Republic v Kibet (Criminal Case E013 of 2022)
[2025] KEHC 4371 (KLR) (4 April 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E013 OF 2022

RN NYAKUNDI, J

APRIL 4, 2025

BETWEEN

REPUBLIC .... PROSECUTION

AND

IGNATIUS KIBET .... ACCUSED

JUDGMENT

1. The accused Ignatius Kibet was indicted on one charge of murder contrary to section 203 of the *Penal Code*. The particulars of the charge are that that on 15th April, 2022 at Soy Sub-County within Uasin Gishu County in the Republic of Kenya murdered KENNETH KIBET.

2. At the hearing, the accused pleaded not guilty therefore placing the prosecution to discharge their duty to prove all the essential ingredients of the offence of murder beyond reasonable doubt. To prove its case, the prosecution lead counsel madam Ms. Kirenge summoned the following witnesses who were cross examined by learned counsel Mr. Evans Oduor. The summary of the evidence is as follows:

3. PW1 Nixon Bitok Kimeli told the court on oath that on the 15th April, 2021 at about 8PM he was in his house hosting a group of friends and neighbours. He acknowledged that some of the persons he hosted included one Solomon, Raymond, Kennedy and the accused person. In the course of the social evening, a conflict arose between the accused person and the deceased for reasons that the deceased had referred to Ignatius as 'Kijana'. This provoked the exchange of harsh words between each one them. In the same occasion, he stated that those of them who were in the room made attempts to deescalate the conflict from rising into a full-blown fight. This did not stop the accused person and the deceased started another conflict and harsh exchange between the two, necessitating the deceased to leave the house. As the deceased opened the door to exit, Ignatius rose up only to be informed by his wife that the accused was armed with a knife. In a twinkling of an eye, PW1 told the court that before even he could reach out to the accused person, he had already stabbed the deceased severally and streams of blood were seen flowing from the lower limbs of the deceased. Further, PW1 told the court that when the

accused made attempts to take flight from the scene, he was pursued by some of the members who were in the house and finally an arrest was effected and the area chief was called upon to facilitate in having the accused turned in to the police station. PW1 further informed the court that the celebration in his house involved drinking of alcohol in the course of planning a wedding which was to happen in the future. He also confirmed to the court that when the deceased referred to the accused as 'kijana' there was no negative response as it were from the accused. He went further to interpret the kind of reference words made by the deceased towards the accused which were kind of demeaning to somebody of the stature of the accused. The witness further told the court that the accused person was armed with a knife but initially did not see the knife until when the wife brought it to his attention. However, it was too late as the stabbing happened simultaneously on receiving the information from his wife about the accused being in possession of the knife. This was the same knife which was used to stab the deceased within the premises of his house.

4. PW2 – Isaac Kipchirchir told the court that on the material day, he received information that his brother Kennedy, the deceased had been assaulted at a scene in the neighbourhood and was already dead. He rushed to the scene only to find that the incident of murder occurred in PW1's house and the deceased was lying on the ground bleeding from the lower limbs. It was also in PW2's evidence that he saw a knife next to the deceased's body which knife he identified before this court. In cross examination, he told the court that he had arrived after the fact and the deceased was already confirmed dead. He described the scene as one in which the deceased's body was still inside the house of PW1 whereas the accused person was seated outside.

5. PW3: - Raymond Kiptoo testified that on 15th April, 2022 on or about 8:00 O'clock, he was at PW1's house attending an engagement ceremony. He further confirmed that in the same house was PW1 Nickson, the deceased, the accused and one Dennis. In his further evidence PW3 told the court that in the course of the discussions, there was a quarrel between accused and the deceased which was due to the provocation from the deceased. There was some form of reconciliation but according to his evidence, it did not last long as a second round of the conflict emerged again between the two. It was his evidence that when they had finalized all the discussions about the wedding preparations, the men to be in the line-up and all those incidentals, the evening meal was shared amongst the guests. He left the house only later to be informed that the accused had stabbed the deceased with a knife.

6. PW4 : Solomon Kosgei told the court he had been invited to attend a wedding engagement by one Bitok. In the said homestead, he was with the deceased and on arrival, there were other four people who included the accused person. According to PW4, in the course of the discussion on the wedding preparedness, the deceased told the accused: "you the resident of Kuinet, what are you doing here? This apparently according to PW4 annoyed the accused and a bitter exchange of words ensued but the members in the room urged them not to escalate the issue. To the best of his recollection, PW4 in addition told the court that they stayed in that room up to 9:30PM when he excused himself and one Dennis to leave for their respective homes. It did not take long, as they were walking home on or about 100 meters away from that. They both heard screams and returned back to re-confirm the circumstances of the distress call. On arrival at the scene, PW4 came into contact with the deceased on the veranda and was unconscious. In cross examination by the lead counsel, PW4 confirmed that the deceased was the one had initiated the quarrel but it was not apparent that it would result into his death.

7. PW5: Detective Karl Peters testified that on the 18th April, 202 he was instructed by the DCIO to investigate a murder which occurred in Soy sub-county.

8. As the investigating officer, his role included to visit the scene where he found the body of the deceased lying on the floor. The witness confirmed that as the body was found adjacent to the main door. The accused was also handcuffed with a rope by members of the public. The witness also processed the scene

by taking the body to MTRH for an autopsy, the metallic sword which was also taken in s an exhibit was later forwarded to the government analyst for a DNA profile. Given his role as the investigating officer, he produced the knife as exhibit 1, and the government analyst report as exhibit 2 and the autopsy report as exhibit 3. In a nutshell PW5 told the court that by the strength of the evidence collected from the scene and the witness statements, he formed the opinion of recommending the accused to be charged with the offence of murder by the Director of Public Prosecutions.

9. This court, by the requirement of the Law at the close of the prosecution case, the accused was called to give his defence under Section 306 as read with section 307 of the *Criminal Procedure Code*.

10. In his defence, the accused elected to give a sworn statement and in denying the offence gave an account of events of the material day in which he also took part in the engagement ceremony at the Bitok's family. The accused further told the court as part of the activities that he had alcoholic drinks with Nixon and others whom did not give their names because he had no prior knowledge of positive identification. He however was able to recall that one of the guests who was not known to him insulted him in Kalenjin "ng'etai wa kwinet" meaning uncircumcised man. From this conversation, the accused told the court that he responded to the statement uttered that he was not from Kwinet. Though he kept quiet, the deceased kept on insulting him while the social evening of taking alcoholic drinks continued in earnest with no major incident. In the words of the accused, he decided to step out from where he was seated that is when the deceased followed him and hit him against the door, this assault according to accused resulted to injuries to his forehead and fearing for his life he disarmed the deceased of the murder weapon which was produced before this court as having been in his possession. The accused further told the court that the persons in the room equally and mercilessly inflicted serious injuries which resulted in him being taken to MTRH for treatment.

11. With this background from both the prosecution and the defence, it is now my singular duty to assess the evidence to establish whether the prosecution has discharged the burden of proof beyond reasonable doubt.

Analysis & Determination

12. The criminal justice system is anchored on the presumption of innocence in Art. 50(2)(a) of *the Constitution* which has endured for centuries since 1700 and the basis of which English common law statement that the law holds that it is better that ten guilty persons escape than one innocent to suffer. The presumption of innocence is also clearly entrenched in the regime of international law which our domestic legal system ensures adherence within the scope of Art. 2 (5&6) of *the Constitution*. As if *the constitution* of the republic relied heavily on international law on this principle of presumption of innocence one has to appreciate the provisions of Art. 11 of the Universal Declaration of Human Rights (UDHR) which declares that everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he/she has had all the guarantees necessary for his/her defence. Likewise, the international covenant on Civil and Political Rights (ICCPR) under Art. 14 provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

13. The prosecution mandate is therefore to discharge this burden of proof of establishing that the accused person in this case committed the offence of murder beyond reasonable doubt. It is an evidential burden as laid down in section 107(1), 108 and 109 of the *Evidence Act*. The maxim of beyond reasonable doubt standard has three fundamental interests to safeguard the rights of an accused person. First and foremost, the accused's interest on the right to liberty and security as provided for in Art. 29 of *the Constitution*. Second, it protects an accused person against infringement or violation of his/her right to human dignity outlined in Art. 28 of the same Constitution. Third, it protects an innocent

person charged with a crime from the stigma of conviction when in the real sense, there was no evidence to meet the threshold of beyond reasonable doubt. In addition, it engenders public confidence in criminal law by giving concrete substance to *the constitution* of presumption of innocence. There is real danger if any criminal justice system will not ensure that proper safeguards are undertaken by the constitutional organs tasked with the duty of investigations like the National Police Service of Kenya in Art. 244 and the Director of Public Prosecution in Art. 157(6) &(7) of *the Constitution* do not keep vigilance in their decision making, the realization of the principle of presumption of innocence. It is my considered view that any acts of omission or commission done to water down to water down the guarantees and protection to realize the rights on presumption of innocence is likely to occasion a mockery to criminal trials for them just becoming little more than a formality. The superior courts in passing judgment on the standard and burden of proof of beyond reasonable doubt which is vested wholly with the prosecution and never shifts to the accused person have articulated the fundamental guidelines in the following case law:

14. In the locus classicus case of Denning J, as he then was in Miller v Ministry of Pensions [1947] 2 AII ER 372 he stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

15. The Supreme Court of Nigeria in Bakare v State [1985] 2 NWLR stated as follows:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says, not admit of plausible possibilities and fanciful possibilities but it does admit a high degree of cogency consistent with an equally high degree of probability."

16. The issue before this court is whether the prosecution has discharged the burden of proof of beyond reasonable doubt in respect with the charge of murder against the accused person based on the following elements.

    a. The death of the deceased,

    b. The death was unlawfully caused

    c. That in causing death of the deceased accused's unlawfully acts were accompanied with malice aforethought.

    d. That additionally the accused was the person who committed the offence on the material day as against the deceased.

17. In the instant case, there is no dispute that the deceased (Kennedy Kibet) is dead. This is informed by both the direct and circumstantial evidence more precisely the post mortem report dated 21st April, 2022 in which the pathologist Dr. Keitanny confirmed the death of the deceased and the cause of

death as due to severe haemorrhage due to stab injury/wound to left femoral region lacerating femoral vessels. (see Nyamhanga v Republic (1990-1994) EA 462, Ndiba v Republic (1981) KLR 103 and Rex v Muhoja s/o Manyenye [1942] 9 EACA 70. There is no dispute as to the proof of death as a requirement of the law under Section 203 of the *Penal Code* as against the deceased.

18. The second element is on proof of causation of death, which the law provides must be unlawfully caused. The starting point will be to lay the legal foundation as provided for section 213 of the *Penal Code* which defines causing death to include acts which are not the immediate or sole causes of the death. 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 on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as 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 an 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.

19. It is trite law that every homicide is unlawful unless justified or excusable as contemplated in Art. 26(4) of *the Constitution*. The landmark case of Guzambizi Wesonga v Republic [1948] 15 EACA 63 addressed this element as follows:

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

20. Like all elements of the offence of homicide, the element of actual causation must be proved beyond reasonable doubt by way of evidence. That is, it must be shown that it was more likely than not that the fatal injuries would not have occurred but for the accused person's breach of the duty of care. It is also the contemplation of the law that in terms of section 203 of the *Penal Code* as read with Art. 26(4) of *the Constitution*, this offence may be justified or excusable if the threshold provided for in section 17, 207 and 208 of the *Penal Code* is established by the accused person. However, it must not be lost by this court that the burden of proof is on the prosecution to prove beyond reasonable doubt that the case is not one of provocation or self-defence. The defence of self is clearly articulated in the following case law:

21. 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. But in DPP v Morgan (supra) it was held that:
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> 26. "..........if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether

the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."

22. In R v Williams [1987] 3 ALL ER 411, Lord Lane, C J held:

> " In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."

23. 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 law 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.

24. The defence of self as derived from section 17 of the *Penal Code* is that which is recognized lawfully to contribute in rendering the offence of murder to be substituted with that of manslaughter or for one to be fully acquitted for causing the death of the deceased. The key features which must co-exist for an accused person to take advantage of the defence of self, include the following:

    a. That the accused person reasonably believed that he was in imminent danger of an attack which causes reasonable apprehension of death or grievous harm.

    b. That the accused reasonable believed that the immediate use of force was necessary to defend himself against that danger coming from his victim.

c. That the accused used no more force than was reasonably necessary to defend himself against that danger being generated by the deceased. what this means is that in weighing the competing interests as between the evidence by the prosecution and the defence of self-raised by the accused the unlawful conduct shows that in inflicting harm against the deceased it was necessary for the purposes of defence. This therefore excludes the plea of self-defence in a case of murder where the accused himself was the aggressor and wilfully drove himself to the circumstances which resulted in use of excessive force.

25. In the perspective of this trial as narrated by the accused person in his defence apparently he was armed with a dangerous weapon prior to this attack being a knife, positively exhibited by the investigating officer (PW5) during his testimony in court. This murder weapon was produced as exhibit 1 by PW5. The investigating officer further told this court that the military like sword with a brown wooden handle was forwarded to the government analyst for a DNA profile. The analyst report dated 8th July, 2024 produced as exhibit 2 made the following positive findings:

> " Issues relating to genetic relationship:
>
> Every person has a unique DNA which is acquired from his/her parents who contribute half each from biological mother and father. By examining the DNA from a blood sample or any body fluid, it is possible to determine the origin of blood or body fluid given the blood samples or body fluid of the suspects.
>
> Conclusion and opinion:
>
> Based on the findings, the DNA profiles generated from the blood stains on the sword (Item "A") matches the DNA profile generated from the reference sample of Kenneth Kibet (deceased)."

26. The specifics of the prosecution case do establish that the initial reference of some Kalenjin words uttered by the deceased could not have been the cause of this second incident when the deceased was stepping out of the house only suddenly to be stabbed by the accused person, which injuries fatally terminated his life. There was no iota of evidence that the accused was under imminent danger which caused reasonable apprehension of him suffering death or grievous harm from the deceased. The defence by the accused person does not meet the criteria in which reliance can be placed on the defence of self as known in law under Section 17 of the *Penal Code*. This similar position can be precisely inferred from the guidelines taken by the court in Selemani v Republic [1963] EA in which the court stated that under English law, there is abroad distinction made where the question of self-defence arises. If a person against whom a forcible and violent felony is being attempted repels force by force and in doing so kills the attacker, the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by and reasonable apprehended from the attacker is really serious.

27. It will appear from the facts of this case the accused has not brought himself within the principles of the Selemani case (supra) for this court to avail him the doctrine of self-defence of either reduce the offence of murder to substitute it with that of manslaughter contrary to section 202 of the *Penal Code* or have him acquitted altogether. I am also satisfied that the elements of provocation under section 207 as read with section 208 of the *Penal Code* remain unproven. This being a common law principle domesticated in our legal system as a defence in homicide cases is satisfied on when the killing is founded on moral indignation or outrage, the result of which is that of uncontrollable rage which evidence can establish to be grave provocation. The defence of provocation under section 207 as read with section 208 of the *Penal Code* contemplates the elevation of emotion of anger above emotions of fear, despair

compassion and empathy. Unfortunately, this was not the case here as concerns the rage displayed by the accused person in stabbing the deceased with a knife occasioning instant death Consequently, I find the prosecution has proved beyond reasonable doubt that the death of Kennedy was unlawfully caused

28. As to whether the unlawful act of assault was actuated by malice aforethought, section 206 of the *Penal Code* defines it as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances —
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> a.an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
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> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. An intent to commit a felony; ord.an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

29. The factors in which such inference can be drawn, were laid out in the case of R v Tubere S/o Ochen [1945] 1 E.A.C.A. 63; when the deceased had been beaten to death with a stick. Justice Sir Sheridan stated that:

> " With regard to the use of a stick in cases of homicide, this court has not attempted to lay down a hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used, and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an interference of malice will flow more readily from the use of say, a spear or knife than from the use of a stick; that is not to say that the court take a lenient view where a stick is used. Every case has of course to be judged on its own facts"

30. In addition, the Tanzanian Court in Enock Kipela v Republic, Criminal Appeal No. 150 of 1994 (unreported) on the same principles to manifest malice aforethought stated:

> " Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors including the following: (1) the type and size of weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending on the facts, of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attacker's utterances, if any, made before, during or after the killing and (7) the conduct of the attacker before and after the killing."

31. The question is whether the accused in stabbing the deceased intended to cause death or new that the manner and degree of assault will probably cause death. From the definition itself, malice aforethought is a term of art or can be described as technical in nature as no judge or court is capable of reading the intention of man or of another human being. The *Penal Code* envisages a trial court to draw inferences

from the set of facts within the legal frame of circumstantial evidence. The following authority by the court in the case of Simoni Musoke v R [1958] E.A 715 it was held that:

> "In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That the circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. That it is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would destroy the inference."

32. In the case of R v Hillier [2007] 233 A.L.R 63, Shepherd v R [1991] LRC CRM 332 the courts observed that:

> "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 stand 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."

33. Having discounted the defence advanced by the accused person, what is left for the court to consider the circumstantial evidence within the scope of the Tubere case (supra) and Enock Kipela v Republic (supra). The narrative of the circumstances leading to the death of the deceased are traceable to the testimonies of PW1, PW3 and PW4 who witnessed the conflict between the accused and the deceased and subsequent unlawful stabbing of the deceased by the accused who are armed with a knife. There is uncontroverted evidence that the accused inflicted stab wounds on the proximal left thigh and the left iliac which severed the vessels resulting in severe haemorrhage. The knife was recovered at the scene and exhibited as exhibit 1 by the testimony from PW5. This dangerous weapon from the circumstantial evidence was supplied and targeted at the part of the body of the deceased with very deep cuts running through the femoral vessels. This is a case which cannot be described as accidental death as the circumstances conclusively are in line with the principles in the Tubere case. That whoever stabbed the deceased had formed the intention to cause the death of the deceased or grievous harm or he knew that his acts or the wounds would probably cause his death. Consequently, although the accused pointed to the deceased as an aggressor, that even the murder weapon came into his possession by disarming the deceased. In overall assessment of the evidence that was a false narrative. Having been involved in the trial of this case, the conceptualization of the evidence by the prosecution witnesses including their demeanour stayed on the line of truth which was never impeached by the accused person. I find that the prosecution has proved beyond reasonable doubt that the death of Kennedy Kibet was caused unlawfully and with malice aforethought.

34. Finally, the prosecution has to prove that it is the accused who caused the death with malice aforethought. In this case, there is credible direct and circumstantial evidence from PW1-PW5 placing the accused at the scene of crime as an active participant in the commission of the offence contrary to section 203 of the *Penal Code*. This was a 'koito' engagement ceremony at PW1's residence meaning that all the invited guests were either friends or known to the host. The evidence of PW1, PW2, PW3, PW4 places the accused squarely at the scene of crime. There is no mistaken identity or an error of facts on identification evidence. In his own defence, the accused admitted having been involved in a conflict with the deceased in the course of the ceremony. The accused by his own admission placed

himself at the scene of crime as an active perpetrator in the causation of the death of the deceased. His admission is also supported by the circumstantial scientific evidence in the government analyst report dated 8th July, 2024. Why do I say so? The accused is the one who stabbed the deceased and that knife was recovered, subjected to forensic analysis which showed that the blood-stained weapon clearly was from that of the deceased. I therefore find that the prosecution has proven beyond reasonable doubt that it is the accused and no one else who killed the deceased. that being the case, I find the accused guilty of the offence of murder contrary to section 203 of the *Penal Code* and hereby convict him as punishable under section 204 of the *Penal Code*.

Order On Sentence

35. This sentencing hearing, is predicated following the decision of the Supreme court in Francis Muruatetu v Republic [2017] eKLR which invalidated the mandatory death sentence as being unconstitutional. The court also laid down sentencing guidelines to be taken into account by a trial court before imposing an appropriate sentence. In addition, the trial court has got to be cognizant the Judiciary sentencing Policy guidelines 2023. At the date set for the hearing as a preliminary matter both the state and the defence submitted their different views orally on aggravating and mitigating factors for or against the sentencing verdict. The learned prosecution counsel for the state Ms. Kirenge invited the court to factor in aggravating factors like the use of a dangerous weapon being the knife which was recovered at the scene, the multiple injuries inflicted with no evidence of provocation on the part of the deceased. It was also the submission by learned prosecution counsel that the doctrine of judicial precedent should be followed by this court to impose a custodial sentence which is commensurate with the offence committed by the accused. The state contended that the unlawful acts of omission by the accused were in contravention by the right to life guaranteed by *the constitution*. In addition to these submissions, thee prosecution counsel invited a nominee of the victim's family who shared with the court on the victim impact the death of the deceased has caused the family and they were looking up to the court to ensure justice is served by passing an appropriate sentence. On the other hand, learned counsel for the defence Mr. Oduor submitted on mitigation highlighting that this offence in which the accused has been found guilty was underpinned on the defence of provocation on the part of the deceased.

36. Learned counsel further submitted that the accused before court is a young adult who has since regretted the incident with all its consequences and pleads for mercy from this court. The learned counsel also took the court through the rehabilitation and transformative trainings on theology undertaken by the accused person while in remand custody awaiting hearing and determination of his criminal case. Learned counsel also pointed out that during the pendency of this case, he approached the victim family so that they can get involved in victim offender mediation within the acceptable limits of the Nandi culture. It was further indicated that the initial family meeting took place on 16th August, 2023 aimed at incorporating the Nandi culture particularly on reparation. It is the law now in Kenya that an appropriate sentence should be one passed after hearing or receiving such evidence or submission in regard of the individual offender and circumstances of the case. Put differently, the Supreme Court decision in Muruatetu pronounced itself among other guidelines that a person or accused person should be heard in mitigation by the trial court before the sentence is meted out.

37. This court having considered the submissions of counsels on both the mitigating and aggravating factors, the sentencing policy guidelines and the dicta in Muruatetu, I have come to the conclusion that this was an homicide unlawfully committed with malice aforethought on an innocent and defenceless victim. As a consequence, the aggravating factors outweigh the mitigating factors offered by the accused person. doing the best in the circumstances to arrive at a fair and proportionate sentence and having taken into consideration the remand period whose countdown was from 8th May, 2022, I impose a

custodial sentence of 28 years' imprisonment. The commence shall commence from the 8th of May, 2022, the date of arrest of the accused and arraignment before the High court at Eldoret in Criminal Case No. E013 of 2022.

38. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 4TH DAY OF APRIL, 2025

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R. NYAKUNDI

JUDGE