REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 24 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JANE WANJA MBOTE.....ACCUSED

JUDGEMENT

Jane Wanja Mbote hereinafter referred as the accused was charged with the offence of murder in respect of Samuel Kiige Kiruthi who died in the night of 8th September, 2013 at Kajiado Jua Kali estate. The accused denied the charge. She was represented at this trial by learned counsel Mr. Kimeu while the state case was conducted by Mr. Alex Akula, the Senior Prosecution Counsel.

In support of the charge against the accused the state summoned nine witnesses and exhibits to buttress their case that it was the accused who committed the murder.

Evidence by the prosecution

The first witness to take the lead was one Pw1 Wangechi Nderitu who gave evidence as a government analyst based on the report she prepared dated 16th December, 2014. According to her testimony while at the government chemist she analyzed exhibits received from PC Julius Omondi comprising of a Knife and blood sample of the deceased. The evidence was that the DNA generated between the knife and blood sample indicated that the stains on the knife were that of the deceased. The analyst report was confirmed and admitted in evidence as exhibit 1(a).

Pw2 - **CPL Charles Kioko** who at the time was attached to Kajiado police station testified that on 9th September, 2013 he witnessed the accused person booking a report on the incident between her and the deceased. Further in Pw2 evidence together with the accused they proceeded to the scene and on entering the house he saw the deceased lying on a sofa set having suffered a penetrating wound around the rib-cage. Pw2 also stated that he was able to see a knife next to the body of the deceased. According to Pw2, the deceased was rushed to Kajiado District Hospital where on arrival referred to Kenyatta National Hospital he succumbed to death while undergoing treatment.

From the evidence of **Dr. Benard Mundia,** Pw3 the pathologist who performed the postmortem alluded to the positive findings of penetrating wound on the left bottom part of the abdomen. In Pw3 testimony by all accounts the cause of death was peritonitis infection of the abdomen. He presented the postmortem form in evidence as exhibit 4.

The evidence of PW 4 Njoki Kiarie was in respect of her role in identifying the deceased body to the pathologist for the postmortem examination to be carried out by Pw3. Pw4 further gave evidence confirming that the deceased who was her biological son, during his lifetime was married to the accused person.

It was Pw5 John Thiga Macharia evidence that they had spent part of the early hours of the day on 8th September, 2013 with the deceased person. This was mainly on the business premises where they operated butchery. PW5 also told this court that he stayed within the same plot with the deceased and his family. According to Pw5 on or about 8.00 p.m the accused person had gone to his house demanding return of a mattress that he had borrowed from the deceased. In Pw5 testimony he handed over the mattress but in a short while the accused came back requesting for a mobile charger device. In the course of this contact with the accused, Pw5 narrated how he tried to reach out to the deceased through his mobile without success. He however was to receive the deceased who visited his house at 9.00 p.m. that is the time the wife (accused) started to quarrel the deceased in regard to where he had spent the previous hours of the day and why he was discussing family matters with pw5. According to the evidence of Pw5 as the accused was leaving his house she uttered threats in kikuyu language to the deceased to the effect "**Nawe niuku nyona**" meaning "**nawe utakiona**" It did not take long before Pw5 heard a distress cry at 9.30 p.m. Outside his door from the deceased in Kikuyu "**John Ndume wa Kiarie niatheca na kahiu**" meaning "**John toka wa Kiarie has stabbed me with a knife."** What followed as per the testimony of Pw5 was the involvement by the police and referral of the deceased to Kenyatta National Hospital. Pw5 further testified that it was at the hospital the deceased died while undergoing treatment.

Pw6 John Ngige Jnr. - A son to the deceased gave unsworn testimony and did indicate that he does not know the whereabouts of his father.

Pw7 CPL Adiel Kamau attached to Kajiado police station testified in this case as having recorded the statement from the accused person. In his evidence Pw7 told the court that the incident in question presented itself as a domestic violence between the accused and the deceased.

Pw8 Dr. Maureen Wangari who testified as the medical officer who attended the deceased at Kajiado hospital. She deposed on the explanation given by the deceased at the time she was attending to him during examination and diagnosis on how he sustained the injuries. At the time of taking the history Pw8 stated that the deceased implicated the accused as the one who while armed with a knife used it to stab him at the abdomen. Secondly after examination Pw8 described the gravity of the penetrating wound, which she thought would be managed well at Kenyatta National Hospital. There was no hesitation she made a referral of the deceased to Kenyatta National Hospital. Pw8 stated that the deceased was conscious of his surroundings.

Pw9 PC Julius Omondi received a report of the assault which eventually resulted in the death of the deceased. He proceeded to the scene the same night and follow up at Kenyatta National Hospital. According to Pw9 he was later to record witness statements, arrange for the postmortem and DNA analysis of the knife which was allegedly used to stab the deceased. On the face of it PW9 compiled the file and recommended that the accused be charged with the offence of murder.

The Accused Defence

The accused defence was to the effect that she did not kill the deceased. She also explained that on the material day they had a minor quarrel with the deceased involving the whereabouts of their children playing at the neighbours compound. The accused also stated in her defence that the same night she was directed by the deceased to go to Pw5 house and collect all of their items in his possession. Apart from the dispute over the children, the accused testified that on or about 9.30 a.m. the deceased left the house on his return at 10.00p.m he started beating her over the same issue. According to the accused she had to leave the house for the police station but still the deceased armed with a knife followed from behind in hot pursuit. She further stated that she managed to flee from the scene to lodge a complaint at the police station on the incident. It was at the Kajiado police station that she sought assistance. She was to be accompanied by the police officers to her house. When they arrived in their house, the accused told court that the deceased was lying on a sofa set bleeding from the abdomen and his right hand holding the knife. At the time they all agreed that he be taken to the hospital for treatment.

Submissions on behalf of the accused

The learned defence counsel Mr. Kimeu argued and submitted that no evidence has been adduced to show that the accused was involved in the death of the deceased. According to Mr. Kimeu it is obvious from the sets of evidence of the nine witnesses called by the prosecution none testified linking the accused with the murder either directly or indirectly. It is trite submitted Mr. Kimeu that the evidence against the accused fell short of the principles stated in the case of ***Sawe v. Republic 2003 KLR 364*** on the elements of circumstantial evidence**.** Further Mr. Kimeu contended that the purported dying declarations by the deceased is inadmissible on grounds as to lapse of the time of the death and the making of the declaration. Secondly, according to Mr.Kimeu the deceased's dying declarations was not at the imminent of death having been admitted at Kenyatta Hospital for a period of four weeks. Mr. Kimeu further submitted that the evidence by the nine witnesses failed to establish the case of murder beyond reasonable doubt.

Submissions on behalf of the state

The learned senior prosecution counsel Mr. Akula supported the evidence presented by the state to prove the elements of the offence contrary to Section 203 of the penal code. Mr. Akula argued and reminded the court that the description and evidence given by Pw5 suffices and fits in placing the accused at the scene of the murder. Further Mr. Akula argued that the incident and motive of the murder is traceable to the domestic violence between the deceased and the accused person. Mr. Akula disputed and submitted on the defence evidence that the deceased had self-inflicted the injuries as an afterthought to shield herself from blame. In light of the prosecution evidence Mr. Akula urged this court to find that the burden of proof has been discharged beyond reasonable doubt to warrant a verdict of guilty and conviction of the accused for the offence of murder.

Analysis and resolution

(i)The law

After considering the charge, both the prosecution case, the defence testimony and submissions by the learned counsels it is not in dispute that the prosecution is under a duty to proof the following elements of the offence of murder contrary to section 203 of the penal code.

(a)That the deceased Samuel Kiige died as a result of injuries inflicted by the accused. (b) Secondly that the death of the deceased was due to unlawful act by the accused. (c) Thirdly that the accused acted with malice aforethought as defined under Section 206 of the penal code.

For all purposes the burden and standard of proof in any criminal cases is always vested with the prosecution. In this regard as expressly stated under Section 107(1), 108 and111 of the Evidence Act cap. 60 of the laws of Kenya. *"**The burden to proof as to the existence of any fact is on the party who desires any court to give judgement as to any legal right of liability depended on the existence of facts he asserts to prove".*** The existence of those facts, the circumstances upon which such burden can shift to the defendant is clearly stipulated in Section 109 of the Act. Fundamentally therefore an accused person can only be convicted of the offence charged based on the strength of the prosecution case and not the weakness of his or her defence. The state has to discharge that burden as it was held in the case of ***woolmington v. DPP 1935 AC 467 and in Miller v Minister of Pensions 1942 AC ALL ER.*** The principle in this two authorities is that proof of beyond reasonable doubt is not proof beyond iota of doubt or to the hilt.

All the evidence to proof the elements of the offence must be examined and any material casting doubt that an offence charged has not been committed ought to be resolved in favour of the accused.

In the case of ***S v. Shackell 2001 4 SA 1 SCA*** the court held and stated:

> ***"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo it's reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true"***

It is this burden of proof that this case by the prosecution against the accused would be subjected to in each of the ingredients. As part of the analysis I would deal with each of the ingredients viza viz the available evidence adduced by the state.

(a) The death of the deceased:

As to the prosecution narrative the deceased Samwel Kiige was alive and in general good health until up to on or about 10.00 p.m. on the 8th September, 2013 when he sustained bodily harm to his abdomen. The chronology of what transpired was clearly given by Pw5- John Thiga Macharia, a business associate and neighbour to the deceased. As per Pw5 the deceased and the accused had a quarrel in his presence. They however left his house for their home. As per Pw5 in a little while he heard cries of the deceased like "***Wa Kiarie has stabbed me***". As indicated earlier Pw5 and the police officers were to make arrangement to take him to hospital at Kajiado. On examination by Dr. Maureen Welunya, he was found to have serious injuries which required specialized treatment at Kenyatta National Hospital. As stated by Pw3 andPw4 the deceased succumbed to death on 8th October, 2013 while undergoing treatment. Thereafter a postmortem examination was conducted by Pw3 where Pw4 positively identified the deceased body before the commencement of the postmortem by the Pathologist Pw3. Pw3 having taken the history of the incident from the investigating officer Pw9 noted the stab wound to the abdomen and surgical incision during the treatment of the deceased. From the postmortem examination Pw3 confirmed the death of the deceased and cause was due to stab wound and peritonitis infection of the abdomen. he accused person also does not dispute the death of her late husband. Both the prosecution and the defence were acutely alive to the fact that the deceased is dead. The prosecution has therefore discharged the burden of proof beyond reasonable doubt.

(b) The second element is on the unlawful acts of omission or commission in causing the death of the deceased.

The law as laid down in these type of offences can be traced to the provisions under Section 213 of the penal code. It is thus summarized in this Section that the death of a victim of the offence of murder or manslaughter need not be caused by the immediate act of the accused person. It defines causing death to include acts which are not the immediate or sole causes of the death. The law recognizes and requires an accused person to be held responsible for the death although his or her acts were not the immediate or sole cause under the following circumstances where: (a) **He inflicts body injury on another person and as a consequence of that injury, the injured person undergoes a surgery or treatment which causes his death. (b)He or she inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precaution as to his mode of ruling. (c) He by actual or threatened violence causes such other persons to perform an act which causes the death of that person such on all being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused …….**

(d)……"

I am in agreement with the interpretation of this provisions given by the persuasive authority in the case of ***Republic v Tembani 2007 C 25 A 291*** where the court held as follows;

> **"It is as well established that a two stage process is employed in our law to determine whether a preceding act give rise to criminal responsibility for a subsequent condition. The first involves ascertaining the facts; the second imputing legal liability. First, it must be established whether the perpetrator as a matter of fact caused the death".**
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> **The inquiry here is whether, without the act, the victim would have died; that is whether the act was the Condictio Sine Qua nor of the death. Emphasis provided for us underlined"**

Further in the decision in ***Republic v Smith 1959 2 ALL ER*** along with a number of other cases addressed similar questions of law as contemplated in our Section 213 of the penal code the court held as follows and stated:

> **"It seems to the court if at the time of death the original wound is still an operating cause and substantive cause, then, the cause can properly be said to be the result of the wound albeit that some other cause of death is also operating. Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death did not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not follow from the wound".**

It seems to the court enough for this purpose, to refer to the passage in the judgement of Lord Unique in the Uropesa 1943 32, 39 where he

said:

> **"To break the chain of causation, it must be shown that there is something which I will call illustrious, something unwarranted, anew cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic" Emphasis recorded**

According to the law on this ingredient all homicides are presumed unlawful unless excused by law as held in the case of ***Republic v Guzambizi S/O Wesonga 1948 15 EACA 65.*** The principle contemplated in this authority is where the offence is committed in defence of self, property or in protecting of a third party under imminent danger.

In considering the evidence under this ingredient the law requires the court to wholly evaluate the circumstances on causation and whether the unlawful act is excusable to avail the defendant defence of self.

In light of the above principles I now consider the evidence against the accused person. The evidence consisted the testimony of Pw5 who spent most of the day with the deceased. In the testimony of Pw5 the deceased before being attacked had picked a quarrel with the accused. In his estimation when they parted ways and he thought the matter had been resolved. According to Pw5 it resurfaced when the deceased called on him that he had been stabbed by the accused. The evidence of Pw5 indicates that the deceased was immediately rushed to Kajiado District Hospital and later referred for further treatment at Kenyatta National Hospital. While at Kajiado hospital Pw8 noticed severe stab wound to the abdomen. The deceased on referral was admitted at Kenyatta National Hospital where he underwent surgery to correct the gravity of the injury.

According to Pw3 who performed a postmortem on 15th October, 2013 the deceased suffered external and internal injuries to the abdomen. In his postmortem report Pw3 confirmed that complications arose from the injured area and as a result the deceased died of peritonitis of the abdomen. This in the testimony of Pw3 was consistent with the assault. There is no cogent evidence from the defence to dislodge this element to demonstrate that the attack was necessitated and grounded under Section 17 of the penal code on self defence or the case was within the legal limit of Section 207 as read together with Section 208 of the penal code on the deemed act of provocation. There is irreversible inference that the accused threats to the deceased uttered on the presence of pw5 did not end at that particular moment.

Having considered the testimony of pw5 and pw8 the nature of their evidence is that they were among the first people to come into contact with the deceased. It is on record that pw5 narrated the preceding events before the deceased assault and what the deceased said immediately after he had been stabbed. In the second incident while pw8 was taking the history on the injuries from the deceased at Kajiado Hospital she was also able to derive from him a statement that the wife (accused) had inflicted him with the physical harm using a knife.

In my view the admissibility of the words uttered by the deceased to pw5 and pw8 are admissible as part of the res gestae (see Section 6 of the evidence Act). In an application of this rule of evidence reference is made to the persuasive case of ***Purple v Desimine 1919 121 N.E. 761*** in which the Court of Appeal held:

> **"That evidence and acts are forced or brought into utterances of emotional by and in the evolution of the transactions itself and which stated in immediate casual relation to it"**

In the case ***Ratten v Republic 1972 3 ALL ER 801*** the court expressly articulated the legal proposition in this issues in the following passage:

> **"The mere fact that evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is relevant fact, a witness may give evidence that they were spoken"**

On the other hand in Kenya dying declarations is governed by Section 33(a) of the Evidence Act Cap. 80 of the laws of Kenya which provides:

> "***Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves in the following cases:***
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> > ***(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statement s are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of death comes into question.***
> >
> > ***(b) When the statement was made by such person in the ordinary course of business, and in particular when it consist of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, or goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually, dated, written or signed by him.***
> >
> > ***(c) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would***

expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(d) When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;

(e) When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement has special means of knowledge, and when the statement was made before the question in dispute was raised.

(f) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statement are usually made, and when such statement was made before the question in dispute was raised;

(g) When the statement is contained in any deed or other document which relates to any such transactions as is mentioned in section 13(a)

(h) When the statement was made by a number of persons and expressed feeling or impressions on their part relevant to the matter in question.

Under Section 33 of the Evidence Act this statements made to Pw5 and Pw8 can be characterized as dying declarations. Thus under the Act. "A dying declaration is relevant whether the person who made it was or was not, at the time it was made under expectation of death, that is, it is immaterial whether there existed any expectation of death at the time of the declaration. In our jurisdiction the admissibility of dying declarations in support of the prosecution case can be traced to the decision in the case of ***Pius Jasanga S/O Akumu v Republic 1954 EACA 333.*** The court acknowledged and distinguished the English position on this issue as follows:

"In Kenya, the admissibility of dying declaration does not depend, as it does in England having at the same time, a settled, hopeless expectation of imminent death, so that the lawful, solemnity of his statement may be considered as creating an obligation equivalent to that imposed by the taking of an Oath"

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the evidence act. It has been said by this court that the weight to be attached to the dying declarations in this country must consequently, be less than that attached to them in England and that the exercise of contusion in the reception of such statements is even more necessary in this country than in England. When the question arises about the interpretation of Section 33 of the evidence Act it is our jurisprudence as stated in the case of ***Republic v Eligu S/O Odel another 1943 CO EACA,***

"That it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration"

It is clear that the whole of the period under review on the night of 8th September, 2013 and 8th October, 2013 both the accused and the deceased had left Pw5 house to their residence. It is apparent that the quarrel they had started while in Pw5 house did not stop during the remainder of the period in that particular night. There is no dispute as to the description and the identity of the person the deceased was referring to as having committed the assault. The time and opportunity for the accused to commit the offence renders reliability and credibility to the deceased dying declarations. The sequence of events in this respect paints a picture for this court to find it safe to act upon the testimony of Pw5 and Pw8 on the dying declaration of the deceased.

Although Mr. Kimeu for the accused submitted against admission of the dying declaration the language of Section 33 of the Evidence Act and interpretation through case law the elements to be included as defined in the statute. There is corroborative evidence that there is no missing link in the chain from the time of assault, admission for treatment at Kenyatta National Hospital and the death of the deceased on 8th October, 2013.

In this context it is relevant to consider the statement made by the deceased. In the first instance he conveyed the message on what caused the injury to Pw5. The deceased also made a complete account of the incident to Pw8 who was the first medical officer to attend to him immediately after the assault.

The point to be emphasized is that the declarations the deceased made to Pw5 is substantially corroborated by the evidence of Pw8. Notwithstanding the persistent denials of the accused in her defence. These two witnesses Pw5 and Pw8 stated out as expressing the circumstances of the transaction of the killing. The reference of Pw5 and the fact of the quarrel between the two is causally and closely related to the actual occurrence of the assault. There is in my view a close proximate relationship in the incident which happened at Pw5 house and the happening of the event which resulted in the murderous assault. It is clear that the totality of the contents of the dying declarations made to Pw5 and later to Pw8 is admissible and relevant in terms of Section 33(a) of the Evidence Act.

One of the strong rules manifested in pw5 and pw8 evidence is the weight of their evidence and credit worthiness as to what the deceased uttered immediately after the assault. I accept their evidence as it relates to the circumstances as a whole on how the deceased met his death. The accused in her defence supported her innocence by producing an alibi and that the injuries were self -inflicted by the deceased.

In my view the answer to this issue does not rebut the evidence narrated by Pw2 and the deceased dying declarations to him immediately after the attack. I am satisfied that the prosecution has proved that the death of the deceased was as a result of unlawful acts of the accused person.

(c) Thirdly the prosecution must proof malice aforethought

Malice aforethought as an element of the offence of murder as defined pursuant to Section 206 of the penal code is characterized by an intent to kill or a disregard to human life and or intention to cause grievous harm. The term malice aforethought as defined under Section 206 of the penal code can either be expressed or implied depending on the peculiar circumstances of each case. For a murder charge it is often enough to prove that the prosecution established a manifestation of any of the following circumstances on the part of the defendant as outlined in Section 206 as follows:

> **(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;**
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> **(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;**
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> **(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."**

From the above circumstances the burden lies with the prosecution to convince the court that in committing the offence the accused had some intent or deliberate purpose behind the killing of the deceased.

The legal elements test which I often refer to as the Tubere test (see ***Tubere S/O Ochen v Republic 1945 12 EACA 63*** determined and construed the requirements to be proven for specific intent to kill or cause of grievous harm to include the following, the nature of the weapon and the sense it was used, the acts of assault and gravity of the injuries inflicted, part or parts of the body targeted, the conduct of the accused before, during and after, whether there is an intent to take life of another. It is also important to note in my view that the main test of malice aforethought being an intention to cause death or grievous harm, evidence presented should show whether the accused formed the necessary intent impulsively.

In a nutshell from the provisions of Section 206 of the penal code and the test in Tubere case, I hold the view that malice aforethought may be found in the intent to kill, where no mitigating circumstances can be shown by the accused. As can be deduced from the decisions in the cases of ***Republic v Godfrey Ngotho Mutiso 2008 KLR, James Masomo Mbatha v Republic 2015 eKLR, Enest Asami Bwire Abanga alias Onyango v. Republic EKLR 1990***, the approach taken by the courts indicates a shift from the Mensrea to aggravating factors to infer malice aforethought.

In these cases the courts have concluded that circumstances which points to infliction of harm beyond what is necessary are: the use of a dangerous weapon targeting the victim, the number times the weapon has been used purposely and the style of killing can be a manifestation of prior calculation and design to cause death.

Further in the case of ***Republic v Daniel Onyango 2015 eKLR***, the court held inter alia that the offence of murder turns out once the prosecution proves one or a combination of the above circumstances, malice aforethought will be deemed to have been established. When one looks at the present case to get a sense of how the killing occurred is to apply evidence to the facts as adduced by the prosecution. From the testimony of Pw5 prior to the assault and wounding of the deceased there had been an exchange of bitter words with the accused. The deceased was a husband to the accused as confirmed by Pw4 and Pw5 respectively. They had been married and cohabited together at Jua Kali estate – in Kajiado.

According to Pw5 the stabbing of the deceased occurred immediately both of them left his house. It was Pw5 evidence that the deceased immediately reached up to him by screaming that he had been stabbed by the accused. Pw5 took a step in going out to check only to be confronted with the harm suffered and some spots of blood on the floor. It is also ascertainable from Pw5 that the accused person at the time of the visit to their house was not present. There is no dispute as deduced from the testimony of Pw7 and Pw9 that the accused person had gone to the police station to complain about the domestic violence incident with the deceased. The testimony at the trial by Pw7 and Pw9 did not show that the accused had been injured in any event.

According to Pw7 and Pw9 the evidence of serious injury was to be informed upon them visiting the scene in company of the accused. The evidence from the Government Analyst showed a correlation between the blood stained knife recovered and the blood sample taken from the deceased. The DNA analysis established that the weapon used to inflict the stab wound upon the deceased was the same knife recovered at the scene.

There was no eye-witness to the killing. The prosecution case on malice aforethought can only be proved by circumstantial evidence. The range of relevant circumstantial evidence to establish the element that accused acted with malice aforethought must be brought within the ambit of the principles in the case of ***Mucheru v Republic2002 KLR*** where the court held:

> **"It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant at but also that there exist no co-existing circumstances which would weaken or destroy such influence"**

It is settled law that burden of proving facts which justify the drawing of such inference from the facts should be to the exclusion of any other reasonable hypothesis of innocence is vested with the prosecution and always remains as such. (See also the cases ***Republic v***

Kipkemoi Arap Koske & another 16 (1949) EACA 135 and Musoke v Republic 1958 EA 718.)

Viewing the evidence in totality there is insufficient evidence for this court to find that the killing of the deceased was premeditated or was accompanied with malice aforethought ton the part of the accused. Although I arrived at this conclusion it should not be lost that malice aforethought need not be equated with ill will or hatred. It can also be formed prior, or during the killing of the victim. It depends on the circumstances of each specific case.

> **"When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing in a broader sense, what was happening. This is O'leary v Regem evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon, J. said:**
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> **"Without evidence of what, during that time, was done by those men who took an significant part in the matter and specifically evidence of the behavior of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event"**

The circumstantial evidence adduced by the prosecution as noted in Pw5, Pw4, Pw3, Pw1, Pw7, Pw8 and Pw9 has woven chain and thread to prove that the deceased was unlawfully killed.

In this case neither was there any real dispute that the deceased suffered bodily harm and as a consequence he was admitted and did undergo surgery or treatment at Kenyatta hospital. There is nothing to show that the deceased of any other independent cause unrelated to the actual violence inflicted on the 8th September 2013 at his house. I think the attack on the deceased was part and parcel of the transaction involving the quarrel with the accused which took place at Pw5 house. On perusal of the evidence of the accused she failed to impress me as a truthful witness. In discerning clearly the circumstances upon which the deceased stabbed himself. There is very little doubt from the circumstantial evidence that the injury to the deceased was inflicted by a third party.

I reject the arguments and evidence by the defence among other things that the deceased was the author of his own death. To me the accused has failed to explain cogently as regards the period they left Pw5 house for their residence how they parted ways with the deceased. The conditions under which the deceased met his injury subsequent to the hospital and succumbing death from the injury brought the case within the provisions of Section 111 of the Evidence Act upon this circumstances. These are facts taken together are within the knowledge of the accused requiring an answer in rebuttal. In my judgement the accused failed to dislodge the overwhelming evidence presented by the prosecution.

As a result the conduct of the accused corroborates the circumstantial evidence adduced by the prosecution in support of the charge. Under Section 119 of the Evidence Act it follows that a rebuttable presumption arose that the accused was the only one in possession of the knowledge and circumstances in which the deceased met his death.

It is therefore clear that the accused unlawfully killed the deceased. The evidence as a whole discloses that the injury was not self-inflicted. Actually, as per the postmortem report the stab penetrating wound causing further complication caused the death of the deceased. From the facts of the case there is irresistible inference that the accused participated in stabbing the deceased with the knife produced as exhibit 3. have always held the view that murder and manslaughter despite the strong legal distinction they are offences closely related. As far as I have been able to evaluate the case for the prosecution against the accused the essential architecture of their case taken together proves beyond reasonable doubt the lesser offence of manslaughter contrary to Section 202 as punishable under Section 205 of the Penal Code. The body of jurisprudence contends that in murder contrary to Section 203 of the Penal Code the prosecution must of necessity prove a guilty mind commonly referred as to malice aforethought as defined in Section 206 of the Penal Code for one to be found guilty and convicted of the offence. This crime though heinous in nature lacks the deliberate, intentional or premediated taking of the life of the deceased person.

Having come to this conclusion I find the accused guilty of the offence of manslaughter contrary to section 202 of the Penal code and on that basis I do convict her accordingly.

SENTENCE

The chronology of events giving rise to your conviction for the offence of manslaughter contrary to conviction for the offence of manslaughter contrary to section 202 as punishable under Section 205 of the penal code are clearly captured in my judgment.

The killing of the deceased occurred within the context of a domestic violence set up. First the deceased was your lawful husband whom you cohabited together at Jua Kali estate- Kajiado. During the substance of the marriage you were blessed with two young children namely, J.N. aged 10 years and J.M. aged 8 years old. I also accept the pre-sentence report following the death of the deceased you are the only parent whom they will look up to for their maintenance and welfare. According to the victim impact statement by the mother of the deceased, this death robbed them of not only a son but has occasioned shock and atraumatic experience which they are yet to recover from despite the passage of time. From the victim family perspective justice can only be seen to be done by passing an appropriate sentence for this offence.

As to mitigation Mr. Kimeu – learned counsel on your behalf urged this court to be guided by the following factors: That though this unfortunate incident happened you remain to be sole breadwinner for the surviving children who at the moment are of tender years. That there is a high risk of rendering them destitute in the event you are incarcerated. Secondly, the first victims of the loss and bereavement is none other than these two children of the deceased. Thirdly, that you regret this unfortunate tragic incident.

From the state perspective learned principal prosecution counsel acknowledged that you have no previous criminal record. However learned counsel advanced the argument to this court to consider the aggravating factors and the violent nature of your actions which resulted in the

death of the deceased.

In this case I have considered all record remarks made for and against the type of sentence this court should exercise discretion in terms of Section 205 of the penal code. As a matter of law any offender found guilty of manslaughter and anchored as such faces a maximum sentence of life imprisonment. It is also true that a court in the sentencing process should take into account the facts and given circumstances of each case. That is to say the essential elements like the nature of the offence, the manner in which it was committed, the consideration whether it was premeditated or occurred at the spur of the moment and the sum of the evidence relevant to the order on sentence. The salient features of any crime is that it affects not only the direct complainants commonly referred to as victims by the overall society. That is why in heinous and serious felonies society abhors it and cries out for justice to be done by passing appropriate punishment. It is discernible from the sentencing hearing, that this murder was committed in gross breach of the trust that the deceased had upon you by making you the mother of his children. I have identified principally that this same children face imminent risk of being rendered complete orphans, in the event I sentence you to imprisonment. I am sure that the law in serious crimes with aggravating factors did not foresee the harm to be occasioned when the killing occurs within the family circle where the accused is one of the biological parents of the surviving children. The situation is even made worse when such children are of tender years.

Furthermore I consider the paramount principle on the best interest and welfare of the children ought to be regarded as a significant mitigating factor in this case. Though you have not reached out to the family of the deceased there is no dispute that you feel remorseful for what you did, given the fact that the deceased was your longtime companion. In addition I consider that you pleaded not guilty to the charge on 4th November, 2013 but your release on bail was allowed on 25th September, 2014. That means you spent considerable eleven months in remand custody. It is also on record that your trial has taken a lengthy period of time, cumulatively up to 27th September, 2018 when I rendered judgement in this case, it is exactly five years. All those delays cannot just be wished away.

When determining the appropriate sentence I am persuaded in this matter to apply the above mitigating factors which leads me to depart from imposing the maximum life imprisonment and or exercise discretion to go for prison sentence.

In view of the totality of the circumstances of this case, more so taking into account the victim children and reflecting on the pre-sentence report a non-custodial sentence of three years' probation is hereby imposed against you. It has also been felt that mediation elements be incorporated in your sentence in the context of subjecting yourself to professional counselling. This would be beneficial in order to serve the interest of the children victims as well as the family of the deceased. The victim offender mediation is therefore central and integral part of this non-custodial sentence. Apart from your normal routine reporting to the probation officer the measure and impact of this approach is that you must contribute to the healing outcome with the victims.

Dated, signed and delivered in open court at Kajiado this 27th day of September, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Kimeu for the accused

Mr. Meroka for DPP

Accused present