he could have had the energy to stab himself or even the strength to fracture his sternum. Consequently, I find that the only probable explanation is that the accused stabbed the deceased in the course of their confrontation as she admitted to PW3 and 4, the first people she spoke to after the incident.

35. The second issue is **whether the prosecution evidence was full of inconsistency, and if so whether it affects the probative value of the prosecution evidence?** It was Mr. Mwita's submission that the evidence of the friends of the deceased was untruthful regarding the deceased demeanor when he got drunk. He urged that while his friends said that the deceased was not drunk, DW4, the Government Chemist proved that wrong. He stated that the content of alcohol found in the deceased blood may according to DW4, cause a person to behave irrationally. Counsel urged that the irrational behavior likely to have been with the deceased was clearly buttressed by what PW1 & DW3 stated that they heard someone crying that night. Counsel urged that the accused was the person crying as she was seeking intervention.

36. Regarding deceased conduct, Ms. Onunga urged that PW4 and 6 all testified that the deceased was calm and not a violent man. Counsel urged that DW3 also confirmed that he had never witnessed any violent acts by the deceased. Counsel urged that according to PW4, the deceased was calmer when he had taken alcohol. Ms Onunga submitted that even though DW4 had found deceased blood had alcohol, he could not tell how the alcohol could influence the deceased reactions to situations. Counsel urged the court to find that even if the deceased was drunk, he did not inflict the injuries on himself.

37. PW4 was asked by the defence whether the deceased had taken any alcohol that day. PW4 stated that the deceased was sober and so was he (PW4). When cross-examined about deceased character, PW6 testified that the deceased was a quiet man most of the time. PW6 stated that the deceased was a social drinker, meaning he only drunk in company with other people. PW6 said deceased never drunk much. PW6 testified that the accused used to tell a lot of stories once drunk and denied that the accused would turn violent once drunk. PW6 also said that the deceased hardly spoke to people he did not know. PW6 said he had not seen the deceased on the material day until he saw him dead at his house.

38. There was other inconsistency in the evidence of PW4 and 6. PW4 said that the accused told him on phone that she had stabbed the deceased and that when they went to the scene, the accused repeated the same. PW6 on his part did not mention hearing the accused say that she had stabbed the deceased nor discuss the issue.

39. The issue is whether there was inconsistency in the prosecution case regarding whether the deceased was drunk at the time he went to see the accused and when he met his death; and if so, whether the inconsistency affects the substratum of the prosecution case.

40. The Court of Appeal had an occasion to address the issue of inconsistency in evidence in **Phillip Nzaka Watu vs. R (2016) e KLR**, where it expressed itself thus:

**“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”** (emphasis added)

41. I have considered the inconsistencies pointed out by the defence. There is the one where PW4 said that the deceased was sober on the day in question, and in particular at 7:30pm when he left to meet the accused. In fact, PW4 said he the accused had visited him two days earlier and was with him until the time he left for his house. That evidence was challenged by the Government Chemist called by the defence, DW4. DW4 produced a report showing that the deceased had taken an equivalent of 12 tots of whiskey or 6 bottles of beer.

42. The Prosecution challenged DW4 why his report was not availed to the Investigating Officer. That challenge does not go to the authenticity of the report. PW5, the Government Chemist who produced the DNA profiling on deceased blood and the exhibits submitted to them regarding this case, made it clear in her evidence that each section in their Department worked independently. PW5 was explaining to the court why she had no clue that a request for blood alcohol levels in deceased blood had been requested saying that such a request was presented to another section.

43. The evidence of PW4 that the deceased was sober on the material day has been shaken. PW4 was wrong. However, since there was a gap of half an hour or more between the time the deceased left PW4 and the time he reached his house, there is a possibility he had an opportunity to drink. In the circumstances, the apparent inconsistency between PW4's evidence and findings of DW4 are capable of an explanation which may exonerate PW4 for blame of being a liar. That matter therefore rests.

44. The other inconsistency appears in the evidence of PW4 and 6. PW6 did not talk of having heard the accused admit having stabbed the deceased when the two of them arrived at the scene. PW4 on the other hand said that the accused told him on phone that she had stabbed the deceased. And that when he and PW6 arrived at the scene she explained further that she stabbed the deceased because they quarreled. The fact PW6 did not hear that conversation between PW4 and the accused is a variation in the prosecution evidence and not an inconsistency or contradiction. The discrepancy is quite small and does not affect the veracity of the testimony of these two witnesses.

45. As to the conduct of the deceased when drunk, what the defence submitted was proved in the evidence of DW3 was in fact hearsay evidence. DW3 had said that PW1 told her that the deceased was a violent man. PW1 herself did not refer to the deceased as violent, neither

was such a question put to her. The evidence of PW4 and 6 shows that the deceased was a reserved person, could be talkative when drunk in company of his friends but had tendency to retreat once drunk.

46. DW4, the Government Chemist said that a person who had taken 12 tots of whisky could be affected by it and may as a result behave irrationally. With due respect to DW4, his comment on the effect of alcohol was not supported by any scientific findings. Besides the effects of alcohol on a person's behavior was not his area of expertise and was therefore an opinion. Such opinion needed corroboration from other evidence. There is no evidence to support DW4's opinion that as a result of alcohol, the accused had a tendency to behave irrationally. Likewise, the evidence of DW3 was hearsay and received no support from other evidence in this case.

47. The other issue was **whether the prosecution has proved malice**. Mr. Chacha Counsel for the accused submitted that it was trite law that the onus lies with the prosecution to prove their case and at no time does the burden shift to the accused person even when the accused is placed on their defence. Counsel urged that the accused was nevertheless articulate and consistent in her defence where she demonstrated that she had not harbored any malice against the accused at any one time. Counsel urged that the state had not rebutted the same.

48. Counsel further urged that the accused found herself in imminent danger when the deceased armed himself with a knife, and having been injured as DW2 showed he found the accused with injuries, some by a sharp object, the accused had to secure herself from being injured. Counsel urged that the accused having realized that the deceased had injured himself, she tried her best to save the deceased and that explains the blood and finger prints all over the wall.

49. Mr. Mwita urged that with malice having not been demonstrated by the prosecution, then the deceased death cannot be attributed to the actions of the accused.

50. Ms Onunga submitted that the pathologist findings at postmortem was that death was caused by exsanguination due to a simple stab wound. Counsel urged that injuries inflicted on the deceased were calculated to cause death and were by a sharp force trauma. Counsel further submitted that the accused informed PW3, 4 and 6 that she had stabbed the deceased and that he was bleeding profusely. Counsel urged that the accused acted with malice aforethought within the meaning of **Section 206 of Penal Code**. Counsel urged that the injury and force used was excessive and pure aggression intended to cause grievous bodily harm.

51. Ms Onunga urged that the accused chose a knife which is a lethal weapon. Secondly that malice was manifested by the fact the accused took time to call for assistance which establishes she had a built up malice. Counsel urged that accused did not call any neighbours to assist. Ms Onunga submitted that PW4 could not tell where deceased was injured because the accused had replaced his shirt. Counsel urged that the shirt had to be lifted for him to see the stab wound.

52. The burden lies with the prosecution to prove malice aforethought. The evidence adduced shows that the accused returned to accused house on the evening of the day in question. A quarrel arose over the calls the accused had called or received from PW3. In the ensuing fight the deceased was injured. The knife was present in the house where the fight took place so that it cannot be argued that the accused had a chance to choose what weapon to use. I find that there is no evidence of pre-meditation in this case. In the circumstances, malice was not proved.

**53. Whether the accused has raised any defence in this case, and if so whether it applies to this case.** Mr. Mwita submitted that the defence was the only truthful analogy of the events of that day. Counsel urged that the evidence of the defence was corroborated by PW1, DW2, 3, and 4. Counsel submitted that PW1 and DW3 heard somebody crying on the material night. Which confirms accused defence that she was seeking for intervention. Counsel urged that under the circumstances, when the deceased armed himself with a knife, the accused found herself in imminent danger and having been injured as DW2 showed in his evidence that the accused had injuries by a sharp object, the accused had to protect herself from being injured.

54. Mr. Mwita submitted that it was in that tussle that the accused realized that the deceased was bleeding. Counsel submitted that the deceased was bleeding because he had injured himself. Counsel submitted that the accused tried all she could to save the deceased life, even giving him water.

55. Mr. Chacha relied on the case of **REP. VS. ISMAIL HUSSEIN IBRAHIM Kajiado Criminal Case No. 4 of 2016** which speaks to the defence of self-defence. Counsel urged that the prosecution had not proved malice aforethought and that in the circumstances court cannot consider the lesser offence of manslaughter.

56. Ms. Onunga, submitted on the issue of self-defence and provocation under **section 207 and 208(1)** respectively of the **Penal Code**. She relied on **YOVAN VS. REPUBLIC 1970 EA 405** for the proposition that for provocation to apply the killing must be shown to have been done in the defence of person.

57. Counsel further relied on **Republic vs. Petero Wabwire s.o Matemo [1949] 16EACA 116** for the proposition that legal provocation under **section 208 (1)** of the **Penal Code** is applicable where a wrongful act and or insult is done by the victim of the murder and must be something of a nature or wrongful act which deprives him of powers of self-control and which induces him to commit the assault. Counsel urged that the lethal force used against the deceased negates the defence of self and provocation recognized by our legal system.

58. Ms Onunga urged that according to the findings by the Police Surgeon when he examined the accused and filled the P3 form, he found no injuries on the accused. Counsel urged that injuries found on the accused by the Prison Medical personnel as per D.Exh.2 were not properly defined and were therefore not helpful to determine whether they related to the time in issue. Ms. Onunga urged the court to consider that the D. exhibit 2 was full of alterations on the date stamp and date of alleged observations making it difficult to tell when the examination was done.

59. The accused did not put forward any defence of person or of provocation in her defence. These defences were raised by the counsels in

their submissions. The accused maintained the deceased committed suicide.

60. I have already analyzed the evidence by PW1, DW3, PW3, PW4 and findings by PW11 the Pathologist. The evidence of PW1 and DW3 is corroborative to accused defence that there was an altercation in the deceased house that day. The two witnesses did not witness anything. They just heard cries which PW1 was sure were from a woman. PW1 heard more because she heard a man shouting telling someone to get out of his place. That was heard at around the same time the accused stated the altercation occurred. That was around half an hour or so from the time the deceased left South C where PW4 was, to go to South B where his house was located.

61. The evidence of the doctor negates any suicide in the deceased death and he explained, as shown earlier in this judgment, the reasons why suicide was not the case. One of PW11's finding was the fact that the stab to the deceased was perpendicular, which means it was by a third party. The Pathologist testified that the force was such a strong force which, given the angle at which the knife entered the body, it could only have been the act of a third party. PW11 explained that a self-inflicted stab to the chest could only be slanted as opposed to perpendicular, and the wound suffered would show signs of multiple superficial stabs or hesitational stabs as opposed to the force trauma the deceased suffered. There is no evidence to contradict PW11. PW11 findings are logical and reasonable and uncontroverted. In the circumstances, I find that the accused lied to court that the deceased stabbed himself. I find that she told the truth to PW3 her former boyfriend and PW4.

62. I further find that the accused lied about many other issues. The accused stated that she had gone to PW3's house for a baby shower to which PW3 had invited both her and the deceased. The lie was discovered for reason PW3 stated in evidence that he did not know the deceased before and had never met him. The defence did not challenge PW3 regarding whether or not he knew the deceased before the incident. Additionally, PW3 never talked of having a baby shower in his evidence and neither was he cross-examined about it.

63. What settles that issue was the accused own evidence that the deceased was incensed with her when he saw PW3's number in accused phone call logs. If the deceased had been invited by PW3 for a baby shower, he could not have become incensed at the accused for going there, neither would he have accused the accused of cheating on him with PW3 after seeing his number on accused call log. The lie that accused went for a baby shower shows her dishonesty. She spent the night with PW3, her former boyfriend, but told her boyfriend the deceased that she was in Mombasa.

64. The other lie was the fact that accused claimed the deceased had her pair of keys to his house and so communicated with him severally before she reached the house. She however concluded that bit of her evidence by saying that she let herself into the deceased house by taking the keys from the sink outside the house. She did not say at any one time that the deceased told her that she could find the keys there. Furthermore, the reason the deceased left PW4 and the others in South C was because he needed to open his house for the accused.

65. The issue of the smashed phone was another lie. She claimed the deceased smashed her phone on the ground in anger. No such phone was found at the scene. And to prove her wrong she called PW3 with her phone to tell him she had stabbed the deceased. PW3 recognized her number. Further PW4 said he received a call from the accused from a strange number. PW4 knew the phone number of the deceased. That is not the one that she used to call PW4.

66. Having considered the prosecution evidence vis a vis the accused defence, I find the accused defence is not reasonable, plausible or believable. I find that the accused was dishonest. She lied a lot and that included the denial in court that she did not stab the deceased.

67. The question to be asked in the end in this case is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what she did to the deceased? Under **section 17** of the **Penal Code**:

**“Subject to any express provisions in this code or any other law in operation in Kenya criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”**

**68. Those principles have been clearly elucidated in the persuasive authorities in Palmer v Republic [1971] AC 814 and in Republic v Mcinnes 55 Cr. Appeal 551 where the Prosy Council and the Court of Appeal respectively stated as follows:**

**“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then it is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury.”**

69. The court of appeal in a similar situation discussed the doctrine of self-defence in Mokwa v Republic [1976-80] 1KLR 1337 the Court held that:

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

70. See also **Joseph Kimanzi Munywoki v Republic Cr. Appeal No. 31 of 2003**. The court substantially followed the principles on self-defence in ***Palmer and Mcinnes Cases (Supra)***.

71. Accused statement to the police on the night of incident was given by PW9 who visited her in the cells and took her back to the scene same day to collect exhibits. PW9 is the officer who booked the accused in the OB and placed her in cells. In cross-examination, PW9 produced her statement recorded in respect of this case. In it PW9 said that the accused informed her that she quarreled with the deceased who was her boyfriend after which he took the knife she was using to cut potatoes and stabbed himself. Her statement was D.Exh.3.

72. I find that throughout the accused defence, the accused has maintained that the deceased stabbed himself as they quarreled. At the same time, she said that the deceased strangled her with one hand as he held the knife with the other before she realized that the deceased was bleeding. I find that the accused lied as to how deceased got stabbed. Her explanation is illogical. I also find that the accused did not claim the defence of self.

73. The charge of murder under **section 203** requires all of the key integral elements, more specifically that of malice aforethought to be proved by the prosecution beyond reasonable doubt. The established facts as earlier analysed in this judgment are not consistent with the existence of malice aforethought. The evidence adduced shows that the accused returned to the deceased house in the evening of the fateful day, a quarrel arose over the calls she had made or received from PW3. The knife used to stab the accused was present in the house and it can therefore not be argued that the accused had a chance to choose what weapon to use. However she chose to stab him in the chest and while at it she used great force that broke the sternum and went deep enough to pierce the heart into two places. This was excessive force.

74. All these facts when considered holistically, negate the aspect of pre-meditation in this case. That therefore discharges the accused of the offence of murder contrary to **Section 203** of the **Penal Code**.

75. I find the offence of manslaughter contrary to **Section 202** of the **Penal Code** proved beyond reasonable doubt. I therefore substitute the charge of murder to that of manslaughter as against the accused person.

76. As a result I find the accused guilty of manslaughter contrary to **Section 202** of the **Penal Code** as punishable under **Section 205** of the **Penal Code** and do hereby convict her accordingly.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF AUGUST, 2019**

**LESIT, J**

**JUDGE**