Republic v Ndege (Criminal Case E026 of 2019)
[2025] KEHC 1199 (KLR) (3 March 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E026 OF 2019

RN NYAKUNDI, J

MARCH 3, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

BENARD ARABU NDEGE ..... RESPONDENT

JUDGMENT

1. The Accused 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 were that on the 10th day of March, 2019 at Soy police station, police line in Eldoret West Sub County within Uasin Gishu County murdered Penny Bosibori.

2. The Accused person in this case was arraigned before this court, pleaded not guilty placing the prosecution to disapprove his innocence as provided for in Art 50(2)(a) of *the Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun who was subsequently assisted by Ms. Kirenge and the accused person was represented by Legal Counsel Mr. Koech.

3. The accused was arraigned in court and denied the charge in totality and as a result the prosecution was called upon to disapprove his innocence. At the end of the prosecution's case, the accused was placed on his defence under Section 306 as read with section 307 of the *Criminal Procedure Code* to answer the charge of murder

A summary of the prosecution's case

4. PW1 was CPL. Lena Chumba who testified that on the night of 9th March 2019, she was awakened by the sound of 3 gunshots coming from her neighbor - the Accused's, home. She confirmed that she and the Accused lived opposite each other and that their houses were made of timber walls and mabati roofing. While on the way to find out what had happened, she encountered the Accused's son, a young boy called Chris who was crying and who told PW1 that he thought his mother had died because he

had seen a lot of blood. The boy also mentioned that it was his father, the Accused, who killed the mother. PW1 confirmed seeing the dead body at the door of the Accused's house.

5. CPL Lorim – PW2, a neighbor and a colleague to the Accused testified stated that at around midnight on 10th March 2019, he too was asleep and was awakened by gunshot sounds outside the compound. Upon peeping through his window, he saw the Accused who was wielding a weapon, and the Deceased shouting at each other outside their home, supposedly fighting over a wallet, a trouser and an ATM Card. PW 2 heard the Accused loudly threatening his wife that if she did not relinquish his items then he would kill her. In the heat of the argument, the Deceased ran back towards their home as the Accused followed. PW2 heard the Accused cocking his gun and while still facing inside the house shot his gun twice in rapid mode. A blackout ensued and it is only later when the lights came back on that PW2 dashed to the report office and notified his colleagues – CI Biwott, Sgt Yatich and PC Owiti who were on their way back to the crime scene to disarm the Accused. The 4 however met with the Accused on the way while he had his AK 47 rifle. CI Biwott disarmed him and informed him that he was being handcuffed because he had killed his wife. They consequently took him back to his home and witnessed the body of the deceased on the floor with multiple bullet wounds in the chest and head. PW2 confirmed that there were no wrangles between himself and the Accused.

6. PW3, PC Korir confirmed that he indeed gave the Accused an AK47 gun S/No 794063 on 9th March 2019 with 30 rounds of ammunition as he was on duty. He also confirmed that he was far from the scene when the incident happened but did hear gunshots. He was later informed of what had transpired by the OCS - C.I Biwott and was instructed to return to the station where he found the Accused arrested. He retrieved the firearm and handed it over to CPL Lumuli on the following day noticing that the same had only 19 rounds, i.e. less 11 rounds. The details of the arms were registered in the arms movement book and occurrence book.

7. PC Ingosi testified as PW4 stating that on the material date he was on duty when he heard gunshots from the police lines at around midnight. He confirmed that the lights went off and came back again upon which he noticed the Accused coming towards him and other officers when the Accused requested to see an Inspector or any officer of a rank higher, to which C.I Biwott disarmed and handcuffed the Accused. PC Ingosi confirmed that the AK47 rifle has 2 modes where it can trigger once or several bullets at a go. However, he added that he was not present at the scene to ascertain the circumstances leading to the shoot-out.

8. CPL Jane Jeptoo testified as PW5 and stated that she undertook investigations in the matter upon being informed of the incident on 10th March 2019. Aside from recording witness statements, she confirmed that at the time of recovery, the firearm AK47 S/No 794063 had only 19 rounds of ammunition and that there were 11 expended cartridges which were 7.62mm. 4 bullet heads were taken for ballistic examination. The post mortem conducted on the deceased confirmed that the Deceased was shot at least 9 times and suffered head and chest injuries due to the penetrating gunshot wounds and thus causing her death. The Arms Movement Book, the actual AK47 rifle, the Post Mortem Form, the Ballistic Expert Report and an Exhibit Memo Form were tendered as exhibits 1 – 6 in support of this testimony.

9. C.I Biwott testified as PW6 stated that on the fateful night, while asleep, he heard gunshots and his immediate instinct was to look for safety especially since the lights had gone off. Once electricity was back, PW 6 looked for reinforcement and proceeded to the Police Station. He, together with other officers, met with the Accused who had made his way to the Station, disarmed and arrested him before placing him in custody. C.I Biwott immediately thereafter went to the scene and found the Deceased lying near the main door in a pool of blood. He also recovered 7 expended cartridges. C.I Biwott secured the scene and arranged for the body to be taken to the MTRH Mortuary awaiting the autopsy.

The Defence case:

10. At the close of the prosecution's case the accused was placed on his defence and stated that he is a police officer who has worked for 32 years. He claimed that he and the Deceased were not arguing or fighting especially about a wallet, ATM Card and trousers, and that the whole time his son was in the house asleep unaware of what was happening. Further that afterwards, he was too much in shock and so confused that he did not recall surrendering himself and the rifle to the Chief Inspector at the police station. He asserted that he and PW2 had previous wrangles which were solved at the local level and as such he did not have any documents and reports to ascertain this information. This, he claims was the reason that PW2, a fellow colleague, testified against him. The Accused claimed that he in fact did not shoot his wife because at all material times the gun that was assigned to him was under his mattress. According to his account, he had been to the police station earlier on in the night to clock out and came back home. Specifically, at the time of the shooting, he had left the house and was near a semi-permanent structure before returning home to find his wife lying on the floor in a pool of blood. According to the Accused, somebody else must have committed this crime.

11. Upon cross examination, it came out that the Accused and the Deceased were man and wife with a son and that on the night of 9th going to 10th March 2019 it was only the 3 of them in the house. Prior to this night he confirmed that he had been arguing with his wife and that they had a strained relationship though he termed it as any other husband and wife relationship. When he supposedly discovered that his wife was dead, from the intensely dramatic account that was narrated to this Honorable Court, his immediate reaction was to look at the various entry and exit wounds of the Deceased as opposed to screaming or asking for help/ an ambulance or at the very least checking on the son who was supposedly asleep in the house. This, he said was because, as a man, he has never screamed in his life. This is also notwithstanding that a few minutes ago, he had told this Honorable Court that he was in so much shock that he couldn't recall most of the details at the Police Station.

Prosecution's submissions

12. Learned Counsel gave a context and submitted on the critical elements to establish the offence of murder. On the issue of malice aforethought, it was submitted for the prosecution that this could be established through the interpretation and application of Section 206 of the *Penal Code*. In support of this proposition, counsel cited the decision in *Kaburu v Republic (Criminal Appeal 103 of 2023*) [2024] KECA 536 (KLR), where the Court of Appeal held that malice aforethought demonstrates the killer's state of mind, their thoughts prior to the murder, and the steps taken to facilitate it.

13. Learned State Counsel further relied on Republic v Ali Kajoto Ali [2021] eKLR, where the court held that malice aforethought can be inferred from the nature of injuries inflicted, the weapon used, the parts of the body targeted, and the accused's conduct before, during, and after the incident.

14. On the causal link between the accused and the death, the prosecution submitted that there was sufficient circumstantial evidence to prove guilt. In support of this submission, counsel cited the decision in Odhiambo v Republic (Criminal Appeal E013 of 2023) [2024] KECA 571.

15. It was further submitted that the circumstantial evidence against the accused included: his knowledge as a police officer in handling firearms, the documented altercation with the deceased immediately before the shooting where threats to kill were made, his presence at the scene with the weapon, the recovery of the murder weapon (which was officially assigned to him) with 11 rounds expended, and the multiple gunshot wounds found on the deceased's body.

16. The prosecution relied on Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR to emphasize that circumstantial evidence can form a strong basis for proving guilt, particularly when it demonstrates, through intensified examination, the accuracy of mathematics.

17. In conclusion, learned counsel for the prosecution submitted that the case against the accused had been proved beyond reasonable doubt and urged the court to return a verdict of guilt based on the evidence tendered and the circumstances leading to the death of the deceased.

Accused persons' written submissions

18. On the Accused Person's case, Learned Counsel Mr. Koech submitted that on the day the incident occurred and prior to that, the Accused and the deceased, who was his wife, were on good terms. In fact, on the fateful day, they were looking for a house together outside the police line and were planning to move to a bigger house outside the station.

19. Learned Counsel Mr. Koech argued that on the unfortunate date, the Accused Person was on standby duties, and after his shift was over, he stepped outside to call his colleague who was to take over the shift. He submitted that while the Accused was outside, he heard rapid gunshots coming from his house, prompting him to rush inside where he found his wife lying beside the bed with a gun beside her. The Accused felt for her pulse but then noticed blood oozing out, and upon checking, he observed a bullet hole entry in the neck of the deceased and an exit wound behind the right ear.

20. Counsel further advanced that the Accused Person testified that he sat down due to shock, and due to the nature of the bullet wound, he knew his wife was gone. He noted that coincidentally, the power went out, and being a trained officer and knowing the procedure for handling a crime scene, he remained seated without disturbing the scene. When power was restored, he took the gun to the station and requested to hand it over to his superior in accordance with National Police Service protocols. That once the Accused handed over the gun, he was placed under arrest and accompanied crime scene personnel to his house where they took photos and collected evidence. He argued that the Prosecution conveniently omitted the testimony of the crime scene personnel from their case.

21. Regarding the handling of firearms, Learned Counsel Mr. Koech explained that the Accused Person testified that the National Police Service does not provide officers with safety boxes for their guns, and they are required to keep their weapons within arm's reach in case of emergency. The Accused stated that he kept his gun under the mattress, and his wife knew about this arrangement. He theorized that his wife could have accidentally removed the safety catch, causing the gun to discharge when the trigger was touched as she prepared the bed. This would explain why eleven bullets were discharged at once, since the rifle was in automatic mode.

22. Learned Counsel Mr. Koech cast doubt on the testimony of PW2, arguing that bad blood existed between PW2 and the Accused, making the testimony biased. He pointed out inconsistencies in PW2's account, noting that the construction of the houses made it impossible for PW2 to hear or see what was happening in the Accused's house. He emphasized that PW1 confirmed that PW2 had ill feelings toward the Accused.

23. On the critical issue for determination, whether the Prosecution's case has been proved beyond reasonable doubt, Learned Counsel Mr. Koech submitted that Sections 203 and 204 of the *Penal Code* require the Prosecution to prove beyond reasonable doubt that the Accused, through an unlawful act or omission, caused the death of the deceased with malice aforethought. He cited Republic v Samuel Tera Tonosho [2022] eKLR, which established the ingredients of murder: the death of the deceased,

unlawful cause of death, malice aforethought in causing death, and direct or circumstantial evidence placing the accused at the scene.

24. Regarding the unlawful death of the deceased, Learned Counsel Mr. Koech presented several arguments challenging the Prosecution's case. That none of the Prosecution witnesses saw the Accused Person shooting the deceased. PW1, who lived opposite the Accused's house, testified she did not hear any quarrel or gun cocking, only rapid gunshots. She confirmed there were no security lights outside, making it impossible to see what was happening. That the Prosecution suspiciously omitted testimony from Chris, who was 13 years old at the time and would have been a competent witness. That PW2's testimony was full of contradictions and physically impossible given the wooden structure of the houses and absence of security lights. PW2 claimed to have heard an argument between the Accused and deceased, but PW1, who lived directly opposite, heard no such thing.

25. Learned Counsel Mr. Koech highlighted further inconsistencies in PW2's testimony, including contradictory descriptions of the deceased's clothing which also differed from the post-mortem report. He cited Ndungu Kimanji v Republic [1979] KLR 282, which established that a witness in a criminal case should not create an impression of untrustworthiness, and urged the court to disregard PW2's testimony entirely.

26. On the physical evidence, Learned Counsel Mr. Koech noted that the Accused had testified about entry and exit wounds that suggested the shooter would have been crouching or lying down, given the height difference between him and his wife. He argued that the Prosecution failed to call the doctor who conducted the post-mortem or the crime scene personnel to provide critical evidence about the bullet trajectory and wound characteristics. The absence of fingerprint analysis on the gun was also highlighted as a significant gap in the evidence.

27. Regarding malice aforethought under Section 206 of the *Penal Code*, Learned Counsel Mr. Koech maintained that the Prosecution failed to adduce credible evidence to prove this essential element. He emphasized that the contradictory evidence from Prosecution witnesses, lack of corroborative forensic evidence, and absence of a clear motive cast significant doubt on the case.

28. In his conclusion, Learned Counsel Mr. Koech submitted that none of the Prosecution witnesses saw the Accused killing the deceased, and no direct evidence linked him to the scene of the crime. He cited Mary Wanjiru Guchiwa vs. Republic Criminal Appeal No. 17 of 1998, which established that "however strong, suspicions cannot be proved by evidence," and JOO v Republic [2015] eKLR, which reinforced the cardinal duty of the Prosecution to adduce adequate evidence to uphold any conviction.

29. Learned Counsel Mr. Koech further cited Lord Denning in Miller v Ministry of Pensions [1947]2 ALLER 372, which established that proof beyond reasonable doubt requires a high degree of probability but not absolute certainty. He argued that the Prosecution's evidence in this case had not attained the satisfactory standards for a murder conviction. Learned Counsel Mr. Koech further cited Lord Denning in Miller v Ministry of Pensions [1947] 2 ALLER 372, which established that proof beyond reasonable doubt requires a high degree of probability but not absolute certainty. He argued that the Prosecution's evidence in this case had not attained the satisfactory standards for a murder conviction.

30. Learned Counsel Mr. Koech concluded by respectfully praying that the Honorable court find the Accused Person not guilty of the offence of murder and acquit him under Section 215 of the *Criminal Procedure Code*, with orders that he be set at liberty unless otherwise lawfully detained.

Analysis and determination

31. The burden of proving guilt in a criminal trial lies squarely on the prosecution to establish its case 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*. In any criminal charge, there is a rebuttable presumption that by the Director of Public Prosecution making a decision to charge an accused person(s) for any offence on any of the Penal laws in Kenya which power is exercised under Art. 157(6) & (7) of *the Constitution*, there is prima facie evidence inconsistent with his/her innocence which right is constitutionally protected and guaranteed under Art. 50(2)(a) of *the Constitution*. This prove of existence of facts is what is provided for in the legislative scheme under Section 107(1), 108 and 109 of the *Evidence Act*. As way back in 1876, learned author Thomas Starkie in "A practical treatise of the law of evidence," observed:

> " What circumstances will amount to proof can never be matter of generation of definition; ..... On the other one hand, absolute, metaphysical and demonstrative certainty to the exclusion of every reasonable doubt: ... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matter of the highest concern and importance to his won interest....." see also the principles as illuminated in the cases of Republic versus Nyambura and four other [2001] KLR 355, Sekitoleko v Uganda [1967] EA 531, Msembe & another versus Republic [2003] KLR 521, Mbuthia v Republic [2010] 2 EA 311.

32. As articulated in Woolmington v DPP [1935] AC 462, Viscount Sankey stated the foundational principle:

> " But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence... Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception."

33. The evidential burden test was formulated in Cross and Tapper on Evidence 12th Edn (Oxford: OUP, 2010):

> " 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."

34. 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 ingredients:

    i. The death of the deceased Penny Bosibori

    ii. The death was unlawfully caused.

    iii. The death was caused with malice aforethought

iv. The accused person participated in or caused the death

35. This case is built substantially on circumstantial evidence. As established in R v Hillier [2007] 233 A.L.R 63, Shepherd v R [1991] LRC CRM 332:

> "The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

36. On the first element regarding proof of death, this is conclusively established through the testimony of multiple witnesses and supporting physical evidence. PW1 CPL Lena Chumba testified that after hearing three gunshots, she encountered the deceased's son Chris, who informed her that his mother had been killed. She personally observed the deceased's body at the door of the accused's house. This was corroborated by PW2 CPL Lorim, who witnessed the shooting incident and later observed the deceased's body with multiple bullet wounds to the chest and head. Furthermore, PW6 C.I. Biwott testified about finding the deceased lying in a pool of blood near the main door, with seven expended cartridges recovered from the scene. The post-mortem examination confirmed that the deceased was shot at least 9 times, suffering fatal head and chest injuries due to the penetrating gunshot wounds.

37. 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 v Gusambizi S/o Wesonga [1948] (15 EAC 65).

38. The requirement that the killing is unlawful is an important element of the offence of murder contrary to section 203 of the *Penal Code*. For this purpose, the prosecution must prove that the accused by his own act or unlawful mission caused the death of the deceased without any justification, excuse or provocation.

39. In Art. 26(3) of *the Constitution*, it is provided as follows:

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

40. On the other hand, Section 17 expressly states that:

> "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."

41. This section should be read in conjunction with section 207 and 208 of the Code which states as follows:

> "(207) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

(208 (1) 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.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality."

42. From the prosecution's genealogy of evidence, there seems to be no chain of events as to prior intense conflict between the accused person as the husband to the deceased which could amount to provocation. The evidence of the prosecution essentially and that of the defense by the accused person does not demonstrate any provocation or some act or series of acts done by the deceased which would have caused any reasonable person in the status of the accused to experience a sudden and a temporary loss of self-control rendering him so subject to passion as to make him for the moment not a master of his mind. If indeed there was provocation in the commission of this offence by the accused, nothing could have been easier for him to demonstrate in his defense to rebut the prosecution's case on actus reus and intention that the unlawful acts of pulling the trigger against the deceased was due to gross provocation which resulted him to lose self-control and use violence with fatal results. There is no sufficient material for this court to form the view that the accused acted under such provocation so that the death of the deceased can be said to be justified or excusable. The word provocation in section 207 as read conjunctively with section 208 has to be interpreted literally with catch words such as causation to qualify any of the stated acts, insults, verbal exchanges, conducts, capable of bringing any unlawful act carried out by the accused person to be brought within the parameters of section 207 and 208 of the *Penal Code*. The way in which the accused person delivered his defense was more towards raising an alibi defence. That as a couple they were living together in the same house but in the turn of events in the 10th March, 2019. The events resulting the death of his wife were also astonishing to him although it is the same firearm loaded with ammunition which he had left within the premises resulted to the fatal injuries. The specifics of it and nature of the alleged usage, though excessive from the pathologist's perspective, remained very scanty to avail the accused the defense of self and provocation. Indeed, the circumstances of this offence did not even go further enough to explain whether the deceased was a firearm holder or had knowledge or experience on the use of such weapons. The more plausible explanation of this events is more hinged to the significance of planning the offence and the existence of a plan to attack the deceased. The accused before us is a trained police officer with experience on handling and use of firearms and therefore expected to have the power of self-control. The Court of Appeal in New Zealand in the case of McGregor [1962] NZLR 1069 puts the whole chain of events

in perspective which warrants this court not to hold the conduct of the accused person justifiable or excusable:

> "It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristic 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 individual's character or personality. A disposition 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 significance or not of sufficient permanency to be regarded as "Characteristics" which would enable the offender to be distinguished from the ordinary man ..... It is to be emphasized that of whatever nature the characteristic 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." See also: Mokua v. Republic [1976-80] 1KLR 1337, Mungai v. Republic 1984 KLR 85, palmer v. Republic 1971 AC 814.'

43. In my considered view, even male possessiveness and jealous should not today be an accepted reason for loss of self-control even if one was to invite the application of the reasonable test to justify the commission of an homicide to inflict fatal injuries upon his wife/ lover. I am convinced that the right to life protected and guaranteed under Art. 26 of *the Constitution* is such that characteristics of a human being or a man for that matter such as jealous and obsession should be ignored in relation with the objective element to invoke the concept of provocation so that one can rely on self-defense to commit the murder. So where an individual who is cognitively capable of exercising reasonable self-control and he/she is just provoked by some petty insult/assault, his/her loss of self-control must be ascribed to his/her own personality rather than to the provocation as defined under section 207 and 208 of the Code.

44. In examining causation, this court must consider both direct and consequential effects of the accused's actions. The prosecution has presented compelling evidence establishing not just the accused's presence and actions at the scene, but also the direct causal link between those actions and the deceased's death. PW1 CPL Lena Chumba was awakened by three gunshots from the accused's house. She encountered the accused's son Chris who stated his father had killed his mother, and she personally observed the deceased's body. This testimony is corroborated by PW2 CPL Lorim, who witnessed a confrontation where the accused was wielding a weapon and threatening the deceased over a wallet, trouser and ATM card. Most significantly, PW2 heard the accused explicitly threaten to kill the deceased if she did not relinquish these items.

45. The physical evidence reinforces this causal chain. PW3 PC Korir confirmed issuing the accused an AK47 rifle S/No 794063 with 30 rounds of ammunition, which was later recovered with only 19 rounds remaining, corresponding precisely with the 11 expended cartridges found at the scene. PW5 CPL Jane Jeptoo's investigation revealed 11 expended cartridges and 4 bullet heads recovered for ballistic examination, confirming the systematic nature of the shooting.

46. The accused's attempts to create an alternative narrative about the events strain credulity. His claim that the firearm was under his mattress at all material times is contradicted by multiple eyewitnesses who saw him wielding the weapon. His suggestion that "somebody else must have committed this crime" fails to explain how this hypothetical assailant would have accessed his service weapon or why multiple independent witnesses would fabricate testimony about his presence and actions.

47. I find it particularly significant that when confronted with evidence at the crime scene, instead of demonstrating natural concern or distress at discovering his wife's body, the accused's focus was on

examining the entry and exit wounds. His explanation that "as a man, he has never screamed in his life" serves only to highlight the calculated nature of his response, especially when contrasted with his claimed state of shock regarding events at the police station.

48. Drawing from the principles established in DPP v Smith [1960] 3 ALL ELR 161, the question is not what the accused in fact contemplated but whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The court although addressing the mental element in murder stated as follows:

> " The court observed that the presumption of intention means that, as a man is usually able to foresee what are the natural consequences of his act, so it is as a rule reasonable to infer that he did foresee them and intended them. Although however that is an inference which may be drawn on the facts in certain circumstances must be invariably drawn, yet if on all the facts of a particular case is not a correct inference, then it should not be drawn. It matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions...."

49. The deliberate discharge of eleven rounds from an automatic weapon, achieving multiple hits on vital areas of the body, can lead to only one reasonable conclusion. This death was unlawfully caused through intentional acts of violence.

50. The accused's claim that someone else must have committed the crime while he was away defies both logic and the evidence. As testified by PW3 PC Korir, he issued the accused an AK47 gun S/No 794063 with 30 rounds of ammunition. When recovered, the firearm had only 19 rounds remaining - precisely accounting for the 11 expended cartridges found at the scene.

51. On the critical element of malice aforethought, Section 206 of the *Penal Code* provides that it shall be deemed established by evidence proving:

> " (a) an intention to cause death or to do grievous harm to any person, whether that person is the person actually killed or not; (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not."

52. The manifestation of malice aforethought was articulated in R v Tubere S/o Ochen [1945] 1 E.A.C.A. 63, where Justice Sir Sheridan established that the court must consider:

> " The weapon used i.e. whether it was a lethal weapon or not; The part of the body that was targeted i.e. whether it is a vulnerable part or not; The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and The conduct of the accused before, during and after the incident."

53. Applying these principles to the present case, the manifestation of malice aforethought emerges with compelling clarity through multiple strands of evidence. The accused, being a trained police officer, chose to employ his service rifle, an AK47 - a weapon of devastating lethal capacity against the deceased. The manner of its use is particularly telling. PW2 CPL Lorim testified to hearing the accused cock his weapon and fire twice in rapid mode after threatening the deceased. This was corroborated by PW1 CPL Lena Chumba who heard three gunshots. The precision with which these shots were delivered, and the fact that they struck vital areas of the body, speaks not of random fire but of calculated

targeting. Particularly significant is that the accused, as a trained law enforcement officer, would have been well aware of the lethal consequences of discharging a firearm at close range. Each of the rounds fired required a conscious, separate pull of the trigger, demonstrating a methodical assault rather than a reflexive response.

54. The premeditated nature of the attack is further illuminated by the accused's conduct before, during, and after the fatal encounter. PW2 testified to hearing the accused explicitly threaten the deceased's life during their argument about the wallet and ATM card, stating he would kill her if she did not relinquish these items. This verbal threat, followed shortly by its lethal execution, forms a direct chain of premeditation. When confronted about the incident, the accused's response was telling - he claimed to be "too much in shock" to recall surrendering himself and the rifle to the Chief Inspector, yet simultaneously maintained that his gun was under his mattress at all material times. He further claimed that he had left the house and was near a semi-permanent structure when the shooting occurred, only to return and find his wife lying on the floor. His suggestion that somebody else must have committed the crime fails to explain how this hypothetical assailant would have accessed his service weapon. This calculated attempt to distance himself from the crime, rather than displaying natural distress at the death of his spouse, serves to reinforce the deliberate nature of his actions.

55. The accused's explanation that he was away from the house when the shooting occurred is not only contradicted by multiple witnesses but defies logic given the evidence of his service weapon being used in the killing.

56. An accused person is said to set up an alibi defence when he alleges that at the time when the offence with which he was charged he was elsewhere, that he is at a place so far distance from which the offence was committed. Therefore, he could not be held guilty for an offence which was not in the locus in quo. In the case of Kareem Olatinwo v the state [2013] LPELR – 19979 (SC) the court made the following observations on alibi defence:

> " what does "alibi" mean" "Alibi" simply means "elsewhere." That is, a defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time. The fact or state of having been elsewhere when the offence was committed. See; Black's Law Dictionary, Ninth Edition, Page 84. In other words, "alibi" means when a person charged with an offence says: - " I was not at the scene at the time the alleged offence was committed. I was somewhere else, therefore, I was not the one who committed the offence." See; Christopher Okosi & Ors v The State [1989] CLRN 29 at 48 per Oputa, JSC. Generally, if an accused person raises unequivocally a defence of alibi, that is, that he was somewhere else other than the locus delicti at the time of the commission of the offence with which he is charged and gives some facts and circumstances of his whereabout, the prosecution is duty bound to investigate that alibi set up, to verify its truthfulness or otherwise. See; Maikudi Alivu v state [2007] ALL FWLR (Pt. 388) 1123 at 1141."

57. Although this alibi defence was not investigated by the police, the other independent evidence by the prosecution from PW1 to PW6 discharged the burden of proof of beyond reasonable doubt to mathematical certainty that the accused person was the author and executor of the offence of murder against his own spouse. Clearly, in his defense has raised his whereabouts were sketchy with no value to establish a prima facie case that he was not at the scene on the material day of the offence. The surrounding circumstances are that his defense is impeachable by both the documentary and circumstantial evidence on the events which inferentially point to his culpability for the murder. This

was purely an afterthought to create a doubt in the homicide offence but woe unto him that proof of the criminal case was beyond any shadow of doubt by the prosecution.

58. The prosecution's case presents a tapestry of evidence that speaks with compelling clarity. The direct testimony of PW2, who witnessed the accused threaten and then shoot the deceased, is fortified by the forensic evidence of the recovered cartridges and ballistic analysis. This physical evidence aligns precisely with PW3's documentation of the accused's service weapon and ammunition. The circumstantial evidence of the accused's conduct from his explicit death threats to his calculated behavior at the scene demonstrates consciousness of guilt. When all these strands are woven together, they present an unassailable picture of premeditated action. The accused, a trained law enforcement officer who understood the lethal consequences of his actions, made a deliberate choice to employ his service weapon against his spouse. The totality of evidence permits only one reasonable conclusion. Bernard Arabu Ndege, acting with clear premeditation and malice aforethought, committed the offense of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

59. As Lord Denning articulated in Miller v Minister of Pensions [1947] 2 ALL ER 372:

> " If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

60. The evidence in this case meets this exacting standard. The prosecution has systematically established each element of the offense beyond reasonable doubt through a carefully constructed chain of circumstantial evidence, corroborated by scientific proof and witness testimony.

61. Therefore, I find the accused GUILTY of murder contrary to Section 203 as read with Section 204 of the *Penal Code* and convict him accordingly.

62. The matter shall be mentioned on 21st February 2025 for sentencing. Both prosecution and defense counsel are directed to file written submissions addressing aggravating and mitigating factors within 14 days.

Ruling On Sentence

63. The convict, Benard Arabu Ndege, a police officer with 32 years of service, stands before this court having been convicted of murder contrary to section 203 punishable under Section 204 of the *Penal Code*. The charge arose from the events of 10th March 2019, when the convict, using his service firearm, an AK-47 rifle, shot and killed his wife, Penny Bosibori, at their residence in Soy Police Station police line in Eldoret West Sub County. Following a full trial where the prosecution established beyond reasonable doubt all elements of the offense, this court delivered a judgment of conviction on 12th February 2025. It is now incumbent upon this court to determine an appropriate sentence that reflects both the gravity of the offense and the convict's personal circumstances. In accordance with the landmark Francis Muruatetu v Republic decision of 2017, the mandatory death sentence previously prescribed for murder has been outlawed, giving courts discretion to impose sentences commensurate with the specific circumstances of each case, with the death penalty reserved only for the rarest of circumstances arising from aggravated homicide. This discretion must be exercised judiciously, with careful consideration of established sentencing principles, statutory guidelines, and constitutional imperatives regarding the right to life and dignity.

64. The sentence hearing was canvassed by way of oral submissions. The Lead counsel for the state told the court that the offence in question was serious with aggravated factors of substantial harm, abuse of trust by the offender who armed himself with an assault rifle to commit the offence. That the number

of gunshots targeted at the vitctim is clear evidence of premeditation having no regard to the right to life of his own wife whom he was supposed to protect.

65. On the other hand, Ms. Koech canvassed mitigation on behalf of the accused where she highlighted the court to take into account that the accused should be considered as a first offender. That he is remorseful and regrets the offence. In addition, learned counsel urged the court to take into account that the accused is the only surviving parent from a marriage blessed with 2 issues who are school going. It was also the case for learned counsel to take into account that the accused was a former police officer who on account of this conviction will be deprived of his employment and any other benefit which might accrue which is already a fact in his detriment.

66. Finally, the son of the accused participated in this hearing representing the victim. In his evidence, he invited thee court to factor in the fact of the death of their mother who was one of their support systems during her lifetime. Further, he told the court that the death of the mother has caused them psychological and traumatic harm by dint of the death. It was his intention that the court tempers mercy to release their only surviving biological parent.

67. The court is guided by the fundamental purposes of sentencing as provided for in the sentencing policy guidelines of the Judiciary, 2023 which can be pursued by the court in applying one or more of the following eight objectives:

    a. Retribution: to punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

    d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

    e. Community protection: to protect the community by incapacitating the offender.

    f. Denunciation: to communicate the community's condemnation of the criminal conduct.

    g. Reconciliation: To mend the relationship between the offender, the victim and the community.

    h. Reintegration: To facilitate the re-entry of the offender into the society.

68. In determining the appropriate sentence, I have considered the submissions made by both the prosecution and the defense. I am aware of my duty to balance the various sentencing objectives while taking into account both the aggravating and mitigating factors in this case.

69. The evidence presented throughout the trial revealed several disturbing aggravating factors. First, the convict was a serving police officer with 32 years of experience at the time of the offense. As a law enforcement officer entrusted with the duty to protect citizens, he held a position of significant public trust. Instead of upholding this trust, he used his service firearm to take the life of his wife in a domestic setting. The abuse of his position and misuse of a government-issued firearm represents a severe breach of public confidence in law enforcement.

70. Second, the manner in which the murder was committed demonstrates exceptional brutality. The postmortem evidence revealed that the deceased was shot at least 9 times with multiple gunshot wounds to the head and chest. The deliberate discharge of 11 rounds from an automatic weapon,

achieving multiple hits on vital areas of the body, demonstrates a calculated intent to cause death. The precision with which these shots were delivered speaks not of random fire but of deliberate targeting.

71. Third, the crime was committed in the presence of the convict's minor son, who according to PW1's testimony, witnessed the aftermath of the shooting and stated that his father had killed his mother. This has undoubtedly caused severe psychological trauma to the child, who has not only lost his mother but witnessed his father's role in her death.

72. The Constitutional Court of South Africa in State v Makwanyane [1995] CCT/3/94 remarked as follows on mitigation and aggravating factors in sentencing:

> " mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence."

73. In R v Engert [1995] 84 A Crim R 67 at 68, Gleeson CJ observed:

> " Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by stature or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment .....
>
> In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance .....
>
> It is therefore erroneous in principle to approach the law of sentencing as thought automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

74. The central challenge in criminal sentencing is achieving an equitable balance between the offender's rehabilitation prospects and society's demand for justice, particularly for victims of crime. Within Kenya's criminal justice framework, a concerning pattern has emerged despite the existence of established sentencing guidelines and judicial principles. Cases presenting substantially similar factual matrices frequently result in notably divergent sentences, raising valid questions about consistency in the application of judicial discretion. While courts often justify these variations through the doctrine of individualized sentencing, this principle alone cannot adequately explain or justify the marked disparities in sentencing outcomes. What is required is a more rigorous and transparent

approach to the exercise of judicial discretion, one that clearly articulates the reasoning behind each sentencing determination. This approach ensures that variations in sentences stem not from arbitrary decisions but from meaningful distinctions in case circumstances, offender characteristics, and broader societal considerations. Such judicial reasoning must be sufficiently detailed to withstand scrutiny and demonstrate a clear nexus between the specific circumstances of each case and the ultimate sentence imposed.

75. In the case before me, I must consider that the convict was a law enforcement officer who took an oath to protect lives but instead used his service weapon to take the life of his spouse. The case is particularly disturbing because it involves a police officer using a government-issued firearm to commit a domestic homicide. The role of a police officer carries substantial responsibility and public trust. When that trust is betrayed through criminal conduct, it not only harms the immediate victim but undermines public confidence in the criminal justice system as a whole.

76. In Veen v The Queen (No. 2) [1988] 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ stated at 476:

> " sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of other who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

77. Having carefully weighed all the factors in this case, including the aggravating circumstances of the abuse of position as a police officer, the brutality of the crime involving multiple gunshots to vital areas, and the presence of a minor child witness, against the mitigating factor of the convict's long service in the police force, I find that the gravity of this domestic homicide committed with a service weapon demands a substantial custodial sentence.

78. The convict's actions have not only robbed a woman of her life but have orphaned a young child and betrayed the trust placed in him as a law enforcement officer. His lack of remorse and attempts to distance himself from the crime rather than accepting responsibility further diminish any prospects for rehabilitation in the near term.

79. In the case of S v Chapman 1997 (3) SA 341 (SCA), Mohammed CJ of South Africa once remarked on circumstances similar to what this court is faced with while sentencing the accused:

> " The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of *the Constitution* and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives should not be compromised by those expected to provide the necessary social and economic support like their very own spouses" (underlined emphasis mine).

80. From the same jurisprudential legal system, in the case of S v Kekana 2014 ZASCA 158 the court held inter alia:

> " Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity."

81. In this country alone, homicide has reached unproportional levels where part of the three months of 2024, 97 women lost their lives in very unclear circumstances. The perpetrators prima facie happen to be the male gender no matter the circumstances of the offence that may have motivated the perpetrators, they must have forgotten that this is a constitutional democracy governed by the rule of law with a robust criminal justice system whose institutions are functional and ready to come through for any victim of crime. One other aspect of importance is the protection of right to life of every citizen under Art. 26 of *the Constitution*. Essentially, every citizen must protect the right to life of another. That it is the duty for each citizen to defend this constitution so that justice can be sustained and found within our borders.

82. These are the factors that a trial court like the one I am presiding on must strike a balance in weighing each element, features, policy guidelines and the principles in the various case law on sentencing to arrive at a fair and proportionate sentence. the key elements at play in my view which carry more weight include but not limited: the nature of the crime and the manner in which it was committed, the offender's level of planning and executed, the public interest and legitimate expectation that crime must be punished appropriately within the legislate scheme on sanctions prescribed, the nuances of sentencing like prevention, retribution, rehabilitation, parity, uniformity and deterrence invaluably influence the judicial function of discretion to arrive at what is perceived as a just sentence. it may appear that different sentences or verdicts are meted out by the various courts for the same but plainly so on the altar of sentencing, each trial court has to strike a balance taking into account the above guidelines which are not limited to the ones identified in this judgment as each case has got to be decided with its unique circumstances.

83. For those reasons, it is without a doubt that unlawful violation of the right to life in Art. 26 of *the Constitution* remains a painful reality for the victims that no sentence of a court of law will ever bring back their loved one however severe it may be imposed by the session judge. Notwithstanding that position, I find that taking into account all that is relevant cumulatively and as correctly submitted by both legal counsels seized of this matter being learned counsel Ms. Kirenge for the state and Messrs. Koech for the accused, there are no compelling and exceptional circumstances for imposition of a lesser sentence like non-custodial as urged by the witness from the victim family.

84. From the record, the accused was arraigned in court on 26th March, 2018 only to be released on bail with on 15th October 2019. Thereafter, he was in breach of the bond terms and this court exercising discretion on 10th July, 2024 following the withdrawal of the surety James Ndege the bond terms necessitating the remand into custody of the accused until the conclusion of his trial and delivery of judgment on 3rd March, 2025. In computation of credit for pre-trial detention under section 333(2) of the *Criminal Procedure Code*, that period which constitutes precisely 14 months be discounted from the thirty (30) years custodial sentence imposed by this court for the offence. 14 days Right of Appeal.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 3RD DAY OF MARCH 2025.

In the presence of:

Ms. Koech for the accused.

Ms. Kirenge for the state

.....

R. NYAKUNDI

JUDGE