**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 2 OF 2014**

**(Coram: Odunga, J)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARY MUENI MUASYA.....ACCUSED**

**JUDGEMENT**

**Introduction**

1. The accused, **Mary Mueni Muasya,** faces the charge of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya for which a plea of not guilty was entered. According to the particulars of the offence the accused was charged that on the night of 20th and 21st day of December, 2013 at Yumbani Village, Kakuswi sub location, Kitela Location in Mbooni East District within Makueni County, she murdered **Joseph Muasya Musumbi** (hereinafter referred to as "the deceased").

**The Prosecution's Case**

2. In support of its case the prosecution called 11 witnesses. According to PW1, **Joseph Musubi Mwasia**, on 20th December, 2013, when he heard screams and upon returning home, found his son, the deceased holding the hand of the deceased's son and upon inquiring what was happening, the deceased informed him that he was going to fetch water and left. PW1 then left and went to tend to his goats. At 9.00 am when he was going to relieve himself next to his son, the deceased's house, when he heard people talking. He then went back to his house to sleep. At midnight he was woken by his wife, **Margaret Kasese**, PW2 who informed him that his son the deceased was calling her. Upon following PW2, they encountered the deceased's wife, the accused herein, who threatened to kill them with all their children. According to PW1, he was informed by PW2 that the accused was carrying a *panga* and arrows. However the accused told PW2 that they go to the deceased's house while PW1 went back to the house. Upon their return, PW2 and the accused were not accompanied by the deceased and PW1 proceeded to go to sleep. When he woke up in the morning, PW2 and the accused were in the house and when he inquired if the deceased had woken up, the two left for the deceased's house but the deceased did not respond to their call. Pw1 also knocked but the deceased never respondent after which PW1 informed his brother, **Jaries Mwasya** and he similarly went to his nephew Peter's house. Then then left followed by PW1's sister, **Jarus Nzevi Mwasya**. When the accused went round the house, she found a window open and upon checking through the window the saw the deceased injured and lying facing upwards with a table on top of his body. He also had cut wounds on his hand and head. PW1 then reported the matter to the Village Elder, **Rael Kilonzo**, who advised him to report to the police which he did at Tawa. Subsequently the police visited the scene and recorded their statements after which the body was taken away. According to PW1, the deceased was staying with his wife, the accused and his three children. According to PW1, when he was in the house he only saw a *panga* but not the arrows.

3. In cross-examination, he denied that when he went to the deceased's house, the deceased was beating his son. He however was not aware that the deceased was mentally challenged. He however admitted that the deceased used to suffer mentally bad not to a bad extent. Although the deceased was married to the accused, dowry had not been paid. According to him he heard people talking but they were not quarrelling. He confirmed that he slept at 9.00 am leaving his wife weaving ropes but was woken up at 12.30 am by PW2 who informed him that she heard the deceased calling her. When they left PW2 who was ahead of him was the one who encountered the accused first and he heard them talking. By the time PW1 encountered the accused, she was alone and that that night the accused spent the night with PW2 on a seat in his house. He however could not tell if the accused had anything. Though he had never entered the deceased's house, he was aware it was three bedroomed house and though the door to the house was not locked, the door to the bedroom was locked from the inside. According to PW1, the first police officer who visited the scene was a corporal from Tawa but he was unable to access the bedroom. It was the officer who followed him who broke the door. He however insisted that the deceased was not chaotic though he used to keep bows and arrows. When PW1 entered the house after the police broke the door, the arrows were however not there.

4. PW2, **Margaret Kathesya Musumbi**, was called by the deceased on 22nd December, 2013 at midnight to go to his house. When PW2 went to the deceased's house, she called him but he did not respond after which she went to call PW1. When they were leaving the house they met the accused who informed her that the deceased had an arrow, bow and knife as he was calling PW2. According to PW2, she was

informed that the deceased had had threatened to finish all his family. As a result, PW2 decided not to go. However, the accused suggested that they go to **Peter Naku's** house and when they requested him to accompany them to the deceased's house, Peter declined to do so as long as the deceased still had the weapons and advised them to go to the village elders. As it was late, they instead went back home and slept. The next morning after preparing tea they went to the deceased's house, called him but he did not respond. Upon being asked by PW1 if the deceased had respondent she responded in the negative after which PW2 went to the deceased's house and peeped through the window. She then saw the deceased having fallen down under the table with no clothes on and with a cut on the back and side of the neck and the hands. PW1 and Peter then went to call the village elder/headman who told them to report the matter to the police.

5. According to PW2, when he was called by the deceased, she left alone and went to the deceased's house, about 40 metres away and only later did she call PW1. According to her, she could hear the deceased calling from his house and that night the deceased and the accused were in the house. However when the deceased failed to respond to her calls, she decided to call **Mueni** who similarly did not respond. It is then that she decided to call PW1. It was then that the accused informed them that the deceased had a bow, knife and arrows and PW1 was unable to get to the home. In cross examination she said that the next day it was PW1 and Peter who opened the window which was locked by then and had to be broken. Though the main door and the children's bedroom was not locked, the deceased bedroom was locked. She was however unaware if the accused slept with the deceased or the children that night. According to PW2, the deceased was completely naked and was under the table. She however confirmed that she never saw the accused do anything to the deceased and had never heard that the deceased had any mental problems. In re-examination she stated that that night they sat in her house without sleeping. To her she found **Mueni** when they were going to the deceased's house but she did not reach the house as the deceased did not call her again.

6. PW3, **Jackson Maeke Musumbi**, was the deceased's brother. He testified that on 27th December, 2013 he was present was post-mortem was conducted on the deceased's body which he identified in the presence of Peter and the doctor.

7. On 21st December, 2013, PW4, **Josephine Syokau Muthama**, was woken up by PW1 who informed her that the deceased was dead. Accordingly her father left the house and went to their home. Later she accompanied PW1 to the village headman after which the accused's father disclosed that he would go with the accused to Tawa. However, as the accused's clothes were dirty, PW4 was requested to give the accused her clothes which she did and the accused left her clothes in PW4's house. Later, the accused's clothes were collected by the police. She however could not tell whether the accused's clothes were blood-stained. She however disclosed that her father and the accused's father were brothers hence the reason she gave her clothes.

8. PW5, **Snr Sgt. Robert Onkware**, received a report on 21st December, 2013 from PW1 and **Josephat Ndaku** that at 6.00am that day PW1 went to the deceased's house and found the door to his bedroom locked. Upon receiving no response from the deceased he pushed the window and when he peeped inside he saw the deceased lying in a pool of blood under a table with his feet blocking the door. Accompanied by the two men, PW5 proceeded to the deceased's house where he found the door to the deceased's bedroom locked from the inside. When he looked through the window he saw the deceased lying in a pool of blood and there were bows and arrows on the floor. He then called the OCS, Mumbuini Police Station who went with other police officers and after seeing the deceased's body through the window directed the said officer to open the door. After taking some photographs, they pushed the door open and found that it was the deceased's knees which were blocking the door from opening. According to him the door was just pushed open but was not broken as it had not been locked from the inside. It was his testimony that the body had deep cuts on the back of his head and the hand and there was a lot of blood on the floor. In the room where the children were sleeping they recovered a blood-stained knife. The accused was then questioned and her clothes which she had taken to PW4's house were recovered wet and blood-stained under a tree. The body and the clothes were then taken by the police. She however did not question the accused and did not know why the accused took the clothes to PW4's house. From his observation of the injuries, he was of the opinion that it is not possible for someone to cut himself at the back of the head the way the deceased had been cut.

9. PW5 also testified that **CIP Gitari**, the former OCS, Muumbini Police Station, who passed away went to the scene after he had arrived there. According to him, he was one of the officers who recovered the sword and the clothes the accused was wearing at the home of a neighbour after the accused informed them that she had taken them there. It was his evidence that the clothes were recovered under a tree in a polythene bag, wet with spots of blood. He produced the said clothes as exhibits.

10. In cross-examination, he disclosed that when PW1 made the report he stated that the deceased was mentally sick but not being the investigating officer he did not investigate this. He was however the first police officer to arrive at the scene where he found several people present. According to him when he arrived the window was already open and he was informed that it was opened by PW1. According to him because there was a lot of blood one could not tell whether there was struggle. However there was no blood on the bed. According to him, in the children's room they only found the knife and the sleeping mattress. However the blood on the knife was fresh. The accused however disclosed that she was given the clothes she was wearing by PW4. It was his evidence that he deceased's body had cuts at the back of the head and on his hand. He could however not confirm if the blood stained clothes were the ones the accused was wearing.

11. The witness was however not aware if any DNA was done on the blood stains on the deceased's clothes and was not aware of any admission by the accused that she had killed the deceased. He however conceded that the statement by **CIP Gitahi** did not mention any clothes recovered from the scene and could not explain **Gitahi's** statement that the deceased was murdered and did not commit suicide since he was not aware of any eye-witness of the alleged crime.

12. After *voir dire* examination was conducted, **Musyoki Mwasya**, a minor was sworn in as PW6. According to him, on 20th December, 2013 he was at home with his mother, the accused and his father, the deceased as well as his younger brother, **Musumbi**. At 9.00pm he went to sleep with his brother in their room after the four of them had had super leaving their father and mother in the sitting room. While asleep he was awoken by the shouts from his father that he was dying. He however just sat up on the bed without leaving. Later they were called by the accused through the window which they used to get out after which the accused took them to PW4's house where they spent the night. In the meantime the accused returned to their house. When he woke up the following day they learnt that their father, the deceased had passed away. According to him, on that night he did not hear his parents talking. He however disclosed that they were not staying well as the deceased used to beat them as well as the accused a lot as well as the mother for no reason. He stated that the deceased was not mentally well and used to get episodes of madness when he would start beating up people. He could however not tell if that day the deceased was unwell as he left the deceased and the accused talking together.

13. On 21st December, 2013 at 12.30pm, PW7, **Josephat Muthama Nkathu**, was asleep when he was called by the accused and PW2 and the accused informed him that the deceased was causing problems and threatening that he would kill the accused, her children, parents and himself. According to him, the accused informed her that the deceased had a *panga*, arrow and bows and that the deceased had cut himself with a *panga*. According to him he declined to go and see the deceased because he was afraid. He instead told them to go and report to the village elder. He also informed them that the accused should spend the night in PW2's house and they agreed to check on the deceased in the morning. The next day PW1 informed him that the deceased had died. He then confirmed that the deceased was lying under a table in a pool of blood. According to him there was a *panga* in the children's bed though he did not see if the *panga* had anything. He testified that when they removed the deceased's body it had three cuts on the neck, the head and the arm though he could not tell how deep they were. However at the mortuary he saw a deep wound on his chest. According to him, he could not tell if the injuries were inflicted by the deceased himself. It was his testimony that he knew the deceased since childhood and that the deceased had no problems when he was young though later on he looked as if he had mental problems as he would speak to himself and chase his wife though he was not violent. According to him, he did not see any bows and arrows.

14. Testifying as PW8, **Dr Pius Muluku**, a medical officer working in Makueno County carried out a post mortem on the body of the deceased at Tawa Funeral Home on 27th December, 2013. According to his report which he exhibited, the deceased was approximately 30 years old in good nutritional health and had clotted blood all the body which was pale because of loss of blood. There were deep cuts on the head, neck and hands and there was a deep cut on the right side of the neck and regular vessel to the head had been severed. There was also a deep cut on the occiput check of the head with loss of the skin on the scalp. There were multiple cuts to the apex of the skull and it had a skull fracture with, multiple cuts on the back and on the wrist of the right arm. According to the report, there was massive intracranial bleeding inside the skull and damage to the brain tissue and the spinal cord at the neck region at carvel C3 and C4 had been severed.

15. The witness therefore formed the opinion that the cause of death was severe head injury and ex-sang nation (severe loss of blood) due to multiple cuts. In his opinion the injuries must have been inflicted by someone else and there were signs of defensive wounds because of the cuts to the hands. The probable weapon according to him was a sharp object and that there was a possibility that more than one person could have been involved in causing the injuries.

16. PW9, **Rachel Wanza**, the village elder, recalled that on 21st December, 2013, she was at home in the morning at 7.00 am when the father of the deceased, PW1, and a member of the family called **Mutuku**, went and informed her that he did not sleep well as the deceased threatened that he would kill them. The accused then woke up the children and hid them. Therefater the deceased went silent and they thought he had fallen asleep. According to the witness the deceased had a problem of making noise. In the morning when tea was taken to the deceased they found that he had killed himself. The witness accordingly advised them to report the matter to the police in the company of the accused but the accused did not come. According to him after the police arrive he went to the deceased's house and saw the body through the window in a pool of blood. After that the police took the body away. Before that they went to the deceased's relatives' home where the accused had changed her clothes and took the clothes which were outside next to the home but were not hidden, though it was the accused who disclosed where the clothes were. The witness confirmed that she had known the deceased since childhood and that he had a mental illness because he used to run to the river with a *panga* to sharpen it. It was his evidence that the whole village knew that the deceased was not mentally well as he used to insult people badly though the witness never got any report of the deceased fighting people. She however testified that the deceased used to chase away the accused to her home but the accused would return because of her children.

17. **Cpl Solomon Koomie**, testified that on 21st December, 2013 was called by the OCS, **CIP Julius Gatahi**, to accompany him to the scene of murder at Kakuswi sublocation. At the scene there were a lot of people though in the house there was no one apart from PW5. Although the door was shut, it was not locked. Upon pushing the door open and entering the sitting room, he saw a blood stained *panga* in one of the rooms used by the children on a mattress. However the door of the bedroom where the deceased was, was shut and there was something blocking it from opening though it was not locked. Upon peeping through the window he saw the naked body of the deceased lying on the floor with the knee blocking the door. He then went back to the door and pushed the door open and saw the deceased cut on the left side of the head, lying upwards with a cut on the left side of the head. Upon turning the body he saw another cut at the back of the head and on the right hand's elbow. After taking the photographs the body was taken to Tawa Funeral Home. From the information he received from the village elder, the deceased was in his house with the accused and the children. It was his evidence that he also witnessed blood stains at the door of the deceased's parents' house. It was his evidence that as the accused could not explain what had happened, she was arrested and the blood stained sword collected as exhibit.

18. According to him, other than the sword there was a bow and arrows hanged on the wall of the house. From an interview of one of the children he was informed that the accused called the children through the window and took them to a neighbour's home. It was his evidence that according to the deceased's parents, the accused had some blood stains on her hand though the accused's clothes did not have any blood stains. Though all the police officers left in one vehicle, the witness did not any clothes. He was however unaware of the mental health status of the deceased.

19. PW11, **Cpl Samuel Odongo**, was present during the post mortem and saw that the body had deep cuts at the back of the head, neck, back and arm.

**Defence Case**

20. Upon being placed on her defence, the accused gave a sworn testimony in which she stated that the deceased was her husband. And that the deceased had mental problems. According to her on the fateful day, she went to work and when she returned at 5.00pm she found the deceased having canned the children. At 8.30pm when the children were asleep, the deceased told her that since she had not given him money to use in drinking, he would kill her and everybody else in the home. The deceased then took an arrow which was in the house and the accused ran away. She then met her mother in law, PW2, outside who had come due to the commotion an asked her where the children were. She informed PW2 that they were still in the house whereupon PW2 told her to remove them through the window as the deceased had locked the door from the inside. After removing the children they went to another home for fear of being harmed. She then returned to the house and but that night she spent the night at PW2's house.

21. In the morning she went to the house with PW2 called the deceased but there was no response. PW2 then called the deceased's cousins and the eldest cousin pushed the window open and informed them that the deceased had fallen down. When her uncle came they pushed the door but found it locked and the village elder directed that the door be forced open and it was done and they entered. According to the accused the elder then informed them that the deceased was not dead and that they would take him to the hospital for assistance. The cousin and the uncle then removed the deceased's clothes to change them in order to take the deceased to the hospital. However, as soon as they did so, the Assistant Chief arrived and ordered that no action should be taken till the police arrived. At about 4.00pm the police arrived when it was raining heavily, carried out investigations and took the body to the mortuary.

22. According to the accused she was not informed the reason for her arrest. She denied that she killed the deceased and stated that she did not know what happened since she left the deceased in the house. It was her evidence that the police did not take any clothes and that the clothes produced were not hers and she did not know where they came from. Similarly, she was not aware of the knife that was produced.

23. In cross-examination she admitted that she was not a doctor and could not therefore tell whether someone had mental problems. She also admitted that after the children went to sleep she remained with the deceased in the sitting room and they were not attacked and the following day the deceased was found dead.

**Prosecution's Submissions**

24. It was submitted on behalf of the prosecution by **Mogoi Lilian**, the Prosecution Counsel that from the evidence presented before the Court, the actions of the accused person purely reflects that she was a person fully prepared to kill the deceased and did not want the deceased to have any chance of surviving. In case the accused acted out of anger or in self-defence, she would not have attacked the deceased to the extent she did and she would have at least called out for help once the deceased was injured.

25. It was submitted that the injuries inflicted, the weapon used and the conduct of the accused thereafter points out to the accused having had malice aforethought to kill the deceased.

**Accused's Submissions**

26. In his submissions, **Mr Muumbi**, Learned Counsel for the accused relied on **Philip Muiruri Ndaruga vs. Republic [2016] eKLR** at page 3 where it was held that:

> **"To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[16] In 1997, the Supreme Court of Cananda in R .vs. Lifchus[17] suggested the following explanation:-**
>
> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.**
>
> **A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.**
>
> **Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt...."**

27. According to the submissions, the prosecution has not proved its case to the required standard for the following reasons:-

a. There is no eye witness to the alleged offence

b. There is no link established between the death of the deceased and the accused person.

c. There is no circumstantial evidence pointing the accused committed the offence

d. The ingredients of the offence have not been proved.

e. No photographs of the scene produced

f. Inconsistencies in the prosecution case

28. According to the defence, the prosecution called a total of 12 witnesses in an attempt to prove their case. However it is not disputed that

the prosecution did not call any eye witness to the alleged offence. All the witnesses came to the alleged scene of crime after the deceased had died and nobody witnessed the accused carry out the alleged offence.

29. It was further submitted that out of all the witnesses who testified no one ever directly linked the accused to the offence.

30. It was submitted that there is a discrepancy as to whether any clothes were recovered. The I.O CI **Julius Gitahi** in his statement and evidence given on his behalf does not mention any clothes recovered. The witness who testified on his behalf was unable to clarify as to whether any clothes were recovered from the accused. **Corporal Koome** (PW10) in his evidence stated that he never saw any clothes being recovered despite the fact that he told the court that they were all present at the scene and they also left at the same time. He also said he did not see any blood stains. The allegation that it is the accused who disclosed were the clothes were kept is unsubstantiated. It was therefore the defence case that there is no direct evidence linking the accused to the offence.

31. It was therefore submitted that there is no direct evidence to show the accused committed the offence. The prosecution is only relying on circumstantial evidence which is insufficient in the circumstances. The standard for circumstantial evidence to be used to convict an accused person is not in doubt and is already and clearly settled. In this case, the defence relied on **Republic vs. Daniel Musyoka Muasya & 2 Others [2014] eKLR** and **Mwangi vs. Republic [1983] KLR 75.**

32. According to the defence, the deceased was mentally unstable; he was violent and would beat the accused and the children. It is possible that the accused inflicted the injuries to himself due to his unstable mind. The investigating officer did not examine this hypothesis and therefore it cannot be ignored. It was reiterated that the allegation that the clothes which the accused was putting on at the time of the alleged offence were recovered is first of all in doubt. Secondly the allegation that the clothes had blood stain was never proved. The exhibits in form of clothes and the alleged sword had no visible blood stains. There was no evidence that there was any attempt to wash out the alleged blood stains. Further in such a case where there is no single identifying witness, to that the prosecution should have at least conducted a DNA test to confirm that the alleged blood stains in the clothes matched the DNA blood samples of the deceased. This was the easiest way of proving their case. This was however not done. There is no possible evidence tendered therefore to link the accused with the commission of the alleged offence. The children of the deceased were in the house but none witnessed the alleged commission of the offence by the accused. Thirdly, in the statement of the investigating officer, C.I. **Julius Gitahi** indicates that photographs of the scene were taken. None were produced in court. There was no attempt to reconstruct the scene. Such omissions can only be interpreted in favour of the accused person.

33. To the defence therefore, the case was based on just mere suspicion which can never be the basis for any conviction and reliance was placed on **Republic vs. Daniel Musyoka Muasya & 2 Others** (supra) where it was held that:

> **"Going back to the test for circumstantial evidence I am of the opinion that the evidence presented to this court lacks cogency and leaves many questions unanswered. The evidence cannot by any means be said to be water-tight. There certainly exists the suspicion that the accused persons may have been involved in the death of the deceased persons but our courts have severally held that suspicion alone, no matter how strong cannot form the basis for a conviction. There must exist tangible and concrete evidence adduced to remove issues in dispute from the realm of suspicion and into the realm of proven facts. This standard has not been met in this case. Even on the basis of circumstantial evidence this court cannot find that it was the three accused (or any of them) who so brutally attacked and killed the two deceased persons. The actus reus of the offence of murder has not been proved to the standard required in law."**

34. It was submitted that under section 203 of the Penal Code, there are four crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge and these are the fact of the death of the deceased; the cause of such death; proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons; and lastly, proof that said unlawful act or omission was committed with malice aforethought.

35. To the defence, though it is not in dispute the deceased died out of the cause stated in the post-mortem report, the person responsible if any and the intention are not known. To that end the state was not able to prove the *actus reus*. It is the key ingredient for the offence of murder and the state has to prove it beyond reasonable doubt which it has miserably failed to do so. Since the burden of proof does not at any particular point shift to the accused, the Court was urged to find that the prosecution had not discharged the burden of prove and proceed to acquit the accused.

36. As regards the inconsistencies in the prosecution case, it was submitted that the prosecution's case is not clear and is full of inconsistencies. It is not clear if the door and window to the house were locked from inside, or broken. It is also not clear whether any clothes were recovered. One witness stated they found bow and arrows on the ground while another says they were intact. It is also not clear whether the alleged table had been put on the accused or the accused got under it in the circumstances. All these inconsistencies can only be interpreted in favour of the accused.

37. The defence argued that the accused's defence was able to displace the prosecution's case. On the other hand the prosecution merely relies on suspicion that the accused committed the offence. However mere suspicion however strong it is cannot infer quit and secure a conviction and reliance was placed on **James Muriithi Njoroge vs. Republic [2016] eKLR** and **Joan Chebichii Sawe vs. Republic Crim. App. No. 2 of 2002 and prayed that the** court proceeds to acquit the accused as the prosecution has not proved or even attempted to prove their case beyond reasonable doubt.

**Determination**

38. I have considered the prosecution as well as the defence case. The case before me is that on 22nd December, 2013, PW2, the mother of the deceased was asleep in her house when she heard the deceased calling her in a loud voice. Upon going to the deceased's house, the deceased did not respond to her calls. However when she was leaving the house, she met the accused who informed her that the deceased had a knife, a bow and arrows at the time the deceased was calling her and that the deceased had threatened to kill all his family. After failing to

get help, the two decided to go to PW2's house and spent the night there though they did not sleep. The following morning they discovered the body of the deceased.

39. From her evidence it is clear that the first time she went to the deceased's house she was alone and that it was only later that she informed PW1, the deceased's father of what had happened.

40. PW1, upon being awoken by PW2, left the house after PW2 and they met the accused. However, PW1 seems not to have gone far as he left PW2 and the accused to proceed while he went back to the house to sleep. During the day, he had however heard screams from the deceased's house and upon going to inquire what was happening found the deceased holding his son's hands. Later in the day he heard people talking in the deceased's house but could not tell who they were. PW4's evidence was that's she was asked to help the accused with clothes as the accused's clothes were dirty which she did. She confirmed that the accused's clothes which she had left with her were later collected by the police. PW6, a son to the accused and the deceased was awoken by the noise in the house apparently from the shouts of his father that he was dying. Later, the accused called them and they left the house through the window and they were taken to PW4's house. By that time the shouting had stopped. After leaving them there the accused returned back to the house. If PW6's evidence is to be believed, and I have no reason not to do so, it must have been that at the time the accused was returning after escorting them to PW4's house that she met with PW2. Pw6 also confirmed that the deceased was mentally disturbed and was a violent person.

41. The death of the deceased was confirmed by the police officers who went to the scene and picked the body. Both from the evidence of the witnesses, the police officers and the doctor, the deceased sustained very serious injuries which were caused by a sharp object. However a sword was recovered from the children's room stained with blood.

42. This Court appreciates the old hat principle of law to the effect that the burden of proof in criminal matters lies with the prosecution. In this case the main issue for determination is whether the prosecution proved to the required standards that the appellant was guilty of the offences with which he was charged. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

43. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

44. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

> **"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 stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

45. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

46. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

**"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

47. **Mativo, J** in In **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

**"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."**

48. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

**"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a 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 which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

49. I agree with the submissions of defence that there was no direct evidence linking the accused with the death of the deceased. It therefore follows that the court must rely on the circumstantial evidence if the case against the accused is to be proved. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

**"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**

50. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held.

**"In order to justify 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; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; 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; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

51. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

**"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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

52. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

**"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

53. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

> **"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."**

54. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** and **Teper vs. Republic [1952] AC 480** as follows:

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

55. Section 203 of the ***Penal Code*** provides:-

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

56. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

> **"For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."**

57. In **Republic vs. Mohammed Dadi Kokane & & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M. Odero, J** as follows:-

> **1) The fact of the death of the deceased.**
>
> **2) The cause of such death.**
>
> **3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
>
> **4) Proof that said unlawful act or omission was committed with malice aforethought.**

58. As regards the first ingredient, there is no doubt at all that the deceased passed away. His body was identified by PW3 and even the accused did not contest the fact that the deceased did pass away.

59. What about the cause of death? According to PW8, the deceased had deep cuts on the head, neck and hands and there was a deep cut on the right side of the neck and regular vessel to the head had been severed. There was also a deep cut on the occiput check of the head with loss of the skin on the scalp. There were multiple cuts to the apex of the skull and it had a skull fracture with, multiple cuts on the back and on the wrist of the right arm. According to the report, there was massive intracranial bleeding inside the skull and damage to the brain tissue and the spinal cord at the neck region at carvel C3 and C4 had been severed. The witness therefore formed the opinion that the cause of death was severe head injury and ex-sang nation (severe loss of blood) due to multiple cuts. In his opinion, the probable weapon was a sharp object and that there was a possibility that more than one person could have been involved in causing the injuries. I therefore find that the cause of death was as found by PW8.

60. Was there a proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person? As already indicated above, there was no direct evidence linking the accused to the death of the deceased. However, on that night the accused admitted they were in the house with the deceased. There was no allegation that a third person was present. Their children went to sleep leaving them together in the sitting room. At some point in the night an altercation seem to have arisen between the couple when according to the accused the deceased demanded for drinking money and threatened to kill her using an arrow. While the accused stated that she decided to run away, there was evidence from PW2 and PW6 that there was shouting from the deceased who screamed that he was dying. According to PW2, she met the accused outside the house when PW2 was trying to call the deceased. PW2 did not state that she was with the accused when the accused was removing the children from the house. Similarly, PW6 did not see PW2. To my mind the only reasonable explanation is that the accused removed the children to PW4's house and was on her way back when they met with PW2. Whereas there was inconsistency as to whether the accused's clothes were recovered from the house of PW4, PW4 admitted that indeed the accused left her clothes in her house after she had given the accused her own clothes and that the same clothes were taken by the police. Those clothes were produced as exhibits and there was evidence that they were blood stained. A blood stained sword was also recovered in the children's room. From the evidence on record it is clear that the only person who had the opportunity to cause the injuries to the deceased, apart from the deceased himself was the accused. This was the position of the Court of Appeal in **Francis Charo Opo vs. Republic [1980] eKLR** where the said Court held that:

> **"The appellant was with the complainant on the material afternoon and had the opportunity to commit the offence."**

61. However, the court must deal with the issue whether the injuries could have been inflicted by the deceased himself. As already indicated above, according to PW8, the deceased had deep cuts on the head, neck and hands and there was a deep cut on the right side of the neck and

regular vessel to the head had been severed. There was also a deep cut on the occiput check of the head with loss of the skin on the scalp. There were multiple cuts to the apex of the skull and it had a skull fracture with, multiple cuts on the back and on the wrist of the right arm. According to the report, there was massive intracranial bleeding inside the skull and damage to the brain tissue and the spinal cord at the neck region at carvel C3 and C4 had been severed. The witness therefore formed the opinion that the cause of death was severe head injury and ex-sang nation (severe loss of blood) due to multiple cuts. In his opinion the probable weapon according to him was a sharp object and that there was a possibility that more than one person could have been involved in causing the injuries. I therefore find that the cause of death was as found by PW8. In his opinion, the injuries must have been inflicted by someone else and there were signs of defensive wounds because of the cuts to the hands. The probable weapon according to him was a sharp object and that there was a possibility that more than one person could have been involved in causing the injuries.

62. In my view the injuries which the deceased sustained could not have been caused by himself and having ruled out the presence of any other person in the house that night it follows that the inculpatory facts linking the accused with the deceased's death are incapable of explanation upon any other hypothesis than that it was the accused who committed the acts that caused the deceased the fatal injuries.

63. That leads me to the last issue: whether it was proved that the said unlawful act was committed with malice aforethought.

64. Section 206 of the ***Penal Code*** on malice aforethought states:-

> ***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 arm 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.***

65. The law is however clear that the burden is on the prosecution to prove that unlawful act was committed with malice aforethought. In this case, the evidence from the accused was that the deceased threatened to kill her and the whole family. The deceased then picked an arrow. There was evidence that the deceased had mental problems and had in the past been violent towards the accused and the family. In fact that very day, PW1 had heard screams from the deceased's house and when he went to inquire, he found the deceased holding the hands of his son. This evidence corroborates the accused's evidence that it had been reported to her that the deceased had beaten the children that day.

66. In my view an arrow in the hands of a person who was prone to violent tendencies as a result of mental instability can make one to reasonably believe that he or she is in danger of being attacked by the person. In **Roba Galma Wario vs. Republic [2015] eKLR**, the Court of Appeal cited the case of **Mohammed Omar & 5 Others [2014] eKLR** and the case of **DPP vs. Morgan [1975] 2 All ER 347** where it was held that:-

> **"The essential element of self defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds."**

67. Whereas the weapon used here was a sharp weapon, from the evidence, it seems that the weapon was actually the deceased's *panga* which the deceased used to sharpen. It is therefore clear that the weapon was not one that the accused had specially kept for the purposes of attacking the deceased. Most probably it was a weapon which was picked by the accused at the spur of the moment. In the case of **Ahmed Mohammed Omar & 5 Others vs. Republic [2014] eKLR** the court held as follows:

> **"What are the common law principles relating to self defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said:**
>
> **"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 may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. .....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 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 immediate defensive action may be necessary. If the moment is one 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. There may be no longer any link with a necessity of defence. ..... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one 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."**

68. The Court of Appeal further held that:

> **"The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP V MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds."**

69. In this case whereas the retaliation may be deemed to have been out of proportion to the attack, this was not an ordinary case where one was dealing with a normal person. The deceased was mentally unstable and one could not tell how he would react to the actions of the accused. This may have led the accused at the spur of the moment to apply more force than would not be justified in the ordinary circumstances. In these circumstances it cannot be said with certainty that the accused did not feel that she was in immediate danger or peril arising from a sudden and serious attack by the deceased. Though the danger the accused apprehends, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means, in **Beckford vs. R [1988] AC 130, Lord Griffiths** stated (at p.144) that:

> **"a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."**

70. As was held in **Nyamweru S/O Kunyaboya vs. Republic (1953) 20 EACA 192:**

> **"the use of lethal weapon may indicate a malicious intention but it is not conclusive of the existence of an intent to murder".**

71. In **Peter King'ori Mwangi & 2 Others vs. Republic CR. APP. No. 66 of 2014,** the Court identified two conditions as prerequisites for the application of provocation as a defence, namely:

> **(a) The "subjective" condition that the accused was actually provoked so as to lose his self control; and**
>
> **(b) The "objective" condition that a reasonable man would have been so provoked"**

72. Here there was a lethal weapon in the hands of a violent mentally unstable person who had threatened to kill the accused and her children. This taken together with the past conduct of the deceased towards the accused and the children in my view was sufficient to constitute provocation. The effect of upholding the defence of provocation in favour of an accused person is to reduce the offence of murder to manslaughter. See the case of **Tei S/O Kibaya vs. Republic [1961] EA 580** as approved in **Roba Galma Wario vs. Republic [2015] eKLR**, thus:-

> **"In considering whether provocation was sufficient to reduce the offence to manslaughter, it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used."**

73. Turning to the doctrine of self-defence, it is provided for under section 17 of the ***Penal Code*** thus:-

> ***Subject to any express provision of 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.***

74. The section has been ably construed in the cases of **Republic vs. Andrew Mueche Omwenga** (supra); **Roba Galma Wario vs. Republic** (supra) and **Ahmed Mohamed Omar & 5 Others vs. Republic [2014] eKLR** from which the following principles have emerged:

> **(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.**
>
> **(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.**
>
> **(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.**
>
> **(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.**
>
> **(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.**

75. **Maraga, J** (as he then was) in **Republic vs. Andrew Mueche Omwenga [2009] eKLR** expressed himself as follows:

> **"In Mokwa Vs Republic, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force. In Palmer Vs R., [1971] 55 Cr.**

**App. R. 223 at p. 243 the English House of Lords held:-**

**"The defence of self defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict may be one of manslaughter."**

**What is reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. In the words of Lord Morris of Borth-y-Gest in the said English case of Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in John Njoroge Vs Republic, Cr. App. No. 186 of 1987:-**

**"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."**

**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. In other words the prosecution must disprove the defences of provocation and self defence and it must discharge this burden beyond reasonable doubt—Joseph Kimanzi Munywoki Vs Republic, Cr. App. No. 31 of 2003 CA Nairobi), [2006] eKLR. In the said case of Beckford Vs R [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-**

**"It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."**

**Adequate provocation, especially when coupled with self defence, can reduce a murder charge to manslaughter- Mbugua Kariuki Vs Republic, [1976-80] 1KLR 1085 and Republic Vs Gachanja, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words:-**

**"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."**

**In Mancini Vs Director of Public Prosecutions, [1941] All ER 272 the English House of Lords held that not every kind of provocation, however, will reduce murder to manslaughter. To have that effect the provocation must be such as to temporarily deprive the person provoked of the power of self control, as a result of which he commits the act which causes the death. The test to be applied therefore is that of the effect the provocation would have on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary and reasonable person to act as he did. And before provocation becomes an operative factor in a murder trial, however, the prosecution must have proved beyond reasonable doubt, that murder, provocation apart, had been committed by the accused—Stingel Vs R. [1991] LRC Crim) 639."**

76. I associate myself with the view expressed in **Joseph Kimani Njau vs. Republic [2014] eKLR** where the Court of Appeal stated:-

**"In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution…In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another."**

77. Similarly, in **Nzuki vs. Republic (1993) KLR 171**, the Court in substituting Nzuki's charge of murder with manslaughter observed:

**"there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to**

**manslaughter."**

78. In this case I am therefore not satisfied that the prosecution has proved malice aforethought in order for the charge of murder to be sustained. Adequate provocation, especially when coupled with self-defence, can reduce a murder charge to manslaughter – **Mbugua Kariuki vs. Republic, [1976-80] 1KLR 1085** and **Republic vs. Gachanja, [2001] KLR 428**. This is also legislated in Section 207 of the ***Penal Code*** in the following words:-

> **"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."**

79. Section 179 of the ***Criminal Procedure Code*** provides that:

> ***179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

80. For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the accused of the charge of murder but convict her of the offence of manslaughter contrary to section 202 as read with section 205 of the ***Penal Code***."

81. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 26th day of November, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Miss Mogoi for the Prosecution**

**Mr. Muumbi for the accused**

**CA Geoffrey**