REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 22 OF 2015

REPUBLIC……...……PROSECUTOR

Versus

DANIEL OKELLO RAPUCH…….....ACCUSED

JUDGEMENT

DANIEL OKELLO RAPUCH hereinafter referred as the accused person was arraigned before this court on a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The brief particulars of the charge are that on the night of 29th July 2013 at Birika Centre in Ololoitikosh Location within Kajiado County the accused murdered SIMON GITHARE GITHUA hereinafter referred as the deceased. The accused pleaded not guilty to the charge and after a series of pre-trial conferences the matter was set down for hearing. The accused was represented at the trial my Ms. Mageto advocate while the prosecution was conducted by Mr. Akula, the senior prosecution counsel.

The prosecution case was projected by the six (6) witnesses who were summoned and adduced evidence before this court to prove the charge of murder beyond reasonable doubt.

The brief summary of the prosecution case was laid out in the following manner:

PW1 GRACE WANJA NJAU a cousin to the deceased deposed that she received information on the death which occurred on 29/7/2013 at Birika area. The police later invited her to attend to a postmortem process which was being carried out at Kitengela Shalom Hospital on 7/8/2013. PW1 confirmed that she was able to positively identify the body to the pathologist. This was also the testimony of PW2 Elkana Michuki a cousin to the deceased who accompanied PW1 to Shalom Hospital Mortuary to participate on identifying the body of the deceased.

PW3 DR PETER MURIUKI deposed that on 7/8/2013 he conducted a postmortem upon Simon Githare and found the following injuries: abrasion of the left elbow, abrasion of the right shoulder, abrasion/laceration of left hip, bruises left chin upper 1/3 and lower 1/3 facture, lower 1/3 bilateral tibia – fibula left leg swollen, abrasion right lower anterior abdominal wall injuries to the penile shaft. Confusion right temporal scalp. PW3 opined the cause of death to be multiple muscle/skeletal and head injuries due to blunt force trauma. He produced the postmortem report as exhibit 1.

PW4 PTER KURIA gave evidence on how he woke up in the morning on the 30/7/2013. On or about 8.00 am while on his way to work he noticed a group of people gathered and decided also to join to find out the purpose of the meeting. That is when he observed the scene and saw a dead body of man which was half naked and the inner wear half torn. PW4 further stated that the public were incensed with the acts of the suspect whom they started to pursue with the aim of lynching him. That is when he managed to

get hold of the suspect, the accused in this case and they proceeded to Birika Police Post. The incident was therefore booked at the police post who took over the investigations of the case. In cross examination PW4 stated that he knew the wife of the accused. He also further deposed that besides the deceased body being half naked there was a condom still in place at the penile shaft.

PW5 PC EDWARD MWARINGA who was attached to Birika Police Post stated that on receipt of the murder report they proceeded to the scene to confirm the circumstances. On arrival PW5 testified that he saw the deceased body lying in the room with multiple injuries all over the body. PW5 further added that a quick interrogation of the members of the public at the scene revealed that the deceased had been found having sexual intercourse with the accused wife. PW5 testified that he was also shown a piece of timber as the weapon used to inflict injuries against the deceased. In cross examination PW5 stated that the accused found the wife with the deceased in bed having sex. The deceased in noticing the presence of the accused picked up a knife and aimed it at the stabbing the accused. There was a fight which resulted in the deceased suffering the fatal injuries.

PW6 APC Benson Ameme of Birika Police Post also testified that on 30/7/2013 he received the accused from two members of the public whom he rearrested and placed in police custody.

At the close of the prosecution case the accused person was placed on his defence under section 306 (2) of the Criminal Procedure Code. The accused elected to give sworn statement in answer to the charge. According to his defence the accused stated in the evening of 29/7/2013 he went to his house and found it locked from inside. In approaching the house he did manage to open it and gained entry. That is when he found a man in his bed having sexual intercourse with the wife. The accused further stated that the man who was armed with a knife started to assault him including pointing the knife at him to inflict harm. After realizing the danger accused stated that he went outside the house picked a piece of timber and hit the deceased in retaliation. As a result of the beating the deceased fell down and at the same time the commotion attracted the attention of the neighbours. In the course of incident some members of the public wanted to lynch him for causing the death of the deceased. That is when he decided to go to Birika Police Post to report the incident and seek protection. In cross examination the accused stated that the deceased never left his house even after noticing his presence. That is what made him go for a piece of timber to confront the deceased whom he feared was going to stab him with the knife. The accused further stated that in inflicting the injuries he left his house until later when he learnt that the man had passed on at the scene.

Written submissions by the defence counsel on behalf of the accused:

Ms. Mageto the learned counsel submitted that this is a case which can be categorized as a death caused in the heat of passion. According to Ms. Mageto the accused found the deceased in bed with his wife. There was a fight between the two and the injuries inflicted occasioned the death of the deceased. In order to substantiate further Ms. Mageto submitted that examination of the prosecution case does not establish the elements of the charge under section 203 of the Penal Code. Learned counsel contended that the prosecution proved the death of the deceased on the material day but failed to prove the death was unlawful and the accused had malice aforethought. According to Ms. Mageto the learned counsel, the prosecution failed to bring the case within the provisions of section 206 of the Penal Code to establish malice aforethought against the accused person. Ms. Mageto contended that this was a clear case where the accused was provoked and acted in self defence. Learned counsel submitted that the circumstances relied upon by the prosecution have not established the offence as the case rightly falls under the provisions of section 208 of the Penal Code on provocation. According to the learned counsel the provocation herein was caused by the deceased who planned and went to the house of the accused to commits acts of sexual intercourse. It is the learned counsel submissions that the accused was temporarily deprived of the power of self control. Learned counsel placed reliance on the case ***of Republic v Gachanja, Republic v Chivatsi & Another [1989] 333, Nthithio v Republic v Republic [1988] KLR 796, Tei S/O Kabaya v Republic [1961] EA, Republic v Martin Kinyua Nancy [2016] eKLR, Republic v Phelimon Chemas [2014] eKLR***. Learned counsel urged this court to find that the offence of murder has not been proved beyond reasonable doubt. The accused should therefore be acquitted and set free forthwith.

Written submissions by the senior prosecution counsel for the state:

Mr. Akula, the learned prosecution counsel for the state submitted that the prosecution has established that the deceased died, his death was unlawful, the deceased was murdered by the accused who had malice aforethought. The learned prosecution counsel further submitted that the prosecution adduced both direct and circumstantial evidence to implicate the accused with the offence under section 203. Mr. Akula argued that the defence of self cannot be availed to the accused in view of the serious injuries inflicted upon the deceased. Mr. Akula further submitted that the accused had the option to retreat from the deceased if he found himself that his life was in danger. According to Mr. Akula what the accused did was to respond with excessive force in hitting the deceased severally with a piece of wood. Mr. Akula further submitted that what the prosecution placed before the court fully support the case against the accused. That all the ingredients of the offence of murder do exist and the defence by the accused has not rebutted the prosecution case. Mr. Akula cited the case of ***Republic v Jared Otieno Osumba [2015] eKLR, David Lentiyo v Republic [2006] eKLR, Palmer v Republic [1971] AC 814, Republic v Mcinnes 55 CR. Appeal R551*** on the principle governing self defence in Kenya and use of excessive force to cause death or do grievious harm to the victim of murder. Mr. Akula urged this court to find in favour of the prosecution and dismiss the defence testimony as one incapable of standing against the overwhelming evidence tendered against him.

I have considered the evidence by the prosecution, the defence and submissions by both counsels. In this case there is no dispute that the accused has been charged with the offence of murder contrary to section 203 of the Penal Code. Under this section the prosecution is mandated by law to prove the following elements:

(1) The death of the deceased.

(2) That the death of the deceased was unlawful.

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

(4) That it was the accused who killed the deceased.

I will therefore endeavour to consider each of the ingredients alongside the entire evidence on record.

(1) The death of the deceased

The prosecution on this element adduced evidence of PW1 and PW2 cousins to the deceased. They received reports that the deceased had been murdered. They visited the mortuary during the postmortem on 7/8/2013 where they identified the deceased body to the pathologist. PW3 Dr. Ndegwa who performed the postmortem confirmed the death of the male adult by the name Simon Githare Githua. The postmortem report was produced and admitted in evidence as exhibit 1. PW3 Peter Kuria who was among the first people at the scene confirmed that he saw the deceased body. He had succumbed to death as at 30/7/2013 at 8.30 hrs. PW6 APC Ameme and PW5 PC Edward Mwaringa received the death report and did visit the scene. The body found at the scene and transported to Shalom Hospital Mortuary at Kitengela was that of the deceased duly identified by PW1 and PW2. The accused person does admit that the person whom he assaulted in his house later died from the injuries inflicted. The scene of the murder was in the accused's house. That therefore proves that the deceased is dead and is the one whom the indictment against the accused was brought under section 203 of the Penal Code. The prosecution therefore has discharged the burden of proof beyond reasonable doubt on the death of the deceased.

(2) The second element is in respect to the unlawful death of the deceased.

The law is very clear that every homicide is unlawful unless authorized by law or excusable under the law. That proposition was elucidated in the case of ***Sharm Pal Singh [1962] EA 13, see also Guzambizi Wesonga v Republic [1948] 15 EACA 63*** the court held:

> **"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."**

According to the prosecution case the death of the deceased was unlawfully caused. Mr. Akula the senior prosecution counsel in his submissions referred to the testimony of PW1 and PW2 who were called in to identify the deceased body at the mortuary. The two witnesses who were related and known to the deceased positively identified the deceased as Simon Githare Githua. Learned prosecution counsel also referred this court to the postmortem report by PW3 admitted in evidence to demonstrate the nature of injuries suffered by the deceased. The cause of death attributable to the death of the deceased being multiple muscle and skeletal injuries with prominent injury identified to be fractures to the head. According to PW3 the probable cause of the injuries was blunt force trauma consistent with assault.

Ms. Mageto learned counsel for the accused submitted that the death of the deceased is excusable because of the circumstances prevailing that of acting in self-defence. The self-defence learned counsel referred to is in respect of the deceased found in bed with the accused wife. The accused person in his defence stated that on the material day he returned to the house after a day's activities. When he arrived the door to his house was locked. He made a forced entry into the house only to find the deceased and the wife having sexual intercourse. According to the accused the deceased drew a knife in his possession which he aimed at him to inflict physical harm. The accused further stated that he sensed danger and rushed out to pick a piece of wood which he used to beat the deceased in retaliation. The accused further admitted that having stepped on the head of the accused he left the scene for some other place. It is only later he learnt that the person he assaulted in his house succumbed to death. The accused therefore decided to submit himself to the police where he reported the incident.

The real point of this case turns up whether or not legal provocation as defined under section 208 (1) of the Penal Code was disclosed to trigger the actions taken by the accused. In order to answer this question it is appropriate at this stage to set out the law relating to provocation. Section 207 of the Penal Code provides:

> **"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 he is guilty of manslaughter."**

Section 208 (1) of the Penal Code defines the term provocation as follows:

> **"The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."**

This question on provocation and provisions of section 208 (1) of the Penal Code have been a subject of interpretation and discussion in our courts in several cases. In the earlier case of ***Republic v Hussein S/O Mohamed [1942] EACA at pg 66*** the Eastern Court of Appeal held as follows:

> **"When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation."**

In the case of ***Peter Kingori Mwangi & 2 Others v Republic [2014] eKLR*** the court stated that, **"for provocation to exist the following two conditions must be established:**

> **(1) The subjective condition that the accused was actually provoked so as to lose his self-control and**
>
> **(2) The objective condition that a reasonable man would have been so provoked."**

In deciding a similar situation on provocation the Court of Appeal in the case of ***Elphas Fwambatok v Republic [2009] eKLR*** held thus:

> **"In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims....."**

In ***Mabanga v Republic [1974] EA 176*** the court further held interalia on this subject as follows:

> **"The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the court was in the particular circumstances of this case provocation sufficient to have rendered the offence of murder to manslaughter.....**
>
> **We have on our own revisited the content of section 208 of the Penal Code and construed it. To us content of provocation means any wrongful act of insult of such a nature as to be likely when done to an ordinary person.....To deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."**

I have considered the prosecution evidence of PW4, PW5 and the accused defence in answer to the charge. It is crystal clear that the accused accosted the deceased when he found him in bed with his wife. There is direct evidence from PW4 and PW5 that the deceased body was half naked with a condom still stuck in his penile shaft. The accused deposed that besides finding the deceased in bed with his wife there was an attempt to stab him with a knife in possession of the deceased.

It could therefore be concluded that sexual infidelity of a wife is an integral and essential trigger for the accused person loss of self control by grave provocation and in the heat of passion. Passion as here used means any of the human emotions known as anger, rage, sudden resentment or terror which renders the mind incapable of cooling down on reflection. The accused action in procuring a piece of wood which he used as a weapon to assault the deceased is persuasive that his passion had not cooled. According to ***H. Gross, a theory of Criminal Justice (Newyork Oxford University Press 1979 at 69***:

> **"In those cases where reason succumbs to passion, the will is determined by something external to it – A relation which Kant terms the heteronomy of the will. In such cases the person's reasons for acting in a certain way pertain only to what he/she desires, independently of his moral beliefs. On the other hand, when the person's will is determined by reason, the will is said to be self-ruled; for reason is viewed as something internal to the will. A will that is determined by reason is at one with itself. According to Kant such a will can override passion and desire."**

On the evidence the wife of the deceased was found in bed with the deceased naked and intimately in love, the accused was confronted with this scenario as he arrived in their matrimonial home. In the circumstances of this case the passion must have been irresistible so as to deprive him of the power of self-control and to induce him to commit an assault. The defence of provocation is therefore available to

the accused to reduce the offence to that of manslaughter.

The second defence pleaded by the accused is that of self-defence. The general principle of law is that it is lawful to act in self-defence or to property and therefore it does act as a complete defence to criminal liability. The burden to negate self-defence or defence to property is an onus on the prosecution.

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

> **"Subject to any express provisions in this code or any other law in operation in Kenya criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law. Those principles have been clearly elucidated in the persuasive authorities in Palmer v Republic [1971] AC 814 and in Republic v Mcinnes 55 Cr. Appeal 551 where the Prosy Council and the Court of Appeal respectively stated as follows:**
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> **It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."**

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

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

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

Ms. Mageto counsel for the accused submitted that the court should avail self defence to the accused and acquit. The contention by learned counsel was that the accused used force to defend himself from the attack of the deceased. Mr. Akula, the senior prosecution counsel submitted that the defence of self is not available to the accused on grounds that he used excessive force in the circumstances of the case. Secondly, Mr. Akula contended that the accused had an opportunity to retreat from the danger and even went further to invite the court to go by the evidence where he went outside the house to fetch the murder weapon. Thirdly Mr. Akula further submitted that the nature of injuries inflicted upon the deceased negates the principles of provocation and self-defence. See the cited authorities of ***Republic v Jared Osumba (Supra) and David Lantiyo v Republic (Supra).***

The case against the accused person is purely circumstantial according to the prosecution. The deceased was killed in the house of the accused while having an affair with the wife when the accused got close to the house and found the two love birds in bed having a good time an attack ensued. The accused picked a piece of wood and challenged the deceased inflicting multiple physical injuries. The impression made out

of the postmortem report by PW3 is that the deceased sustained muscle skeletal injuries with a severe one involving the head. The accused admitted using a piece of woof to strike and also kicks on the deceased. The observations i make from the case is that the accused had constituted events of escape from the scene if he so wanted if he felt is life was in danger. However my view is that the incident occurred in the house of the accused. The contention by the accused has no support that he suffered any bodily harm attributable to the deceased. He was not faced with imminent danger of being attacked by the deceased as no evidence to that effect has been placed before this court.

The question to be answered in self-defence is whether the force used by the accused was reasonable and necessary in the circumstances. The answer to the arguments is found in ***Palmer and Mcinnes Cases (Supra)*** which the Court of Appeal adopted with approval in the case of ***Peter Kingori v Republic (Supra)***. The first test applicable is whether the accused exceeded the bonds of self-defence. According to the prosecution evidence the accused assaulted the deceased severally. The accused had over powered the deceased during the confrontation, but that did not stop him from continuing to hit the deceased. The prosecution medical evidence as to the cause of death is a testimony to the fact that accused targeted the sensitive and vulnerable part of the body herein the head. The disproportionate of the attack against the deceased person was excessive indicative of the intention to occasion serious grievious harm. The acts by the accused were unlawful and the acts inadvertently caused the death of the deceased.

(3) Malice aforethought.

Malice aforethought is provided for under section 206 of the Penal Code. It may be established by way of evidence when any of the following circumstances exist:

> ***"(a) An intention to cause the death of or to do grievious harm to any person, whether that person is the person actually killed or not.***
>
> ***(b) Knowledge that the act or omission causing death will probably cause death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by a wish that it may not be caused.***
>
> ***(c) An intention to commit a felony; and***
>
> ***(d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it."***

Malice aforethought can also be inferred from the manner of the killing as held in the case of ***Abanga alias Onyango v Republic Court of Appeal Cr. Case No. 32 of 1990***:

> **(e) "The deceased in this case was tabbed severally with a sharp object apparently the knife recovered by PW6. The knife once used for a commission of the offence like grievious harm or murder is a lethal weapon. It is clear from the postmortem report that the accused targeted the head, neck anteriorly and posteriorly. The medical doctor described the interior stab wounds in the following manner:**
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> **(f) 3 stab wounds anteriorly on the face, right chest, 2 stab wounds measuring 5cm and 4cm in length, a through and through stab wound though the next anteriorly measuring 15 cm running from left to right. Four stab wounds to the head and neck, the largest being a 10 cm through and through wound to the nape of the neck being left to right on the neck. A 6 cm stab wound between the shoulder blades. A 4 cm stab wound over the left scapula and 5 cm stab wound over right scapula.**
>
> **(g) On the right shoulder a 5 cm and 7 cm deep stab would on the dorsten of the right hand and 3 cm long stab wound.**

(h) There is no dispute that the assailant herein had an opportunity and time to inflict the extensive injuries. He was not a person in a hurry. The vulnerable parts of the body were targeted."

See the case of ***Tubere S/O Ochen v Republic [1945] 12 EACA 63***. In ***Republic v Nedrick [1986] 1WLR 1025*** the existence of malice aforethought is not a question of opinion by the court but one which the prosecution must prove beyond reasonable doubt by law of evidence. In this case the deceased and the wife to the accused were having sexual intercourse. The accused in revenge retaliated by arming himself with a wooden weapon and inflicted multiple injuries upon the deceased for sleeping with his wife.

Murder under section 203 of the Penal Code is the unlawful killing of a human being with malice aforethought. As outlined under section 206 of the Penal Code the inference on malice aforethought can either be express or implied depending on the circumstances specific to each case. As deduced from the evidence of PW1, PW2, PW4, PW5 and PW6 the prosecution did not place before this court evidence to draw an inference on direct or indirect malice on the part of the accused to kill the deceased. The accused herein is said to have acted suddenly or the heat of passion when he found the deceased in bed with his wife.

The real point of this trial therefore turns upon whether or not legal provocation as defined in section 207 (1) and section 208 (1) of the Penal Code is applicable in this case.

The former Court of Appeal for Eastern Africa held in the ***Republic v Hussein S/O Mohamed [1942] EACA at pg 66*** that:

"When once legal provocation as defined in our code has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation, the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence, but will not of itself necessarily rule out the defence of provocation."

The principle in this case appears to focus in point of mitigation neither on the gravity of the provocation offered, nor on the role of the victim in being provocative, rather, the focus is placed on the role of the accused's mental state in making him perhaps peculiarly susceptible to provocation.

What can be seen from ***Hussein Case (Supra)*** the defence of provocation involves a subjective limb that provocation caused the accused to lose self control and an objective limb that the provocation could have induced him applying the test of a reasonable man to have so far loose self control as to form an intention to inflict grievious harm as he did to the deceased. The accused in this case killed under provocation but exceeded the limits and made him culpable to the offence of manslaughter. The accused seemed to have been angered and by the fury of the flirting moment brought about by the concerted action between the deceased wife in her act of love making with the deceased in their matrimonial bed.

The facts of this particular case show that the accused response in attacking the deceased was disproportionate to the provocation. As for me the occasion warranted action in self-defence but the accused action of searching for a weapon while he was not under imminent danger went beyond the exception rules on self-defence. That is the wife, the deceased and accused person. Secondly, the postmortem reveals that the deceased injuries were caused though repeated beatings. Thirdly, this was a situation of one man beating another and no existence of a fight between the two was established by way of evidence. Fourth, the accused life scene when he had confirmed that the injuries had endangered the deceased life. Fifth there is no evidence that the accused believed that such excessive force was necessary to beat the deceased until he takes the last breathe. The death of the deceased person occurred in the presence of three people.

What is peculiar in the evidence by the prosecution was the fact of existence of a knife in which the

deceased was armed with at the time of the incident. This alleged knife was never recovered nor produced in court as an exhibit to support that piece of evidence that the accused was under attack. This court had no explanation from the investigation officer at what point the knife disappeared from the scene making it impossible for its recovery. That fact of the deceased being armed at the time was neither proved by direct or circumstantial evidence to warrant this court consider defence of self on the part of the accused absolute defence to exonerate him from criminal responsibility.

In the circumstances of this case i seriously wonder how many married men would have the strength to walk away when they find a stranger drinking from the very well he considers a personal possession and sexually engaged without inflicting some kind of corporal punishment. In the instant case the accused reacted in revenge toward off the trespass into his beloved wife and partaking from the forbidden well only meant for the accused as the lawful husband. As held in the case of ***Peter Kingori (Supra)*** the force in self defence by the accused exceeded the acceptable limits of punishment and a life was lost. In my view although the act of adultery is morally reprehensible i do not believe death is the usual or expected result of it.

Jonathan Burchell the leaned author of ***Principles of Criminal Law 2nd Edition*** states as follows at pg 139 – 140, ***"avoiding the attack where the threat is one of personal injury, a defence is not necessary if the attack can be avoided by retreat or escape. Indeed save legal systems concerned about preservation of human life, impose on the victim of an attack a duty to retreat in so far as this is possible and could not expose another human being to harm."***

As i have discussed elsewhere in this judgement on scrutiny of the evidence in the entire trial i hold the following view:

That in the instant case the issue of self-defence triggered by the provisions of section 208 (1) of the Penal Code has been rebutted by the prosecution beyond reasonable doubt. The evidence being that although the accused was entitled to beat the deceased when he found him in bed with his wife, the retaliation of the accused in occasioning multiple skeletal injuries including the vulnerable part of the body, the head cannot be said to be reasonable act of self-defence. That force used by the accused in my considered view exceeds reasonable force and is not excusable.

of the finding therefore that the accused hit the deceased in the circumstances of provocation and in the heat of passion but did retaliate by using excessive force. The charge of murder under section 203 requires all of the key integral elements more specifically that of malice aforethought. The established facts from the evidence are not consistent with the existence of malice aforethought. That therefore discharges the accused of the offence of murder contrary to section 203 of the Penal Code.

What therefore remains is to nail home the case against the accused based on an examination of all the evidence submitted that the offence of manslaughter has been proved beyond reasonable doubt.

In accordance to section 202 of the Penal Code any person who by unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter. From this definition the offence of manslaughter can be broken into three elements:

(1) There must be an unlawful act.

(2) The unlawful act must be dangerous.

(3) The unlawful act must cause death.

(See ***Republic v Church [1965] 2 WLR 1220***).

In the present case guided by the evidence and the judicial precedents cited herein on i find the offence of manslaughter contrary to section 202 proved beyond reasonable doubt. I therefore substitute the charge of murder to that of manslaughter as against the accused person.

As a result i find the accused guilty of manslaughter contrary to section 202 of the Penal Code as punishable under section 205 of the Penal Code and do hereby convict him accordingly.

Dated, delivered and signed in open court at Kajiado on 30th day of March, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Ms. Mageto for accused present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant

Accused present