REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 15 OF 2016

REPUBLIC ……….…………………….................................………..................PROSECUTOR

VERSUS

JOSEPHAT MUKUNDI KANONO…………………………………………......……......ACCUSED

JUDGEMENT

1. Before me is one Josephat Mukundi Kanono, hereafter referred as the accused charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code (Cap 63 of the laws of Kenya). The particulars comprising the alleged offence are that on the 31st day of July 2016, at Kwale slums within Ongata Rongai Kajiado County accused murdered Purity Gakii Karianki hereinafter referred as the deceased.

2. The accused pleaded not guilty. He was represented at the trial by Mr. Wakla Advocates and the prosecution was conducted by the senior prosecution counsel Mr. Akula. The prosecution called twelve witnesses.

Factual Matrix by the Prosecution:

3. The prosecution version which emerged subsequent upon the completion of investigations and including the accused arrest reveals the following: The accused and the deceased were leaving together as husband and wife at Kwale slums - Ongata Rongai. In the better part of the day on 31.7.2016, the accused had spent time in a bar within the area enjoying some beer with his friends. In one of the incidences the deceased made her way to the bar but did not stay for long. The accused seemed to have raised the issue over food with the deceased. It appeared from the conversation between them that the accused had demanded the deceased to prepare super for the day.

4. When the accused left the bar and came home a disagreement arose over why the deceased had declined to prepare the evening meal for the accused. The exchange of words escalated into violence against the deceased.

5. Based on fight the deceased sustained fatal physical injuries. It is this web of facts that the twelve witnesses the prosecution line-up set to present before this court as evidence. The very witnesses in this case who dealt with transactions at the incident are the ones I have decided to begin with in presenting the prosecution case.

6. PW5 ALI MOHAMED a resident of Ongata Rongai testified that on 31.7.2016 he heard some screams from a nearby plot. This caught his attention and decided that he rushes to the scene. PW5 told this court that the moment he arrived he saw a man beating his wife as they exchanged insults at each other in Kimeru language which he was unable to understand.

7. In reference to the assault PW5 stated that the man whom he identified in court as the accused was using a broom, as he dragged the lady along the ground. According to PW5 he suddenly saw the accused abandon the idea of pulling the lady and went back to the house where on return he pursued the lady. In this second time PW5 noticed that the lady has been hit by the accused with some other object which is not a broom. Thereafter when accused was done he again went back to his house leaving the lady bleeding from the injuries sustained. The escalation and the injuries suffered now attracted members of the public.

8. According to PW5 when they followed up the lady to the staircase who was found to be in serious condition, that is when the public and PW5 went for the accused to effect arrest before he could take flight. Following the arrest they took the accused to the police station as suspect for murder; while the lady was rushed to the hospital.

9. In cross-examination by Mr. Wakla, PW5 confirmed that he saw the accused initially hit the lady, the deceased with a broom and at the same time using kicks. When asked at what distance he followed the events PW5 stated that despite presence of many people he was 10 metres away. PW5 estimated that the whole episode lasted about 45 minutes.

10. PW10 PHILIP MAINA a resident of Ongata Rongai testified to the effect on how he found himself at the scene where there were screams and voice of a lady. On arrival he learnt that a man has stabbed his wife with a knife and was on the run. According to PW10 he gave chase of the man and managed to effect arrest about 50 metres away from the scene. In the testimony of PW10 when he went back he was able to see the lady victim on a staircase with her body full of blood. That is when it was decided that some people take the victim to the hospital and the rest escort the man whom he identified as the accused to the police station.

11. In cross-examination by the defence counsel, PW10 told this court that he heard screams. He further confirmed to this court that he was informed at the scene that a man had stabbed his wife. As a result of commotion and presence of many people PW10 told this court that he could not observe the body to verify the injuries.

12. PW2 ANN LEYIAN testified as the clinical officer attached to Nairobi Women Hospital Ongata Rongai. In respect of the incident PW2 stated that when at the hospital on 31.7.2016 her attention was drawn to go to the emergency room. According to PW2 she saw somebody lying on the examination table and on observation she was already dead. In her testimony PW2 stated that a quick examination revealed presence of deep stab wounds at the back. PW2 on being shown some photographs she was able to identify the deceased as the one who was taken to the facility as a patient. It was the evidence by PW2 that having concluded that clinically the lady was dead on arrival she decided to inform the police.

13. PW3 SGT. GEORGE ODHIAMBO a gazetted scenes of crime officer was instructed to visit Nairobi Women Hospital to document the deceased body lying in the emergency room. PW3 further told this court that he also proceeded to Kwale area where the incident of murder was alleged to have taken place. On arrival he was able to take various photographs including the residence, the staircase where the deceased was found lying last by members of the public. The photographs taken and processed were admitted in evidence as exhibit 5 (1-9).

14. P.W1 ELIZABETH WAITHERA OYIENGO a government analyst testified on the analysis done to the samples forwarded to her in respect of this murder. In her testimony the exhibits received at the government chemist laboratory comprised of blood sample and a blood stained knife. The request from the investigating officer was for DNA analysis. According to her evidence PW1 testified that the request was acted upon and the DNA profile generated. PW1 confirmed that the DNA profile from the blood stained knife matched the DNA profile from the blood sample indicated as that of the deceased - Purity Gakii. The report was admitted in evidence as exhibit 1.

15. PW4 JACKLINE MWENDWA a cousin to the deceased testified as to her role of identifying the body of the deceased to the pathologist at the City Mortuary on 10.8.2016.

16. PW6 BERNARD KALWE a police officer attached to Ongata Rongai police station told this court that the received the report from PW5 and PW10 on a murder incident at Kwale area. Besides the report PW6 testified that PW5 and PW10 had come in with the suspect who allegedly committed the offence. He was therefore to re-arrest him and await further police action.

17. On the cause of the death PW7 Dr. Ndegwa testified that on 10.8.2016 in the presence of the family of the deceased he conducted a postmortem on the body of the deceased. In the evidence of PW7 the examination revealed that the deceased had sustained multiple stab wounds at the back spreading from the right shoulder to the left lower posterior chest wall. In the respiratory system left lung perforated and collapsed, left sided haemothorax, right lung perforated and right sided haemothorax. The postmortem was produced and admitted in evidence as exhibit 4.

18. PW8 GEOFREY KARIUKO testified as the property manager of the estate where the accused and the deceased lived in house No.5. PW8 did visit the scene and learnt from the other tenants that the accused who was a tenant to house No. 5 had murdered his wife.

19. PW9 JAMES MURIUNGI testified as the uncle to the accused. According to PW9, he told this court to have been invited by Ongata Rongai police station to participate during the recording of the confession statement from the accused. In the evidence of PW9 he considered to avail himself in the session of making the statement by SP. Simon Musyoki PW11. PW9 further testified that the accused recorded the statement voluntarily explaining on how it all started and culmination of the death of his wife. At the end of the recording of the statement he confirmed being asked to sign as to the correctness of what he had witnessed.

20. This was followed by the testimony of PW11. SP. Simon Musyoki attached to Ongata Rongai as the Deputy OCPD. PW11 testified as to the compliance with the rules of procedure on the confession statement recording of a suspect. He further confirmed to this court that there was no duress, coercion or inducement or any torture inflicted before or during the period the accused offered to record the confession. The confession statement subject matter of this trial was duly signed by the accused and admitted in evidence as exhibit 8(a)(b) being the hand written and typed copy.

21. The highlights of the statement according to PW11 revolved around the dispute over food. It emerged that the accused had demanded of the deceased to prepare food on that particular day but she did not hear of it. The demands by the accused escalated into a domestic violence between the accused and the deceased. In the statement the accused recorded that when things got hot from the public he took a knife which he threw into the crowd and not the deceased.

22. At the close of the prosecution case the accused was placed on his defence. In his unsworn statement the accused denied the offence. According to his recollection in the course of the day he had interacted with the deceased. He further stated that the deceased had even followed him to the bar where he was drinking but left shortly thereafter.

23. The issue of contention started with a dispute over food not being prepared by the deceased. The accused further stated that he was annoyed with the deceased conduct. He thought therefore to take a broom which he used to beat her but denied that he ever used a knife against the deceased.

THE DEFENCE SUBMISSIONS:

24. Mr. Wakla for the accused submitted that the state has not proved the charge of murder against the accused beyond reasonable doubt. Learned Counsel took issue with the evidence relied upon by the prosecution which lacked an eye witness. Learned counsel further contended that the circumstantial evidence on record was not cogent nor credible capable of producing an outcome of a case proven beyond reasonable doubt.

25. Learned counsel submitted and cited the evidence of PW5 and PW10 as key witnesses to what transpired on 31.7.2016. The complaint by the learned counsel with these two witnesses they could not

explain how the stabbing was done. Secondly, learned counsel urged this court to take notice that scene comprised of a crowd of people which impaired PW5 and PW10 from sighting properly the occurrence of the incident. Learned counsel urged that the court weighs the defence by the accused vis viz the prosecution evidence.

26. It was learned counsel contention that the accused was confronted with a mob of people. The mob wanted to lynch him suspecting that he is the one who had killed his wife. Given the circumstances the learned counsel submitted that the accused got hold of a knife in order to use it to defend himself against the mob. According to learned counsel, the evidence of the accused points out that he threw the knife to the mob without aiming at anybody. He therefore denied the prosecution case that the stab wounds were caused by this same knife.

27. In addition to the above submissions learned counsel argued that the case by the accused can be correctly fall within the provisions of section 17 of the Penal Code on the defence of self. In support of his submissions learned counsel cited and relied on the following authorities with respect to the legal proposition on circumstantial evidence. The cases of ***Musili Tulo v Republic (2014) eKLR, EMI v. Republic (2013) eKLR, Republic v. Kipkering Arap Koskei & Ano. 16 EACA 135, Musoke v Republic [1958] EA 715, Teper v Republic [1952] AC 480.***

28. On the issue touching on the principles in the defence of self–defence the following authorities were relied upon; ***Ahmed Mohamed Omar & Others v Republic (2014) eKLR, Palmer v Republic [1971] AC 814, Republic v Mcinnes 55 Cr. Appeal R551, Robert Kinuthia Mungai v Republic [1982-881] A KAR 611, Roba Galma Wario v Republic [2015] eKLR***.

29. Learned Counsel rested his submission by urging this court to resolve the benefits of doubts in favour of the accused and acquit him of the offence.

The Respondent's Submissions:

30. Mr. Akula, the senior prosecution counsel in his written submissions reiterated the evidence which came up during the trial by the 12 witnesses in support of the charge. In his submissions counsel urged this court to find that the ingredients of the charge of murder contrary to section 203 of the Penal Code have been proved beyond reasonable doubt.

31. It was the learned counsel submissions that the defence of self being relied upon by the accused cannot be availed to him in view of the circumstances of this case. Learned counsel went further to urge this court to find that the prosecution case is dependent on both direct and circumstantial evidence.

32. Learned counsel submitted that the circumstances surrounding the death of the deceased places the accused squarely at the scene of crime. It is this same scene learned counsel argued and submitted that the accused was arrested by members of the public and taken to the police station.

33. On the question of whether or not malice aforethought under section 203 of the Penal Code was proved, learned counsel relied on the following cases:-

(i) ***Republic v Godf rey Ngotho Mutiso (2008) eKLR***

(ii) ***Republic v Tubere S/O Ochen (1945) 12 E.A.C.A. 63***

(iii) ***James Masomo Mbatha v Republic (2015) eKLR***

(iv) As regards motive the case of ***Libambula v Republic (2003) KLR 683,*** was cited to supplement the other circumstances to prove the case against the accused.

34. Therefore learned Counsel contended that the prosecution has made out a water tight case on the elements of the offence beyond reasonable doubt to warrant a verdict of guilty and subsequent conviction.

ISSUES BEFORE THIS COURT:

35. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal code. The offence of murder is defined as follows under section 203,

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

36. As stated in the case of ***Republic v Andrew Omwenga (2009) eKLR:***

> ***"It is clear from the definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-***
>
> > ***(a) The death of the deceased and the cause of that death.***
> >
> > ***(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had the malice aforethought."***

37. The standard of proof under Section 107(1) of the Evidence Act (Cap 80 of the Laws of Kenya), it provides:

> ***"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists".***

38. It must be emphasized that the accused person is presumed innocent until the contrary is proved. (*See Article 50 (2) (a) of the Constitution*). The accused therefore in a criminal case carries no burden to proof his innocence. The state has the obligation to proof the contrary. That is the basis of Section 107(1) of the Evidence Act.

39. The phrase and burden of proof of beyond reasonable doubt was explicitly captured in the case of ***Miller v Minister of Pensions (1947) 2ALL ER 372-373*** by none other than **Lord Denning** who stated as follows:-

> ***"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. If the evidence is so strong against a man as to leave only a remorse possibility in his favour which can be dismissed with the sentence of course it is possible the case is proved beyond reasonable doubt, but nothing of short of that will suffice".***

40. In ***Bhatt v Republic (1957) EA 332 at 334*** the Court held *inter alia* on prima facie evidence:

> ***"A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence....".***

41. The court therefore from this passage is precluded from entertaining suspicion or evidence that does not meet the threshold of beyond reasonable doubt in the dicta of the ***Miller case (supra)***.

42. It is therefore my singular duty to sift through the evidence with a view to make a finding whether the burden of proof has been discharged by the prosecution.

43. In discharging this mandate I shall proceed to consider each ingredient of the offence over the evidence availed by the prosecution.

44. (a) Death of the deceased Purity Gakii Karianki:

There is no dispute about the death of the deceased as supported by both prosecution and the defence case. In support of this ingredient the testimony of **PW4 Jackline Mwendwa** a cousin who identified the body of the deceased at the City Mortuary was examined and admitted in evidence. **PW3 Sgt Odhiambo**, PW5 of scenes of crime office was instructed to visit Nairobi Women Hospital Langata Rongai and Kwale slum area. In both scenes PW3 was able to document the deceased body at the hospital and further at the scene in a staircase where blood stains were noticed in Kwale Estate. The fresh blood stains were to be connected to be that of the deceased. The Photographs taken by PW3 confirmed the deceased death and that there is a nexus with scene at Kwale estate and her subsequent death.

45. PW3 Anne Nazieku a clinical officer at Nairobi Women Hospital who was the first clinician to see the deceased on 31.7.2016 confirmed that she came into the facility already dead. The witness through the photographs taken by PW3 positively identified the deceased as the one taken through their hospital but save that she had already passed on.

46. In addition **PW7 Dr. Ndegwa** a government pathologist testified that the postmortem he conducted on 10.8.2016 was that of Purity Gakii identified by family members, the investigating officer at the City Mortuary. The testimony of PW7 alluded to the cause of death as the multiple stab wounds at the back. According to PW7 the severe injury to the chest culminated in the final blow to the life of the deceased.

47. The prosecution therefore has proved beyond reasonable doubt that the deceased person is dead.

48. (b) whether the death of the deceased was unlawfully caused:

Law:

A wrongful death occurs when through an act of omission or commission of another person causes another person's life to be injured which escalates it to death. Secondly it must be shown by the state through evidence that the unlawful action was intentional or negligent resulting in the death of the deceased.

49. Under Article 26 (1) of our constitution, ***"every person has a right to life."***

> ***"(3) A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or other written law."***

50. It is trite that lawful homicides committed in execution of court order, in reasonable defence of property, defence of a person, or as a result of natural fate or accident are excusable in our jurisdiction. The only order in cases of defence of property or self the use of force applied should not be disproportionate to the aggressor. In offences of this nature like the one facing the accused the state must establish the actual and proximate cause of the death and the accused involvement.

51. The real question to be answered is whether the accused infact caused the deceased's death. If the death of the deceased is proved to be caused by a combination of factors but the accused act of omission or commission remains an operating or substantial cause, then the accused will still be held liable.

52. It was acknowledged in the English case of ***Republic v Malcherek [1981] 73 Cr. Appeal R 173*** where the court remarked on the following facts:

> **"The defendant attacked a woman causing injuries that were so severe that the victim had to be placed on a life support machine. Doctors decided to switch off the machine after determining that the victim was brain dead and that there was no prospect of recovery. Half an hour later the victim was pronounced dead. The defendant was convicted of murder and appealed on the ground that the doctors had broken the chain of causation between the attack. He was the husband to the deceased they enjoyed spousal relationship. The accused as a man is the head and protector of his family including the deceased. It is generally accepted**

that the physical strength of male gender to the female is not always at bar."

53. In the present case the nature, severity and persistence of the attack by the accused is laid bare by the testimony of PW5, PW10 and PW7. The nature of the weapon used to attack was positively identified as the knife obtained by the accused from their house. It is not in dispute that the accused initially used a broom accompanied with kicks. He was however not satisfied with that form of punishment. It is evident from PW5 and PW10 as corroborated by PW7 that the severity of the injuries and harm in the sustained attack by the accused resulted in the death of the deceased and the death of the victim by deliberately switching off the life support machine. The Court of Appeal by dismissing the appeal, that the operating and substantial cause of death had been the original wounds inflicted by the defendant.

54. As the court said in the South African case of S v Groblier En 'n' Anden 1 SA 507, ***"the crime of murder is committed whenever life is unlawfully and intentionally taken because the crime of murder is so defined."***

55. The circumstantial evidence from the prosecution establishes that the deceased was alive upto the late hours of the day on 31.7.2016. The deceased was married to the accused and they lived together in house No.5 at Kwale estate. In this particular element the prosecution had evidence by **PW5 Ali Mohamed** who was attracted by screams and noises from Kwale estate which happened to be the residence of the deceased and the accused.

56. PW5 confirmed that on arrival he saw the accused and the deceased quarrelling in their mother tongue in Kimeru. This is evidence that the deceased was there with no injuries noticeable by PW5. According to PW5 the accused initially was armed with a broom which he used to assault the deceased together with some kicks. However the beatings escalated to a level that when the deceased resisted being pulled towards the house, the accused left slowly and came back. What followed according to PW5 were more beatings and this time round the accused used a different object other than the broom. It did not take long before they realised that the deceased had been stabbed and was bleeding from the injured parts of the body.

57. The testimony by PW5 was corroborated by **PW10 Philip Maina** who also joined the other people at the scene. It is not in dispute that PW5 and PW10 are the ones who pursued the accused after the incident when he wanted to escape from the scene. Further PW5 and PW10 confirmed that they apprehended the accused and surrendered him to Ongata Rongai police station.

58. The photographs taken by the scenes of crime officer PW3 also established that on 31.7.2016 the deceased suffered physical harm more severely to the back. The investigating officer recovered the knife - the murder weapon in this case. The prosecution produced the knife as exhibit 3. The blood stained knife was subjected to DNA profile with the blood sample of the deceased.

59. According to PW1 Elizabeth Oyiengo, the government analyst, the DNA analysis of the blood stained knife and the blood sample of the deceased generated a positive DNA match with the blood of sample of the deceased.

60. The inference to be drawn from the government analyst analysis is that the knife exhibit 3 was used to inflict fatal injuries on the deceased. In the circumstances of this case the deceased death was unlawfully caused.

61. It is now trite that all homicides are presumed unlawful unless caused in execution of the law, in self defence or property or can be excused if it occurs through natural causes by accident. (See the principle in the case of ***Republic v Guzambizi S/O Wesonga (1948) EACA 65***.)

62. Mr. Wakla the learned counsel submitted and urged this court to find that the accused acted in self-defence. He therefore sought this court's intervention to exercise discretion by acquitting the accused. Mr. Wakla based his submissions on the unsworn testimony by the accused which went at length to show the misunderstanding with the wife. Learned counsel further submitted that members of the public came

to the residence of the accused and in retaliation started assaulting him as punishment for his actions.

63. According to learned counsel the prosecution did not place before court any direct evidence as to how the deceased was stabbed. In this respect the court has nothing to go by except defence by the accused on how he used the knife. In the submissions by learned counsel the accused person threw the knife to the mob to scatter them apart for he believed that serious harm was about to be occasioned to his life. Learned counsel basing his arguments on this material he maintained that the accused acted in self-defence as enhanced by his testimony.

64. The question I ask myself is whether self defence is available to the accused in this case.

The Law on Self Defence:

I will start by setting out the statutory provisions. Section 17 of the Penal Code provides as follows:-

> ***"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."***

65. The English Common Law on this subject dealing with self defence was discussed in the classic cases of ***Palmer v Republic (1971) AC 814*** and ***Republic v Mcinness 55 CR R551*** which is exemplified by the following passage:-

> ***"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 the particular facts and circumstances. Some attacks may be serious and dangerous, others may not. 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 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 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 issue will remain if in any case the view is possible that the intent was necessary to constitute the crime of murder was lacking then the matter will be left to the jury".***

66. This decision sets the highlights on the legal threshold on the use of force in exercising one's right to self-defence. The Kenyan courts have adopted an approach similar to that of English courts in determining the scope of self-defence. In cases of murder and acts causing grievous harm, the cases of ***Palmer v Republic*** and ***Republic v Mcinness*** set the basic principles of self-defence. ***"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."***

67. The primary factor to consider in determination of whether force used was necessary? Was there need for the use of such force? An accused person must prove that there was reasonable apprehension and the circumstances warranted a response in form of self-defence. The Kenyan courts taking the queue from the decision of ***Palmer and Mcinness case*** have stated as follows in the following cited authorities:

In ***Republic v Joseph Chege Njora (2007) eKLR*** the Court of Appeal held;

> ***"A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is***

necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack".

68. In ***Republic v David Kinyua (2014) eKLR*** the court with approval in the case of ***Mungai v Republic (1984) KLR 85*** the court held;

> ***"No doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice aforethought is rebutted and the offence will be manslaughter".***

69. In ***Koitee Jackson v Republic (2014) Cr. Appeal 146 of 2009*** the court held *inter alia* that, ***"self defence has a limitation and it must be shown that there was no malice on the part of the accused in committing the acts causing death or bodily harm."*** Further the court held that, "***acts done in self-defence should not be vicious".***

70. In light of the above principles this court has weighed the evidence and submissions by Mr. Wakla for the defence. In the present case the accused assaulted the deceased initially using a broom. In the course of the struggle with the deceased the accused was seen by PW5 rushing to the house. That is when he came out with the knife and used it to stab the deceased. PW5 and PW10 noticed that the deceased had sustained wound from which she was bleeding. The deceased succumbed to the injuries as proved by the postmortem report by PW7. The deceased was not armed with any weapon when the accused started assaulting her with kicks, later with a broom and finally by use of a lethal knife.

71. It was the accused who armed himself with the knife from their house. It is on record from the testimony of PW5, PW7 and PW10 that the deceased suffered multiple deep cuts more specifically to the back and chest. The post traumatic effect of the injuries was a perforated left lung, left side haemathorax, right lung perforation and right side haemathorax. The accused was not at any time in immediate imminent danger or peril from the deceased.

72. The accused and the deceased were outside their house No.5 when PW5 and PW10 responded to the screams. On arrival they only saw a man struggling with his wife, hitting her using a broom and kicks. The second time, PW5 saw the accused used a different object against the deceased. It turned out to be the knife - exhibit 5.

73. The nature of injuries inflicted as evidenced by the postmortem report and the photographs taken were all at close range. The defence testimony that he threw the knife to a crowd of people in self-defence is neither here nor there. According to PW5 and PW10 the exact time of the stabbing was before the public responded in anger when they noticed the deceased bleeding from the injuries. From the evidence the statement by the accused clearly does not negate the overwhelming circumstantial evidence by the prosecution on the attack and subsequent death of the deceased. The defence of self is not therefore available to the accused.

74. An assault and killing of a human being by the accused is prima facie unlawful. The evidential burden placed on the accused to rebut the prima facie evidence that he killed in self-defence has not been discharged. What the version by the prosecution witnesses establishes is that the killing of the deceased was orchestrated by the accused. In this particular case the lethal force used against the deceased negates the defence of self and provocation recognized by our legal system.

75. The evidential burden shifted to the accused rebutt the presumption that he killed in self-defence. The prosecution placed before court cogent and credible evidence by PW5 – PW10 that the assault and the

killing of the deceased was occasioned by the accused. That version of unlawfulness was not controverted by the accused. In my view the prosecution has discharged the onus of prove beyond reasonable doubt that the accused exceeded the legal boundary of self-defence.

I therefore find and hold that the prosecution has proved that the deceased death was unlawful.

76. (c) The element on malice aforethought:

The next question to be answered is whether the person who killed the decease did so with malice aforethought. What constitutes malice aforethought has been defined under section 206 of the Penal Code as follows;-

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

(b) Knowledge that the act or omission causing death will probably cause the dearth 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 cause 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."

77. The following passage from the cited authorities demonstrates on the circumstances malice aforethought can be inferred depending on the facts of each particular case. In the classic case of ***Tubere S/O Ochen v Republic EA (1945) 12 EACA 63*** the Court of Appeal of Eastern Africa said as follows:

"The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack".

78. Yet another case by the same court in ***Nyamweru S/O Kunyaboya v Republic (1953) 20 EACA 192, "that the use of lethal weapon may indicate a malicious intention but it is not conclusive of the existence of an intent to murder".***

79. What the prosecution needs to prove is existence of any of the element provided for by parliament under section 206 of the Penal Code. This was reiterated in the case of ***Republic v Ndalamia & 2 Others [2003] KLR 638***. The court in considering the conduct of the accused stated as follows *inter alia*,

"That there was sufficient proof of malice aforethought as defined in Section 206(b) of the Penal Code where the accused persons beat the deceased violently and persistently and when they were persuaded to stop they could not listen. They continued to beat the deceased inflicting injuries on him which caused his death".

80. The Court of Appeal further on other issue in the case of ***Republic v Godfrey Ngotho Mutiso [2008] eKLR*** held that, ***"the injury on the head was grievous. The deceased's head was hit against the wall and as a result the deceased bled through the mouth. Can it be said that malice aforethought can be inferred from these injuries?"***

81. The same court emphasised that malice aforethought can be inferred from such a case on the part of the accused by emphasizing the principle in the case of ***Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 (UR)***. In this case the court held *inter alia* that, ***"if repeated blows inflicted the injury then malice aforethought could well be presumed"***.

82. I reiterate that these passages in the authorities cited represent the correct principles in the application of section 206 of the Penal Code. I have already referred to Mr. Wakla submissions regarding the position herein taken by the defence. In his submission Mr. Wakla maintained that the prosecution placed no evidence to proof malice aforethought on the part of the accused.

83. Mr. Akula Counsel for the state in a rejoinder vehemently urged this Court to consider the nature of the weapon, the manner it was used and the injuries sustained. This according to Mr. Akula is sufficient that malice aforethought was present in the killing of the deceased. Malice aforethought being the intention to cause the death or to do grievous harm to any person has to be inferred from the circumstances surrounding the commission of the offence by way or evidence. The required *actus reus* for the offence is the inflicting of bodily harm while the *mens rea* is the evil mind/criminal intention to commit the offence.

84. As far as the present case is concerned I have scrutinized the evidence and the exhibits in support of the prosecution case against the accused. To begin with there is the testimony of PW5 and PW10 who witnessed the accused assaulting his wife, the deceased. In the initial stages according to PW5, the accused was beating the accused using a broom and kicks. The effect of the broom and kicks overwhelmed the deceased who fell on the ground. PW5 further narrated how accused took another action of dragging the deceased but surrendered midway. That is when PW5 saw the accused rush to the house and back again to where the deceased lay and hit her with another object which was not a broom. According to PW5 it was realised that the deceased had been stabbed. The knife used in this unlawful act was recovered. It was taken through analyses by PW1. PW1 confirmed that the blood stains on the knife were that of the deceased.

85. According to evidence of PW7 Dr. Ndegwa the pathologist, the four stab wounds on the back were deep and penetrated to the internal organs of the body of the deceased. The stab wounds dealt a final blow to the deceased. She died before she could make it to the Nairobi Women Hospital. This court did appreciate the evidence rendered by the prosecution in this respect. The accused had started with a blunt object identified as a broom. What was seen initially was an exchange of words between them. The accused instead armed himself with a broom and used his kicks against his defenceless wife - the deceased. There is no dispute a domestic misunderstanding ensued between them but what happened later was the accused turning violent to his own wife including use of a lethal weapon the knife. This type of weapon in terms of peace is a necessary cutlery in every home to facilitate cutting of vegetables and other food materials in the kitchen. Hardly any household can accomplish kitchen tasks more effectively without a knife. Incidentally in times of violence and attacks its use against a human being is lethal.

86. The question this court has to contend with before inferring malice aforethought is whether the accused actions can be brought under the provisions of section 207 as read together with section 208(1) on provocation. Under section 207 of the Penal Code it provides:

> ***"When a person who unlawfully kills another under circumstances which, but for the provision 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 only."***

87. 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 a 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"***

88. I weighed this legal principle on provocation with the evidence adduced by the prosecution.

According to PW5 evidence, on the material day the accused and the deceased exchanged bitter words in Kimeru language which he did not understand. Moments later the accused took a broom and started beating the deceased accompanied with kicks. There was no corresponding defence attack from the deceased either with punches, kicks or any other weapon in retaliation. The deceased who got overwhelmed fell down on the ground with accused continuing with beatings. Admittedly there is no evidence from the prosecution and the accused that the words used between them were vulgar or insults to amount to legal provocation in terms of section 208(1) of the Penal Code. The accused however accosted the deceased for about 45 (forty five) minutes including going upto his house and arming himself with a knife.

89. I find the following authoritative statements from the East African Court of Appeal cases applicable in the circumstances of this case. In the case of ***Yovan v Republic [1970] EA 405*** the court observed that for a provocation to apply the act of killing must be shown that it was done in the heat of passion.

90. The other aspect to be taken into account is that legal provocation must consist of a wrongful act to render the accused to loose self-control and act in revenge. This was clearly illustrated in the case of ***Republic v Petero Wabwire S/O Matemo [1949] 16 EACA 116***. What the court stated in this authority was that the legal provocation under section 207 as read with section 208 (1) of the Penal Code is applicable where a wrongful and or insult done by the victim of the murder must be something of a nature or wrongful act which deprives him the power of self-control and to induce him to commit the assault.

91. See also the decision in ***Marwa S/O Robi v Republic [1949] EA 660*** and ***Robert Owiti Obiero v Republic [1949] 16 EACA*** and ***Mungai v Republic [2002] 2 KLR*** where the predecessor of East African Court of Appeal and in the latter case the Court of Appeal considered the legal principle that the retaliation or response to the provocation ought not to be excessive or the one considered to be overboard.

92. In addition in the case of ***Republic v Toya S/O Mamure [1937] 14 KLR*** it was held that, ***"as a general rule no words, however opprobrious or provoking, can be considered in law to be provocation sufficient to reduce murder to manslaughter if the killing is effected with a deadly weapon"***

93. In the present case and applying the principles in these cases the relevant questions I ask myself are: *whether the deceased conduct or the things she did or words uttered could have induced the accused to lose self control? Secondly, whether the conduct of the deceased could have induced an ordinary person in the position of the accused to have lost control and formed the necessary intention to kill or inflicted grievous body harm to the deceased?*

94. As regards the answers to the above questions it seems to me that upon the evidence before the court does not endeavour to prove that the accused acted under diminished responsibility. The accused while acting on provocation that this wife the deceased had not cooked a meal was not by itself a wrongful act to entitle the accused to stab her with a knife. It was unusual situation that the accused used excessive force in relation and disproportionate to the act causing provocation. Women in Kenya like elsewhere in the world do most of the childcare, house work and general care giving work within the home set up. Whatever the scope of this service provision from a woman none of it entitles another human being to demand fulfilment of that obligation by violent means including causing death is recognizable under our laws. The social/cultural patterns or customary indication that food in a marriage home is only prepared by a woman is a culture based on repugnant justice and morality. In that aspect alone the defence of provocation on the ground that the deceased had not prepared a meal for accused is not available as a defence to mitigate this heinous crime where human life was lost.

95. It's also recalled that the accused in defence told this court that he spent part of the day in a drinking spree taking alcoholic drinks. There is no evidence that being drunk contributed in any way for his actions of causing the fatal injuries to the deceased.

96. It was observed in the case of ***Cherungwa v Republic [1956] 23 EACA 45*** as follows:

> ***"That intoxication may provide a defence either by enabling the accused to prove temporary insanity or by indicating that he was incapable to forming the intention necessary to constitute the offence. In the first case, the onus is on the accused to show the insanity. In the second, the onus never shifts from the prosecution".***

I am therefore of the conceded view that the elements of provocation and intoxication are not available to the accused person.

97. The accused voluntarily consumed beer on this fateful day prior to picking a fight with his wife. The mental assessment conducted soon after the incident confirmed the accused to be mentally sound and fit to stand trial. There is no evidence that when he committed the offence he was unconscious or suffered some temporal insanity. In his own statement the accused did not allude to any fact that his judgement was impaired or suffered loss due to alcoholic intoxication.

98. In my view under section 111 of the Evidence Act the onus rests on the accused relying on the defence of insanity from intoxication to establish that he was insane at the time of commission of the offence. That burden was not discharged by the accused to controvert the prosecution case that he was of fit and of sound mind when he killed the deceased.

99. I have considered the entire evidence by the state and the answer given by the accused in his defence. I do find the following elements so material so as to bring this case within the provisions of section 203 on malice aforethought. The accused was not an ordinary criminal who came into contact with the victim. The accused had the opportunity and the means to retreat and offer support including escorting the deceased to the hospital. According to PW5 and PW10 the accused started running away from the scene leaving his wife to die in a pool of blood having stabbed her severally. The uncontroverted evidence that the deceased at all times was on her knees and the ground receiving all manner of beatings connotes "*intention*" that the accused targeted vulnerable part of the body cannot be brushed aside as a normal act of assault. The lethal knife in possession of the accused was meant specifically to be used against the deceased and not the public as the accused wants this court to believe.

100. I am of the considered view that the prosecution evidence remains unassailable. The more i consider the defence that the knife was thrown to the crowd in self-defence the more hollow it becomes. In this ingredient i affirm that the prosecution has proven its case beyond reasonable doubt that there was manifestation of malice aforethought on the part of the accused person.

101. **(d) The fourth element – placing the accused at the scene:**

The final element to consider in this matter is an identification and placing the accused at the scene. As regards identification, there is the evidence of PW5 and PW10 who were at the scene and apprehended the accused and escorted him to Ongata Rongai police station. The testimony by PW10 was corroborated by PW8 Geoffrey Muthengi caretaker at the plot where the accused and deceased rented house No.5. PW11 further revealed that when he recorded the confession statement from the accused, he confirmed being present at the scene of the murder. The confession statement was admitted in evidence as exhibit 8. From the confession statement it emerged that the accused had a dispute with the deceased over the preparation of the evening meal. The accused went further that the alteration become violent and members of the public responded in trying to separate them. What followed was fear of his life which he attempted to protect by throwing a knife to the crowd.

102. The prosecution evidence further confirms the testimony of PW6 a police officer attached to Ongata Rongai that on 31.7.2016 he received PW5 and PW10 accompanied with a suspect of murder one Josephat Mukundi Kanono.

103. I am satisfied that there is direct and indirect evidence from PW5, PW10, PW6 and PW11 cogent and credible enough to place the accused positively at the scene of the crime. As however there was, I have demonstrated ample evidence by the prosecution that the accused started beating the deceased with a broom outside their compound. It has emerged that the accused and deceased lived in a storey building

occupying house No.5.

104. Having severally beaten the deceased he left for their house to pick the knife exhibit 5. The accused came back to the scene and stabbed the deceased four times in the most sensitive and vulnerable parts of the body as identified in the postmortem report. Unfortunately in a span of few minutes when PW5 and PW10 came to her rescue, she was already dead.

105. The accused conduct thereafter was telling. He started running away but luckily PW5 and PW10 gave chase and effected arrest to enable him go through the due process of law.

106. I am satisfied that both direct and circumstantial evidence answers to the question whether the prosecution case has been proved beyond reasonable doubt. The evidence to prove circumstantial evidence is enunciated in the case of ***Republic v Kipkering Koske 1949 EACA 135 at pg 136*** where the court held:

> ***"In order to justify the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable to explanation upon any other reasonable hypothesis 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 the burden which never shifts to the party accused".***

107. The rights to life and dignity provided for under Article 26(1) and 28 of our Republic constitution are some of the most important rights of all other personal rights. It must be remembered that the onus and commitment we placed in ourselves as a people to respect, uphold and defend this constitution. The same is true with the accused when it comes to the right to life and human dignity; affecting the deceased.

108. I have evaluated the chain of evidence adduced by PW1 – PW12 on the various aspects of this case. The link in the evidence is such that it points to the guilty of the accused with such a precision and certainty. The unsworn statement did not impeach or taint any of the prosecution witnesses so as to create a doubt in the mind of the court to draw an inference that the accused was positively identified as the perpetrator of the murder.

109. Accordingly I find that all the essential ingredients of the offence of murder contrary to section 203 as read with section 204 of the Penal Code have been proved beyond reasonable doubt by the prosecution.

110. The upshot I find the accused guilty of the charge of murder and do hereby convict him as per the law established under the provisions of section 203 of the Penal Code.

DATED, DELIVERED, AND SIGNED AT KAJIADO ON 4TH DAY OF AUGUST, 2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Chege for Wakla for the accused

Mr. Akula for the Director of Public Prosecutions

Accused present

Mr. Mateli Court Assistant

SENTENCE VERDICT

During the sentencing hearings Mr. Itaya, learned counsel holding brief for Mr. Wakla made submissions on mitigation that the accused is a young man who was remorseful and ready to reform from his actions. Learned counsel argued and invited this court to consider non-custodial sentence in favour of the accused.

On part of the state Mr. Akula, the senior prosecution counsel advanced the arguments that murder is a serious offence. He contended that though the accused is a first offender as supported by the records from the Director of Criminal Investigations that does not lesser the punishment to be imposed. Learned counsel for the state further submitted that there is no evidence to prove that the accused is remorseful or sought any forgiveness from the family of the deceased. This court had also called for the pre-sentence report which was duly submitted and dated 14/8/2017.

From the report the accused is a young man aged 29 years, a Standard 8 graduate. He married the deceased and they were both blessed with one child now aged 8 years under the care of her grandmother. The accused lived with his wife the deceased at Kwale slums in Ongata Rongai – Kajiado County. He was engaged in casual employment to support his family.

The victim impact statement recorded by the social worker at the time of preparing the report indicates the following:-

The statement by the uncle describes the deceased as a responsible and committed wife to her family. The death of the deceased at a very young age has traumatized both the accused and deceased family. The family lamented to the fact that the untimely death of the deceased has really affected them and the minor child.

I have heard the submissions on mitigation by Mr. Itaya for the accused. Secondly Mr. Akula, the senior prosecution counsel has submitted that you have no previous record. This is a case that you have been convicted with the offence of murder contrary to section 203 of the Penal Code. I further note that the deceased had trusted you as a husband and protector. The manner in which you subjected her to the cruel and barbaric assault finally terminated her life prematurely. These cases of domestic violence resulting in the loss of life are issues which this court takes a serious view. The escalation of this offence from simple beating with a broom to a level of being armed with a kitchen knife demonstrates that you do not have any regard to human life.

The offence committed by the accused is no doubt very serious. As i have stated elsewhere in this judgement the right to life is fundamental and core in our constitution. This court has the duty to uphold that right unless there are clear circumstances supported by evidence to enable us to depart from those provisions. The deceased, a young lady a citizen of this country deserved to live and number her days as ordered by the creator. Her untimely death has left a gap in the lives of her family and society.

The accused judgement was neither impaired as a result of consumption of alcohol or caused any mental infirmity to influence him to commit the crime. There is no explanation from the accused why he went for the knife and walked up to the deceased only to stab her severally in the back with penetrating wounds to the chest. When i look the evidence as a whole, accused acted with direct intent to cause death or grievious harm.

In considering sentence, i pay regard to the nature of the crime, the conduct of the accused before, during and after the murder. The circumstances under which the offence was committed, the character of the offender who even at the verdict of this court is in self-denial. He has not come to terms to the impact of the crime on the victim and society. The manner in which the accused executed the killing and other factors to me constitute aggravating factors to attract the only mandatory sentence of murder fixed by law under section 204 of the Penal Code. That is the Sentence that I pass against you that you suffer death as provided for under section 204 of the Penal Code.

THE ORDER OF SENTENCE DELIVERED IN OPEN COURT ON 15.8.2017.

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R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

Mr. Akula for Director of Public Prosecutions

Mr. Itaya for the accused

Accused

Mateli Court Assistant