



REPUBLIC OF KENYA



**Republic v Ntinyari (Criminal Case E024 of 2023)
[2025] KEHC 1573 (KLR) (17 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E024 OF 2023
RN NYAKUNDI, J
FEBRUARY 17, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

DORCAS NTINYARI ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 8th of November, 2023 at Kipkarani Estate, Kapseret sub-county within Uasin Gishu County in the Republic of Kenya murdered Felix Otieno Anunda.
2. The Accused person in this case was arraigned before this court, pleaded not guilty placing the prosecution to disapprove her innocence as provided for in Art 50(2)(a) of *the Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun and the accused person was represented by Legal Counsel Mr. Tarigo.
3. The prosecution called 5 witnesses who gave evidence to establish the ingredients of the offence of murder contrary to section 203 as read with section 204 of the Penal code. The core elements to be proven by the prosecution for the court to make a finding of guilty include the following:
 - a. That the deceased has died
 - b. That his death was unlawfully caused
 - c. That in causing death, the accused person was actuated with malice aforethought.
 - d. That it was the accused person who committed the heinous crime.



The Prosecution's case.

4. The commencement for the prosecution's case was through the testimony of PW1, Collins Kirwa who worked with an organization called KUDA whose offices are at Elgon View. To his recollection, PW1 told this court that on 8th November, 2023 he received a telephone call from the accused who worked as a house cleaner in the same facility. In that telephone call, she made a request to be paid for the cleaning services of about Kshs. 500/= to compensate for the work done. Apparently, according to PW1, he only managed to send her Kshs. 100 instead of the requested amount of Kshs. 500. However, the house cleaner did not leave through the motorcycle rider as contemplated but asked to be escorted to Annex stage to board a motor vehicle, which PW1 agreed in company of the watchman. According to PW1, while walking towards annex stage her sister telephoned and requested that she be restrained from travelling but have a report to Langas Police Station. In a short while, a motorcycle rider who had been sent by the OCS instead effected an arrest and what followed was an interrogation that the accused had committed an offence. That is how he was to be later released and made to be a prosecution witness against the accused person.
5. PW2 Elizabeth Kabure gave evidence that on 8th November, 2023 at about 5:30PM, while in the house, her sister the accused person had a conflict with the husband necessitating her to move temporarily to facilitate reconciliation. In the course of her stay, she indicated to PW2 that she wanted a permanent divorce. On the other hand, the husband wanted his property so that he can part ways. PW2 noted that the Accused would still entertain and be cordial with the Deceased to the point that he would pick the Accused up and she would sometimes end up spending nights with him away from her home. According to PW2, the chain of events happened so fast that the husband came to her home with full force, bypassed her and entered into the house. He held the accused with a view to strangle her, that is when she picked a knife and aimed it at her husband, inflicting grievous harm. In the testimony of PW2, the injuries inflicted were so severe that he could not make it to the hospital to seek treatment, that is when she decided to report to Langas police station for assistance. She was later to record the statement on the events which she witnessed on the material day on the conflict between the accused and the deceased.
6. PW3, Inspector Dennis Imboko gave evidence as a scenes of crime officer, who happened to document the scene of the murder incident which occurred on 8th November, 2024. The 18 photographs taken by PW3 were produced as exhibit 3(a) and the Certificate of photographic evidence as Exh 3(b).
7. PW4, Dr. Erick Chesori a pathologist based at MTRH testified to the effect that on 16th November, 2023 he conducted a post mortem examination on the body of the deceased Felix Otieno Anunda who had been placed in the mortuary with a history of being stabbed by a knife on the left side of the chest and he died on the spot. In PW4's positive findings, the following injuries were visible as having been inflicted on the material day of the incident: Stab wound through the 6th intercostal muscle with puncture; massive 2L Left Pleural haematoma/haemothorax; pericardial stab wound through and through with associated haemopericardian; left ventricle through and through 2Cm stab wound at the tip of the ventricle; Diaphragmatic 2cm stab wound within the hip on the left lobe of the liver causing 1CM laceration in haemoperitoneum. In his view, all the injuries he found were caused by a sharp object.
8. PW5 Detective Zebatayo Mbakaya gave evidence to the effect that in the year 2023, to be specific on 8th November, 2023 investigated a case involving the death of the deceased who had been stabbed by his wife. PW5 told this court that he visited the scene and found the deceased's body on the floor with injuries to the chest. He also recovered the murder weapon which had been used by the wife to stab the deceased. Thereafter, the body was taken to Moi Teaching Referral Hospital for a post



mortem examination which later formed the basis of the prosecution against the accused person. The investigating officer also recovered the knife hidden under the mattress as an exhibit and a mobile phone as an exhibit.

The defence case

9. The accused person while being led by her learned counsel Mr. Tarigo in presenting her side of the story on the tragic events of 8th November, 2023 elected to give a sworn statement with the following evidential highlights: that on the material day she acknowledged to have had a quarrel with the father her children which escalated into a full blown fight stemming from underlying conflicts within during the subsistence of their cohabitation. It was her evidence that in their estranged relationship, she had temporarily separated with the husband (now deceased) and moved out of their common matrimonial residence. As to what constitutes the tragic moments on the material day was the conduct of the deceased who had earlier on telephoned her so that he could be pick some of his personal belonging which were in the house where she stayed. This day the accused acknowledges that she was in company of her sister who also happened to be the prosecution's witness as PW2. It is this house the deceased made entry by force confronted her and started inflicting physical bodily harm going as far as holding the neck so as to execute strangulation. It is at that moment they struggled so that she could flee herself but at the spur of the moment, she noticed the presence of a knife on the top of a table within the house. In retaliation, she picked that knife and used to stab the deceased and immediately she fell down and on raising an alarm for the members of the public to come through for them for assistance, the deceased took flight from the scene. It came to pass that the deceased died of the stab wounds inflicted during the fight at her sister's house.
10. In addition to her testimony, the accused summoned the evidence of one Duncan Kinoti who also happened to be a pastor with the Seventh Day Adventist Church a congregation where she worshiped. According to DW2, the accused was also a sister in-law for his wife was the eldest in that family. Therefore, he knew the accused as a friend and also a sibling to his wife. It was further the evidence of DW2 that on the material day he received a report about a murder of the deceased following a fight with the accused person. The fight apparently happened in the house of his wife. In the same testimony, what DW2 was to recall among other things was the fact that the accused and the deceased were in a love relationship which even gave rise to children sired during the subsistence of that union. However, he told the court of being privy to intermittent sour relationship which occasionally forced the accused person to seek shelter in their homestead.
11. Finally, in the line of defence DW3 Lydia Kerubo told the court that the accused person is her neighbour and she knew her as a spouse to the deceased. The witness acknowledged that during the subsistence of their marriage, they had these incidents of conflicts which always escalated into full blown fights. That it would sometimes result in the deceased leaving the house or as the case may be, the accused person.
12. The prosecution closed its case and the accused was placed on her defence under Section 306 of the Criminal Produced Code. In her Defence, the Accused maintained that she did indeed stab the Deceased with the kitchen knife as correctly pointed out by the Prosecution maintaining that the Deceased was strangling/ attempted to strangle her at least twice and therefore her life was in danger.

The Prosecution's submissions

13. Learned Prosecution Counsel Ms. Kirenge filed written submission in buttressing the prosecution's case. On the issue of malice aforethought, learned counsel submitted that it could be inferred from various factors. In support of this argument, counsel relied on the case of *Kaburu v Republic* (2024),



where the Court of Appeal emphasized that malice aforethought reflects the killer's state of mind and the steps taken to facilitate the murder. Further reference was made to *Republic v Ali Kajoto Ali* (2021), where Justice Nyakundi outlined the characteristics contributing to a finding of malice aforethought, including the nature of weapons used, manner of use, targeted body parts, and the accused's conduct before, during, and after the incident.

14. Addressing the defence of self-defence raised by the accused, counsel cited Section 17 of the *Penal Code* and the landmark case of *Palmer vs Republic* (1971) AC, which established the principle of reasonable necessity in self-defence. The prosecution also relied on *Barisa vs Republic* (2024) KECA 2019, which established that self-defence is an absolute defense unless excessive force is applied.
15. Learned counsel argued that the accused's actions were not consistent with genuine self-defense, questioning how she managed to precisely target the deceased's chest during an alleged struggle. The prosecution referenced *Victor Nthiga Kiruthu & another vs R* (2017), which established that the apprehended danger must be sufficiently specific or imminent to justify the action taken.
16. On circumstantial evidence, counsel cited *Odhiambo v Republic* (2024) KECA 571, which case emphasized that the existing inculpatory facts were incompatible with the accused's innocence and pointed solely to guilt.
17. In conclusion, Ms. Kirenge submitted that the prosecution had proved its case beyond reasonable doubt, demonstrating that the accused had the intention to kill the deceased and that her life was not in danger as claimed. Counsel noted that in the heat of being strangled, the Accused was able to single out that knife that was being used elsewhere for kitchen purposes, specifically aimed for the Accused person's left side of the chest, and with a single stab managed to kill him. The prosecution urged the court to find the accused guilty of the offense as charged.

Analysis and determination.

18. I have carefully considered the evidence adduced by both the prosecution witnesses and the defence proffered by the accused person. The burden lies squarely on the prosecution to prove its case against the accused person beyond reasonable doubt. This doctrine on the standard and burden of proof is enshrined in Article 50(2)(a) of *the Constitution* and detailed in Sections 107(1), 108 and 109 of the *Evidence Act*. As Lord Sankey articulated in *Woolmington v DPP* (1935) AC 462:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law...”

19. The onus of proof is always vested on the prosecution and at no time it ever shifts to the accused person. This burden is underpinned within the scope of the doctrine of presumption of innocence under section 50(2)(a) of *the Constitution* with the maxim that an accused person is presumed innocent until the contrary is proved. The burden of proof is more precisely explained under the provisions cited above in the *Evidence Act*. It is a burden of producing evidence by the state witnesses constituting of physical, oral and other documentary evidence to satisfy the trial of facts on particular issues which are in dispute as alleged against the accused person that the alleged offence indeed did take place and he/she is the one who committed the unlawful acts of omission or commission. This requirement of the law in criminal law is the obligation vested with the state to meet the requirements of the standard and burden of proof on the facts in issue to be proved beyond reasonable doubt. So the duty to prove the guilt of the accused in Kenyan criminal law is always borne with the state and even in exceptional



circumstances under section 111 of the *Evidence Act*, that burden is never watered down in any event. (See *Semfukwe and others v Republic (1976-1985)*, *Republic v Nyambura and four others (2001) KLR 355* and *Mbuthia v Republic (2010)*).

20. How the trial court is able to measure the gravitas of this doctrine of beyond reasonable doubt in our legal system is practically a matter where there is no consensus. If anyone is in doubt, a research on the already decided jurisprudential decisions that one trial court can ascertain prove beyond reasonable doubt in a particular case but end up being overturned on appeal. Yes, I agree that the consideration of this standard and burden of proof is firmly based on evidence but another court examining and scrutinizing the same set of facts is likely to make a finding that there was no real possibility of the case having been proved beyond reasonable doubt. The truth is in my experience as a trier of facts in criminal cases, no one can be said to have invented or discovered a mode of measurement for the intensity of human belief on this ancient common law doctrine of proof beyond reasonable doubt with absolute certainty to find the accused guilty of the offence charged. Emphasis mine.
21. In the same breadth, the same necessities of the law can be said of the canon of suspicion in criminal cases. The phrase is used primarily in the context of the question where the standard and burden of proof of beyond reasonable doubt falls short of the requirements of the law. The persuasion dicta in the case of *Powell v. Lenthall 44 C.L.R 470, 474*, provides a framework to explain the formulae which sometimes courts run into a risk when measuring the metrics of the two maxims of great significance in criminal law. The court remarked that:

“the questions What is a suspicion and when it is reasonable are susceptible of great deal of subtlety and refinement of argument attempts to define such conceptions are seldom helpful. Indeed, it does not seem possible to paraphrase this expression, still less to arrive at any nice definition of the precise stages which the mind must have travelled from complete in-credulity to comfortable belief before its condition answers the description “reasonable suspicion”.

22. One has got to appreciate that applying the test the trial courts have to state the facts, the strength of the evidence and draw inferences compatible with a number of hypothesis weighing the scales of both the state and the defence case to lay a basis for some positive findings as to whether the accused is guilty or not guilty of the offences charged. That is the tapestry this court will subject the facts and the evidence adduced by the state to draw an inference whether the threshold of the standard and burden of proof of beyond reasonable doubt has been met for this court to make a finding of guilty against the accused person.
23. To start with, there are two hypotheses to this charge of murder against the accused person. as for the state, the crime of murder falls squarely within the provisions of section 204 of the *Penal Code*. Whereas on the other hand the defence lays claim on the defence of self and provocation bringing into perspective the provisions of Art. 26(4) of *the Constitution* as read with section 17, 207 and 208 of the *Penal Code*. Essentially, the accused person in her defence took the view that the death of the deceased was justified and excusable for reason of self-defence and provocation. The chain of events of this offence is based on both direct and circumstantial evidence.
24. The evidential burden test vested with the prosecution is as formulated by the learned author in *Cross and Tapper on Evidence 12th Edn (Oxford: OUP, 2010 (reprint 2013))* thus:

“The test is to determine whether there is sufficient evidence in favour of the proponent of an issue, is for the judge to inquire whether there is evidence that, if untainted and uncontroverted, would justify men of ordinary reason and fairness in affirming the



proposition that the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for unless their cross examination were utterly shattering, the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has been considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or opposition itself is itself conjectural his application must be dismissed. At this stage, the submission should succeed only if the circumstantial evidence raises no hypothesis consistent with guilt."

25. For the prosecution to secure a conviction on the charge of murder contrary to Section 203 of the [Penal Code](#), it must prove four essential elements beyond reasonable doubt as highlighted earlier. It is now the singular duty of this court to test the evidence appropriately under the following subheads:
26. On the first element regarding proof of death, this is not in dispute. The ingredient can be proved by either direct or circumstantial evidence. It is crystal clear from the prosecution's case from PW1-PW5 that the deceased on the 8th November, 2023 sustained fatal injuries as evidenced by PW4 Dr. Chesori who testified on oath on the post-mortem findings confirming the deceased's right to life was terminated as a consequence of the incident. The medical evidence on proof of death has not been rebutted by the defence rendering this element proven beyond reasonable doubt. (See *Nyamhanga v Republic (1990-1994) EA 462*, *Ndiba v. Republic (1981) KLR 103* and *Felix Nthiwa Munyao Nairobi HCCR No. 43 of 1999*).
27. Regarding the second element on whether the death was unlawfully caused, it is a presumption in law that any crime of homicide is unlawful unless that presumption is rebuttable by an accused person by providing sufficient evidence that the homicide so committed and complained of by the Prosecution, was excusable or justified. See the guidelines in *R versus Gusambizi S/o Wesonga (1948) (15 EAC 65)*.
28. Causation is about drawing an inference from the evidence on the acts of omission which can be stated to have resulted to the consequences namely death of the deceased. It is a central issue to the definition of murder under Section 203 of the [Penal Code](#) that is why the evidence must be led by the state connecting the acts or omission of the accused person to the death of the deceased. Indeed, it is the cause of death which is the link between the accused and the offence of homicide subject matter of these proceedings. The conclusion is more often than not drawn from direct and circumstantial evidence adduced by the state as against the accused person. Like the preceding element, the cause of death is also proven by medical evidence especially the post mortem report by a pathologist. This element is so critical that it twins with that of proof of death of the deceased which must be answered with the question how did the deceased die? Or what caused his/her death? In analysing causation, one cannot ignore the sequencing of events prescribed under section 213 of the [Penal Code](#) with the primary text being that the death need not be caused by the immediate act of the accused. It goes on to state: the accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances:
 - a. He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death;
 - b. He inflicts injury or another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living;



- c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused:
 - d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
 - e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.
29. It is not in dispute from the evidence adduced by the state's from PW2 Elizabeth Kabure who also happened to be at the scene of the murder that the deceased had gone to their house with an inquiry of the whereabouts of his personal belongings which he was in need of collecting. In executing this assignment, PW2 observed that on arrival at the scene, the deceased had a conversation with the accused person to avail the various items which were in her possession. This according to PW2 was gladly undertaken by the accused person but the deceased continued to insist on certain specific items which were yet to be released by the accused person. As this conversation was going on, at the spur of the moment, PW2 saw the deceased bleeding from the injuries which had been inflicted by the accused person. that prompted her to raise some kind of alarm for the members of the public to come through for them to make an intervention and at this time she was focusing on the inflicted wounds sustained by the deceased. What followed was the response by the National Police Service who included the investigating officer, the scenes of crime officer to establish the chain of events and who was culpable for the homicide. It is also the case for the prosecution that the body of the deceased was taken to Moi Teaching and Referral examination was conducted by PW4 who also produced autopsy report as an exhibit in support of the prosecution case which had the following positive findings on causation issues: stab wound through the 6th intercostal muscle with puncture; massive 2L Left Pleural haematoma/haemothorax; pericardial stab wound through and through with associated haemopericardian; left ventricle through and through 2Cm stab wound at the tip of the ventricle; and Diaphragmatic 2cm stab wound within the hip on the left lobe of the liver causing 1CM laceration in haemoperitoneum. With this in mind PW4 opined that the cause of death was severe haemorrhage (exsanguination) secondary to stab wound to the chest with heart injury.
30. The main defences advanced by the accused were provocation and self-defence which means the offence was justified and excusable as contemplated under section 17 as read with section 207 and 208 of the Penal Code. In the first instance, the law on self-defence envisages that the accused must have been justified in using some force to defence herself against an attack, real or reasonably apprehended from the deceased; that the accused must have honestly believed that she was justified in using the force that she did against the deceased; that the force used by the accused was only excessive because it exceeded what the accused could reasonably have considered necessary.
31. The classic test of our application of self-defence under section 17 of the Penal Code is traceable to the English law jurisprudence as stated in the case of *Palmer v Republic* (1971) AC 814

“The defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. ... Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If



there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If 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 imminent danger, he may have [to] avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence... If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."

32. Similarly, in *R v Beckford* (1988) 1 AC 130 the court stated:

"A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property..... It must be reasonable."

33. The court in the case of *Mancini v. The Queen* 1942 AC 1, remarked that to retort in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a dagger or firearm or any such device commonly defined in our Penal Law as a dangerous weapon. In short the mode of retaliation must bear a reasonable relationship to the provocation if the offence of murder is to be reduced to manslaughter. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man had 'time to cool.' The distinction therefore is between asking 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did? (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence the provocation was in fact enough to lead a reasonable person to do what the accused did? And, if so, 'Did the accused act under the stress of such provocation?'" (See also *R v. Lesbini* (1914) 3 KB 1116.) Emphasis mine.

34. These English principles found their way to our domesticated section 17 of the *Penal Code* and the dicta in various decisions from the superior courts as demonstrated herein below:

35. The common law position as regards the defence of self-defence was well articulated by the Court of Appeal in Nairobi in *Cr App No 414 of 2012 Ahmed Mohammed Omar & 5 others v Republic* [2014] eKLR as follows:

"25. The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent



danger of being attacked but also that such belief was based on reasonable grounds."

36. In the case of *Mungai v. Republic* (1984) KLR 85 the court held:

- “ 1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter – *R v Ngolaile s/o Lenjaro* (1951) 18 EACA 164; *R v Shaushi* (1951) 18 EACA 198.
2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – *Palmer v Reginam* [1971] 1 ALL ER 1077.” (See also *Mokwa v Republic* [1976 – 80] 1 KLR 1337)

37. It is trite law that the defence of self applies where the accused uses necessary, reasonable and proportionate force to defend himself/herself from imminent attack of his/her aggressor. As the law contemplates under Art. 26(4) of *the Constitution* and Section 17 of the *Penal Code*, it is a complete defence to entitle an accused person an acquittal. Therefore, the trial court have to tread cautiously and have the defence interpreted in a restricted way so as to avoid acquitting an accused person/persons too easily. The guiding principle is that the trial courts will not usually acquit an accused person or persons just because he/she thought the force used was reasonable. The test is fundamentally objective and it is not for the accused person to decide for himself/herself based on his/her own values. The court is under duty to draw the inference taking into account all the relevant circumstances of the case including the level of threats, the pressure of being under attack and the likely harm posed by the aggressor. It is also significant for courts to ignore simple facts like the victim or the deceased was armed. One can be armed but not used a dangerous weapon against the accused person to trigger an attack by inflicting multiple serious injuries.

38. In the instant case, Elizabeth Kabure (PW2) gave the synopsis that on the events which culminated in the use of force by the accused person against the deceased. The injuries suffered are as reflected in the post mortem report conducted by PW4 which opined that the cause of death arose from the sever multiple, physical harm. The accused person in her defence maintained that the deceased disproportionately escalated the violence and was apprehensive that by targeting the neck she was going to be strangled. The question is; whether the accused person in arming herself with a knife feared that she was in immediate danger from which she had no other means of escape and if she did not use the violence as she did to preserve his own life from the deceased, she could have suffered the same fate of death. *The constitution* of Kenya in Art. 26(1) holds every citizen accountable to the command that everyone’s right to life shall be protected. Deprivation of life is regarded as a violation of this article unless there is probative evidence to bring the unlawful acts or omissions within the purview of subsection 4 of *the Constitution*

39. According to PW2, the accused picked a knife and inflicted the fatal injuries. The evidence critically undermines the accused's claim of defensive action. The medical evidence from PW4 reveals a precise, calculated stab wound that penetrated multiple vital organs. The nature and severity of these injuries; a single, precisely targeted stab to the chest cavity suggests deliberate action rather than defensive reflex. Furthermore, PW2's testimony reveals that while there had been ongoing domestic discord, the accused



had maintained cordial relations with the deceased to the point where he would pick her up and she would sometimes spend nights with the deceased.

40. I have reviewed the evidence by the prosecution as a whole and besides the assertion by the accused person, on strangulation by the deceased, I am not convinced that she was under any serious imminent danger to her right to life if the evidence of PW2 who was at the scene is anything to go by to make a finding in her favour. As a consequence, therefore, the accused retaliation to the extent of picking up a knife, losing her self-control and inflicting the fatal injuries on the deceased, the ingredient of the homicide being unlawfully caused without any excuse, justification or defence of self under Section 17 of the *Penal Code* falls short of the threshold to reduce the offence and substitute it with manslaughter contrary to section 202 of the *Penal Code* or all together avail her a complete acquittal. Justifiable homicide constitutes two ingredients:
- a. Where the homicide is committed in prevention of a forcible or atrocious crime as for instance, if the victim of the crime attempts to rob or murder, the accused or that other person; or
 - b. Where the proper person employed for instance a police officer in execution of his official duties and in conformity with his/her mandate to protect life and property and in good judgment, the use of force is to prevent the commission of a felony or theft of property of the victim or a third party, the use of force may be excusable or justified. On the other hand excusable homicide is of two kinds:
 - i. Where a man or woman doing a lawful act without any intention of hurt by accident kills another.
 - ii. Where a man or woman kills another upon the a sudden encounter merely in his/her own defence or in defence of his wife or husband, child, parent, servant etc and not from any vindictive feeling. Given this background This is an offence in all practical intents and purposes and upon the evidence is within the provision of section 203 of the *Penal Code*.
41. This defence of self would not be complete without a discussion on provocation under section 207 and 208 of the *Penal Code*. It is evident from the characterization of the defence, the accused invited this court to place reliance on the power of self-control and test it against the doctrines of self-defence and provocation. With regard to the principles on self-defence as construed from the domain of English law, the term provocation as defined in Section 208 of the *Penal Code* means and includes any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him off the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.
42. The characteristics and features of this case, when looked holistically, from the typologies relied upon by the prosecution and the defence, it is nevertheless within the guideline principles in the persuasive case of Regina v. Mc Gregor 1962NZLR 1051 in which the court observed as follows: “ The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristics must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individuals character or personality. A deposition to be unduly suspicious or to lose one’s temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility. These matters are either not of sufficient permanency to be regarded as characteristics which would enable the offender to be distinguished from the ordinary man. The unusually excitable or pugnacious individual” spoken



of in R.V Lesbini is no more entitled to special consideration under the new section than he was when that case was decided. Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor.

The word “characteristics” in the context of this section is wide enough to apply not only to physical qualities but also to mental qualities and such more indeterminate attributes as colour, race and creed, it is to be emphasised that of whatever nature the characteristics may be, it must be such that it can fairly be said that the offender is thereby marked off or distinguished from the ordinary man of the community. Moreover, it is to be equally emphasised that there must be some real connection between the nature of the provocation and the particular characteristics of the offender by which it is sought to modify the ordinary man tested. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because of the characteristics. In short, there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test. Such a connection may be seen readily enough where the offender possesses some unusual physical peculiarity. Though he might in all other respects be an ordinary man, provocative words alluding for example to some infirmity or deformity from which he was suffering might well bring about a loss of self-control. So too, if the colour, race or creed of the offender be relied on as constituting a characteristic, it is to be repeated that the provocative words or conduct must be related to the particular characteristic relied upon. Thus, it would not be sufficient, for instance, for the offender to claim merely that he belongs to an excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again the provocative act or words require to be directed at the particular characteristic before it can be relied upon.

Special difficulties, however, arise when it becomes necessary to consider what purely mental peculiarities may be allowed as characteristics. IN our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded. To allow this to be said would...deny any real operation to the reference made in the section to the ordinary man, and it would moreover, go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it. There must be something more, such as provocative words or acts directed to a particular phobia from which the offender suffers. Beyond that, we do not think it is advisable that we should attempt to go.”

43. Whichever angle one looks at this case the thread ever present is that of a sour marriage by cohabitation relationship which had persisted for a long time. No matter what the prevailing circumstances were, the prosecution has negated the defence of self, provocation, or any mental infirmity. Amongst the action undertaken by the accused person, could have been avoided and the choices to retreat from the scene of crime were never utilised to save the life of the deceased. The view which I find favour with the facts of this case is an offence of murder proved beyond reasonable doubt and incapable of any justification or excuse as contemplated in Article 26 (4) of *the constitution* as read with Section 17, 207, & 208 of the *Penal Code*.
44. Consequently, I find the accused, DORCAS NTINYARI, GUILTY of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*, and I hereby convict her accordingly.



Verdict On Sentence

1. The accused, Dorcas Ntinyari, stands convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code. The conviction arises from events that occurred on the 8th of November, 2023, at Kipkarani Estate, Kapseret sub-county within Uasin Gishu County, where she murdered Felix Otieno Anunda.
2. The offence of murder under Section 203 as read with Section 204 of the Penal Code carries a maximum sentence of death. However, following the landmark Supreme Court decision in Francis Muruatetu versus Republic (2017) eKLR, the mandatory death sentence was declared unconstitutional, reserving it only for the most egregious cases of aggravated homicide. This provides the court with discretion to consider various factors in determining an appropriate sentence that serves both the ends of justice and the interests of society.
3. The court in the said case stated as follows:

“(48) Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”
4. The finding by the Supreme Court paved way for courts to receive mitigating circumstances from convicts before passing the appropriate sentences. The factors to consider include the following: -

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

 - (a) Age of the offender;
 - (b) Whether the convict is a first offender;
 - (c) Whether the offender pleaded guilty;
 - (d) Commission of the offence in response to gender based violence;
 - (e) Character and record of the offender;
 - (f) Remorsefulness of the offender;
 - (g) The possibility of reform and social adaptation of the offender;
 - (h) Any other factor that the court considers relevant.”
5. Lesit J in Republic vs Ruth Wanjiku Kamande [2018] eKLR while maintaining death sentence where the accused had stabbed the deceased 25 times held that: -

“It is important to say that in my view that discretion to pass a sentence other than death in capital offences should only be exercised in the deserving cases. I do not find this a deserving case. I think to pass any other sentence than the one prescribed would turn the accused to



a hero. I want young people to know that it is not cool to kill your boy or girlfriend. Even where you feel disappointed or frustrated don't do it. Instead it is cool to walk away and thereafter forgive.”

6. In exercising discretion, the court is guided by the Sentencing Policy Guidelines of the Judiciary, 2023, which outline several key objectives including retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation, and reintegration. These objectives must be carefully balanced against the specific circumstances of each case.
7. The personal circumstances of the accused present several factors for consideration. She is a first offender and a mother of two young children aged 6 and 3 years, who are now effectively orphaned by these tragic circumstances. She is the 8th born daughter from a humble background in Meru County, who prior to this incident maintained honest employment through casual work and M-pesa agency services. Her children are now in the custody of their grandmother, who is over 70 years old and of limited means. These circumstances, while compelling, must be weighed against the gravity of the offense and its impact on society.
8. The nature and circumstances of this offense are particularly serious. The medical evidence presented by PW4 Dr. Chesori revealed a precise, calculated stab wound that penetrated multiple vital organs. While the accused raised claims of self-defense and provocation, the nature of the injuries and the circumstances surrounding their infliction suggest a more deliberate action that went beyond mere self-preservation. The method and manner of the fatal injury indicate an intent that cannot be easily reconciled with claims of defensive action.
9. This case must be viewed within the broader context of domestic violence in our society. The prevalence of domestic violence and its escalation to fatal outcomes remains a matter of grave concern for our courts and society at large. As noted in various authorities, including *S v Chapman 1997 (3) SA 341 (SCA)*, the rights to dignity, privacy, and integrity of every person are fundamental to constitutional values. Women, in particular, have a legitimate claim to protection from domestic violence, and the courts must demonstrate through their sentencing that such violence will not be tolerated.
10. The impact of this crime extends beyond the immediate parties. Two young children have been effectively orphaned, creating a burden on their elderly grandmother. The deceased's family has suffered an irreparable loss, and society as a whole is diminished when domestic disputes escalate to fatal violence. The court must send a clear message that such actions carry severe consequences while remaining mindful of the possibility of rehabilitation and the need for proportionality in sentencing.
11. The court has carefully considered both mitigating and aggravating factors. In mitigation, the accused's status as a first offender, her role as a mother to young children, and her previous good character through honest employment weigh in her favor. However, these must be balanced against the aggravating factors: the precise and calculated nature of the fatal injury, the domestic violence context of the offense, and the devastating impact on both families.
12. Having weighed all these considerations, this court must strike a delicate balance between the gravity of the offense and the accused's personal circumstances. The evidence clearly demonstrates a pattern of domestic violence that tragically culminated in death. While the court recognizes the accused's personal circumstances and the impact on her young children, it cannot overlook the serious nature of this offense and the need for deterrence.
13. In mitigation, the court considers that the accused is a first offender, a mother of two young children aged 6 and 3 years who are now effectively orphaned by these tragic circumstances. The court has also



taken note of the accused's background as presented in her mitigation. That she is the 8th born daughter from a humble background in Meru County. Her attempts to make an honest living through casual work and M-pesa agency services demonstrate her prior commitment to lawful conduct. The court is particularly mindful of the impact of incarceration on her two minor children, who are now in the custody of their grandmother, herself over 70 years old and of limited means.

14. The deceased died a brutal death which could have been avoided by the accused person. The unlawful Acts by the Accused person were foreseeable that the murder weapon being the knife was to penetrate the body and eventually occasion death of the deceased.
15. It was submitted by learned counsel Mr. Tarigo on behalf of the Accused that this court should take into account the aspect of regret and remorse to exercise discretion and pass a lesser sentence including non-custodial given the doctrine of the welfare and the best interest of the victim children survived of the deceased and the Accused person. I have always held the view that Accused persons during mitigation have never really internalised the elements of regret and remorse which is founded in a broken heart and spirit out of the circumstances of the offence in question. Sometimes they say it as a matter course without knowing its far reaching implications in imposing the fair, appropriate, and proportionate sentence. I think there is need for some civic education in this area so that mitigation is more participatory and inclusive to be measured by the trial court in striking a balance to arrive at a just verdict. My more deeper appreciation of what constitutes remorse or regret comes from the remarks by Satchwell, J in *S v M* 2007 (2) SACR 60 THUS: “ ...is there remorse in the sense of deep regret or guilt, for the wrong done?...As stated in *S v Martin* 1996 (2) SACR 378 (w) AT 383g-h...Remorse cannot repentance, and inner sorrow inspired by another's plight or by a feeling of guilt. The court should investigate the intensity, longevity and foundation of proclaimed remorse to determine if it is sincere and whether it is “regret at having been caught” or whether it is contrition for what was done and constitutes part of an undertaking not to commit the offence again. In the present instance, all the Court has upon which it can judge the genuineness of otherwise of the accused's so-called remorse is the guilty plea offered by him. By itself this is an insufficiently demonstrable manifestation of genuine remorse. After all this admission of guilt was only made after he had been arrested and prosecuted.”
16. In addition, the court in *S v Matyityi* 2011(1) SACRA 40 (SCA). It was observed “ There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate into genuine remorse. Remorse is a gnawing pai of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful. And not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist, cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it need to have a proper appreciation of, inter alia. What motivated the accused to commit the deed, what has since provoked his or her change of heart, and whether he or she does indeed have a true appreciation of inter alia: what motivated the accused to commit the deed what has since provoked his or her change of heart, and whether he or she does indeed have a true appreciation of the consequences of those actions.”
17. However, the court cannot overlook the serious nature of this offense. While the accused has claimed self-defence and provocation, the evidence, particularly the medical findings from PW4 Dr. Chesori, reveals a precise, calculated stab wound that penetrated multiple vital organs. The method and manner of inflicting the fatal injury suggests an intent that goes beyond mere self-preservation. Considering the



escalating nature of domestic violence in our society, this court sentences the accused, Dorcas Ntinyari, to thirty-five (35) years imprisonment. The period spent in custody shall be taken into account when computing the sentence in compliance with section 333(2) of the *Criminal Procedure Code*. The accused has a right of appeal against both conviction and sentence within fourteen (14) days.

DATED AND SIGNED AT ELDORET THIS 17TH DAY OF FEBRUARY, 2025

.....

R. NYAKUNDI

JUDGE

