



**Republic v Kibichiy (Criminal Case E005 of 2021)
[2025] KEHC 4345 (KLR) (4 April 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E005 OF 2021
RN NYAKUNDI, J
APRIL 4, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

WILFRED KIBICHIY ACCUSED

JUDGMENT

1. Wilfred Kibichiy was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that the accused on 12th January, 2021 at Kakong'u area, Kainuk division within Turkana South sub-county murdered Susan Kasiru Emure.
2. The accused person pleaded not guilty to the offence as stipulated under section 203 of the *Penal Code*. The lead prosecution counsel in these proceedings was Mr. Kakoi whereas the Accused person was represented by Mr. Ondabu under Art. 50(2)(h) of *the Constitution*.
3. In discharging its burden of proof, the prosecution called 7 witnesses who gave evidence in an attempt to establish the various elements of murder. The summary of their evidence is as follows:
4. PW1 Ekidor acknowledged as one of the workers of the deceased. In her testimony, PW1 gave chronology of events as they unfolded on the fateful day of 12th December, 2021. The highlights of it being the arrival of the accused person, who joined other customers and ordered for alcoholic drinks. The deceased also came and sat at the bar at around 10 pm. It emerged that a scuffle ensued as between the customers necessitating the deceased to push out one by the name TOO out of the compound. This is because, TOO had become unruly causing disturbance within the bar as against other customers. The conflict escalated to a level where Too Left the bar for the police post premises to harm himself with a firearm. On his return, gunshots were heard and in PW1 testimony, the victim of the shooting was the deceased and owner of glorious bar.



5. The next witness to adduce evidence on behalf of the prosecution was PW2 Nelly Amoit. This witness identify herself as a niece to the deceased and whom they lived together at Kakong'u Centre. In her narration of the chain of events, PW2 stated that the accused clearly known to her as a police officer used to visit the deceased in their residence. PW2 further recalled that on 12th January 2021, when she came back from school, she witnessed a fight between the accused, the deceased and Naomi apparently she is also her aunt. According to PW2, she happened to witness Naomi picking stones and targeting one Too the accused in this case against his head this resulted in physical injuries to the said accused. This fight occasioned the deceased to order TOO out of the premises as she retreated to her house. In PW2's testimony, that was not the end of the conflict as the accused came back armed with a rifle. The people around the premises cautioned the deceased that the accused person was armed with a rifle and it was necessary to take safety measures. That made her to close the door to her house but did not stop the accused to gain entry to the room where they were while carrying the gun. In the testimony of PW2 that when the accused pulled the deceased by her hand using the same rifle he shot at her on the head. That was followed with streams of blood from the deceased body parts.
6. PW3 CPL Domiano Lotian in the same vein told the court that on 12th February 2021, he left the camp to go and buy some foodstuffs. On his way back to the police post he met the accused who was in the bar operated by the deceased taking alcohol. In a little while PW3 concluded his conversation with the accused, living for his residence to take a nap. It did not take long, before the accused's wife went to his house conveying the message that her husband has been injured on the head. As PW3 was internalizing the information, he saw the accused person in a hurry armed with a G3 rifle and at the spur of the moment, gunshot was emanating from the bar. The creating disturbance of the accused and the gunshots demanded that persons around the scene seek for safety of their lives. In the mean time according to PW3 the head of Anti-Stock-Theft unit and other police officers disarmed the accused person but not after he had shot at the deceased.
7. The prosecution in pursuit to discharge the burden of proof, also sought the evidence of PW4 PC Moses Wafula. In brief, PW4 told the court that on 12th January 2021, he left the police camp for glorious bar owned by the deceased. Thereafter PW4 was joined by the accused and one by the name Cheby sharing drinks in that social moments. They were also joined by the deceased and sergeant Amalema continuing with the same activity of enjoying their alcoholic drinks at glorious bar. According to PW4, it did not take long for the accused and the deceased started quarrelling on grounds that the accused was exposing the deceased to the rest of the world that he had sexual relationship with her. That was not the end of the heated conversation as the accused ordered for drinks worth 550 and the deceased demanded to be paid to settle the bill. In addition, PW4 stated that it appeared the accused did not have the money to settle the bill he made a request for him to settle on his behalf which he did with civility but the accused later never refunded the debt. In the same reflection of events, PW4 testified that on or about 1pm, he received information from Cpl. Lotia that the deceased as been shot dead by the accused. As police officers of the area where the murdered had taken place, they all rushed to the deceased house, opened it only to confirm her body lying in the bedroom with fatal injuries on the arm and head.
8. PW5 Chief Inspector Alfred Mbalani a forensic ballistic expert testified on the following exhibit marked as;
 - a. One G3rifle S/no/KP-006622 marked Exhibit (A1)
 - b. One magazine marked Exhibit (B1)
 - c. Ten rounds of ammunition marked exhibit (C1-C10)



- d. Three spent cartridge cases marked Exhibit (D1-D3)
 - e. Two bullets marked Exhibit. (E1-E2)
9. On examination of the exhibits in the ballistic laboratory, PW5 arrived at the following findings;
- a. Comparative microscopic examination of exhibits IPOA (A1-A4) in conjunction with each other revealed sufficient matching ejector, firing pin and breech face markings which enabled me to form the opinion that they were all fired in one gun.
 - b. Exhibit (A1) is a G3 rifle S/no.006622 designed to be chambered with caliber 7.62*51mm ammunition such as exhibits (C1-C10). It is in good general condition and complete in all its components parts including its 20-round detachable box magazine marked exhibit (B1). It is capable of being fired as it was successfully test fired using three rounds of ammunition picked at random from the lot of exhibits (C1-C10).
 - c. Exhibit(C1-C10) are ten rounds in caliber 7.62*51mm. Each one of them is live as three rounds were picked at random and successfully test fired in exhibit(A1). The test cartridge cases and test bullets were recovered and marked (TC1-TC3) and (TB1-TB3) and retained for comparison purposes.
10. From the above examination, he formed the pinion that exhibit A (1) and (C1-C10) are capable of being fired and that they are firearm and ammunition respectively as defined under the firearms' Act, Chapter 114, Laws of Kenya.
11. Exhibit (D1-D3) are three fired cartridge cases. Each one of them is formerly a component part of a round of ammunition in caliber 7.62*51mm.
12. Exhibit (E1-E2) are two fired bullets. Exhibit (e1) weighs 8.54 grams while exhibit (E2) weighs 7.65 grams. Each is formerly a component part of a round of ammunition in caliber 7.62*51mm. The bullets are damaged as a result of hitting a hard surface thus have lost ballistic forensic data.
13. The witness additionally testified that further comparative microscopic examination of the exhibits IPOA(A1-A4) in conjunction with the test cartridge cases fired in the G3 rifle exhibit(A) and exhibit(D1-D3) submitted by DCI Turkana South, their laboratory reference number 285/2021 revealed sufficient matching ejector, breech face, firing pin indentation markings which enabled him form the following opinions.
- a. That the exhibits IPOA (A1-A4) and exhibits (D1-D3) were fired in the same firearm.
 - b. That the exhibits IPOA (A1-A4) and exhibits (D1-D3) were fired in the G3rifle S/NO.006622 marked exhibit (A1).
14. In closing the evidence for the prosecution, it was inspector Meshack Ombongi who testified as PW7 to walk the court through the chain of events from the investigations on the murder of the deceased which led him to conclude that the crime falls within the scope of section of 203 of the penal code. His evidence involved visiting the scene of the homicide, recording witness statements who have since testified in this trial, recovery of exhibits i.e. arms movement register, documenting the scene by way of photographic impressions which were admitted in evidence as exhibit 11, 12 a and b this is the evidence clustered together for this court to consider as to whether it meets the threshold of prima facie case. If the prosecution fails to establish a prima facie case, it will be reasonably probable to acquit the accused person without calling him to state his defense.



15. At the close of the prosecution case pursuant to section 306 of the criminal Procedure code, a finding was made by this court that a prima facie case has been made out by the prosecution on the elements of the offence of murder contrary to section 203 of the *Penal Code*. As a constitutional imperative under Art. 50 of *the Constitution* as read with section 306 and 307 of the Code, the accused elected to give a sworn statement laying down the background which led to the allegations of murder in the charge sheet which was instrumental for his trial as having been culpable for the offence. The accused informed the court that prior to his indictment, he worked as a police officer at the rank of a constable at Kainuk Police post. From the onset, he denied to have committed the offence as prosecuted by the state. According to the accused, on the material day of 12th January, 2021 in the morning. He left his work station for Lockichar arriving at Kakong police post, took a short nap up to around 8:30. That is when he heard his phone calling and on a quick check, it was one from PC Wafula trying to reach him via the voice call. That upon exchanging greetings with PC Wafula, he decided to join him at a nearby bar where they had a stint of ordering for a beer together with another officer but he sat outside where the other customers were also having alcoholic drinks. In his testimony, on or about 10AM, the cleared their bills and parted ways. He left for his house to have some rest. It was around 11:30AM when he heard a knock at the door and on checking, it was corporal Lotiang from Kakong Police Post and that is when he learned of a complaint on the theft of goats lodged by woman which required police assistance. It was therefore decided that himself, PC Wafula, Corporal Lotiang make arrangements to pursue the suspects who had taken flight with the herd of goats. This pursuit involved corporal Lotiang and PC wafula taking a different route while he also took a different route in order to increase the chances of effecting the arrest. Unfortunately for him according to his defense, he came into contact with the suspect who in retaliation assaulted him on the head while armed with pangas and sticks. This attack triggered the action of him firing in the air with a view to scare them away so as to dispel any further attacks. It was at that moment he got a chance to take flight from the scene and sought refuge at Kakong police station. Incidentally and simultaneously the accused told this court that as he was running away he could hear other gunshots not from his firearm. It was only later after investigation, he was apprehended and charged of the offence of murder which he never committed.
16. In Cross examination by the lead prosecution counsel Mr. Limo, the accused vehemently denied that the life of the deceased was lost as a result of the gunshot he fired in the air only meant to scare away the suspects of theft of goats.

Analysis and Determination

17. Having provided that background and examined both the evidence presented and submissions filed, this court must now determine whether the prosecution has established a case against the accused persons to the required standard of proof beyond reasonable doubt as to the individual responsible for the death of SUSAN KASIRU EMURE.
18. The prosecution's evidence must be evaluated in accordance with the provisions of Section 107(1), 108, and 109 of the *Evidence Act*, which stipulate as follows:
- 107: (1)Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- 108: The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.



- 109: The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
19. In *Kioko versus Republic* (1983) KLR 289, the court of appeal held that the law does not require the accused to prove his innocence save in a few exceptional cases under Section 111 of the *Evidence Act*. The test remains that of beyond reasonable doubt not of any doubt at all.
20. In section 203 of the *Penal Code*, which provided for murder envisages the following ingredients to be proved beyond reasonable doubt:
- 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 the accused is responsible in causing the death of the deceased.
21. The Court in *Mbugwa Kariuki v The Republic* [1976-80] 1 KLR 1085 emphasized:
- “That the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.”
22. The rationale behind the proof of the prosecution case beyond reasonable doubt is based on the provisions of; Article 50(2) (a) of *the Constitution* of Kenya, 2010, which stipulates that every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved.
23. 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.”
24. The initial burden of proof rests with the state to establish all elements of the offense beyond reasonable doubt before a conviction can be secured. This burden appears to shift to the accused persons only in two specific circumstances:
25. First, in the exceptional scenarios outlined under Section 111 of the *Evidence Act*.
26. Second, when the defense raised falls within the categories of insanity, justification, excusable acts, self-defense, or other legally recognized presumptions. When an accused person presents such defenses, particularly those related to self-defense or provocation, they are not contesting the factual allegations. Rather, they are acknowledging the actions or omissions asserted by the prosecution while claiming



justification or excuse from criminal liability. Other defenses, such as insanity, are intended to absolve the accused from liability due to mental incapacity, as may be applicable in this case.

27. Under Art. 50 (2) (a) of *the Constitution* the accused is presumed innocent until the contrary is proved either by direct or circumstantial evidence. Two primary classifications are used for evidence: circumstantial evidence or direct evidence. Circumstantial evidence indirectly proves a fact whereas direct evidence directly establishes a fact. In *People v Bretagna* (298 NY 323, 325-326 [1949]) the court addressed itself in the following language:

“Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred” see *People v Hardy*, 26 NY3d 245, 251 [2015] By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)”; *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]”

28. An analysis of the facts of the case reveal that is purely a case built on circumstantial evidence. The law on circumstantial evidence is settled. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows:-

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

29. Further, the court in *Republic v Jumaa Kaviha Kalama Ndolo* [2020] eKLR citing the case of *DPP Kiborne 1973 AC 729*, stated as follows on circumstantial evidence: -

“Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords: One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of.”

30. In analyzing whether the prosecution has met its burden, this Court must carefully evaluate the testimonies presented to determine if the circumstantial evidence forms a coherent narrative. PW1



Ekidor testified about the accused's presence at the bar, a scuffle involving several patrons, and subsequent gunshots. PW2 Nelly Amoit described seeing the accused with a rifle at the scene, and provided testimony about an interaction between the accused and the deceased. PW3 CPL Domiano Lotian stated he observed the accused moving hurriedly with a G3 rifle, followed by sounds of gunshots coming from the bar's direction. PW4 PC Moses Wafula described earlier interactions between the accused and deceased, including conversations about their relationship and a dispute regarding unpaid bills. PW5 Chief Inspector Alfred Mbalani presented forensic evidence regarding the recovered bullets and cartridges in relation to the accused's service weapon.

31. When evaluating circumstantial evidence, the court must consider not only each piece of testimony individually but also how the various accounts may corroborate or contradict one another. The accused has offered an alternative explanation, stating he discharged his weapon only to defend himself against suspected goat thieves who had assaulted him. The court must therefore carefully weigh this defense against the prosecution's evidence, considering whether the totality of circumstances establishes the elements of the offense beyond reasonable doubt, or whether reasonable doubt remains as to the accused's criminal liability in the death of Susan Kasiru Emure.
32. It is well established that any crime in our legal system requires proof of both mens rea (guilty mind) and actus reus (guilty act). The trial court has an obligation to ensure that before entering any conviction, both elements have been proven beyond reasonable doubt. This principle was affirmed in the case of Joseph Kimani v R (2014 eKLR). In murder cases specifically, the following essential elements of the offense must be proven beyond reasonable doubt, without relying on conjecture or suspicion.
 - a. The death of the deceased one.
 - b. The death was unlawfully caused
 - c. The death was caused with malice aforethought
 - d. The accused persons participated in or caused the death of the deceased.
33. The first issue for consideration is proof of death. In the instant case, there is no dispute of the deceased's death. This was confirmed by all the prosecution witnesses, particularly by the evidence of PW7 Inspector Meshack Ombongi who testified about visiting the scene of the homicide and documenting it with photographic impressions (admitted as exhibits 11, 12a and 12b). The post-mortem examination determined that Susan Kasiru Emure died from gunshot wounds. By consent of the State and Defence Counsel herein, the investigating officer produced the Exhibit Memo Form requesting analysis of the exhibits, the resulting ballistic expert report from PW5 Chief Inspector Alfred Mbalani showing that the spent cartridges and bullets recovered were fired from the G3 rifle registered to the accused, along with other physical evidence as exhibits in the matter. The evidence established that the deceased sustained fatal injuries to the arm and head resulting from gunshot wounds. Accordingly, it is my opinion that the prosecution has satisfied this element beyond reasonable doubt.
34. The next ingredient is to determine whether the death of SUSAN KASIRU EMURE was an unlawful act or omission. Put differently, it must be presented in evidence that the victim of the murder suffered either physical or bodily harm as a result of the unlawful act of omission or commission. That the evidence demonstrates beyond reasonable doubt that the injuries inflicted leading to the loss of survival of a human being as known in law were unlawfully executed. It is therefore necessary to appreciate the scale of evidence on this ingredient as submitted before this court by the prosecution. In the present case, PW2 Nelly Amoit testified that she witnessed the accused pull the deceased by her hand using a rifle and shoot her in the head, resulting in streams of blood from the deceased's body. PW4 PC



Moses Wafula further confirmed finding the deceased's body lying in the bedroom with fatal injuries to the arm and head. The forensic ballistic evidence from PW5 conclusively established that the spent cartridges recovered from the scene were fired from the G3 rifle registered to the accused, weapon marked as Exhibit (A1).

35. On the question of whether there was malice aforethought on the part of the Accused, Section 206 of the [Penal Code](#) defines Malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (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;
- (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; (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

36. Malice aforethought, though not defined under Section 206 of the [Penal Code](#), constitutes an essential element in murder cases that manifests either directly or through inference from case circumstances. In some instances, evidence clearly demonstrates the perpetrator's premeditation to commit murder, while in others, malice aforethought emerges as part of an evolving sequence of events occurring before, during, or after the homicide. The legal provisions permit a nuanced examination of this mental state, allowing courts to apply the concept flexibly to the specific facts of individual cases. This adaptability ensures that the requisite mental element for murder charges can be appropriately established across diverse situations, with each case evaluated on its unique factual basis. The extract from one of the landmark cases ever litigated in South Africa in *S V Pistorius 2016 (1) SACR 431 (SCA)*, tends to articulate this concept of intention for purposes of clarity as follows:

“In the case of murder, there are principally two forms of dolus which arise: dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore ‘gambling’ as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act ‘reckless as to consequences’ (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have ‘reconciled’ with the foreseeable outcome. Terminology



aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions, It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.”

37. The Court of Appeal in the case of Joseph Kimani Njau v R [2014] eKLR, the Court of Appeal held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the

following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

38. When construing section 206 of the *Penal Code* on malice aforethought, liability for murder attaches if death ensues as a consequence of the use of the weapon or a consequence of the possession of a weapon which was in possession of an accused person during the commission of the offence and there is material evidence that the same weapon was used to inflict the fatal injuries. The policy behind section 206 is to put the risk of killing a victim during the cause of the commission of the offence upon the accused to a higher degree to present a distinction between the offence of murder and manslaughter. Patently, the legislature in enacting the provision made a decision that any person who will be in possession of dangerous weapons and so manifestly intends to use that weapon to endanger the life of others and as a consequence of the use of the weapon during the commission of the offence of assault or causing grievous harm, the underlying offence of murder becomes the final outcome of that unlawful act, he/she would have been presumed to have intended that risk of death to bear the full responsibility of the crime.

39. The provision is so broad that under it, a person may be found guilty of murder even though the death was a result of an accident of using that dangerous weapon like a firearm in the instant case. The statute being the *Penal Code* outlaws the unlawful killing of another human being with malice aforethought. The law within our jurisdiction recognizes and permits the defense of self under Section 17 and provocation in section 207 and 208 of the *Penal Code* as a justification by the defendant to have used a dangerous weapon to inflict serious harm against another human being but it is upon the trial court to assess the veracity and viability of the evidence adduced by an accused person to establish whether on balance of probabilities the death was excusable or justified. It is the finding of this court in other decisions and decisions of other superior courts that the issues require that the accused person to adduce admissible evidence that at the time of the incident, he had a reasonable belief that the use of deadly force was necessary to repel a threat of death or bodily harm which was imminent from the victim or the initial assailant which could not wait for him not to strike first and for the accused to have an opportunity to retaliate to that attack.



40. The first point of consideration is whether the accused person had a duty to retreat and to take positive steps for his own safety before he could be able to use a dangerous weapon like a firearm against the victim. In the case at bar, the accused person's defense made some attempts to raise the defense of self, conflicted with an alibi defense on the chain of events when he came into contact with the suspects of livestock who apparently included the deceased. It was his case that there was some level of imminence of attack by the suspects and some of the weapons in their possession were used to inflict harm targeting his head and with that closer proximity, he used his firearm to shoot in the air so as to scatter the suspects in defense of self. Although the defense provides only a synopsis of the criteria used by courts to assess self-defense claims, the prosecution's cogent evidence on how the deceased was shot with a firearm in possession of the accused persuades this court that the self-defense requirements are not available to the accused person as defined Section 17 of the *Penal Code*. This section permits a self-defense justification when a reasonable person believes the use of physical force to be necessary to defend himself, herself or a third person from what he/she reasonably believes to be the use or imminent use of unlawful physical force by such other person subject to several exceptions on a case to case basis.
41. Given the application of International Law in the promotion of our jurisprudence as provided for in Art. 2(5) & (6) of *the Constitution*, according to international standards such as the code of conduct for Law enforcement officers, the basic principles on the use of force and firearms are that effective prevention and investigation of extra-legal, arbitrary and summary executions are prohibited under only permissible and exceptional circumstances. The principles regarding the use of force that are often contained in international documents and even in our national guidelines include the following:
- a. Legality which requires that force be used only to pursue legal aims
 - b. Necessity: That is, that there are no alternative or less violent means to achieve the same end.
 - c. Proportionality: which means that force used by the state agents, the military sector of the National Police Service or other armed state actors or employees cannot significantly exceed that used by suspects or an adversary.
 - d. Precaution: it imposed a duty on the state to plan law enforcement operations in a manner that minimizes the use of excessive force.
 - e. Accountability: which means that the state has to duly investigate incidents of lethal force and inform the relatives of victims of the outcome of such investigation. This is also a value and principle of governance in Art. 10 of our Constitution.
42. It was in this respect that the African Commission on Human and People's rights in its general comment No.3 with regard to the right to life in Art. 4 specifically states that the intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life and all other means are insufficient to achieve that objective. In other words, even taking for a moment what the defense made attempts to explain to this court, there was no probative evidence that the principle of necessity can be availed as a defense to the accused, that the shoot out was such that a need had arisen to protect the property and other human lives to warrant the use of lethal force on the material day. This is an incident of interest where all evidence by the prosecution points to the culpability of the accused person presumably as a member of the police force, the accused failed to show cause why he shot dead the owner of the bar where they had gone to have a social evening with other officers, which should not have ended in the abuse of his office and subsequent infringement of Art. 26 of *the Constitution* on the right to life. The manifestation of express malice as provided for in Section 206 of the *Penal Code* as an indicator of use and abuse of lethal force has been settled by the prosecution beyond reasonable doubt.



43. As for this case, the prosecution proved beyond reasonable doubt that the accused did not act in self-defense. This is a case where the facts demonstrate that the accused acted with malice and having had a drinking spree of alcohol within the local market. The accused person appears to have manufactured a claim of self-defense that when he was pursuing the alleged thieves of stock and on coming onto physical contact, they retaliated by use of force against him and that is what triggered the use of a firearm. What the accused failed to answer if the shooting was in the air to scare away the suspects, how come that approach occasioned precise targeted injuries to the deceased which instantly resulted to her death. This was a defense which was unable to place before court evidence on the homicide having been justified or excusable for the court to make a finding of a lesser offence of manslaughter contrary to section 202 of the *Penal Code*. Therefore, it is the finding of this court that the element of malice aforethought on the part of the accused person is incompatible with the self-defense relied upon by the accused.
44. The scene of crime being formulated by the accused person and the altercation was a false misrepresentation of facts, non-disclosure on the events which culminated in the death of the deceased who was clearly not one of the suspect of stock theft as alleged by the accused person. The scope of the situational analysis as drawn conclusively from the circumstantial evidence in support of the prosecution's case, the scene of crime was within range of the local pub where the accused and others not before court were enjoying a social drinking moment and at one time an argument ensued on the bills incurred by the accused, which soon thereafter became a full blown conflict and his recklessness he went to his residence to pick his firearm which he functionally used to inflict the fatal injuries to the innocent victim. This is an accused person who desired to kill the deceased and there was no reasonable fear for his safety. This scenario by the accused is farfetched and described as hypothetical to the real and actual murder contrary to section 203 of the penal code.
45. The evidence presented establishes that the deceased died from gunshot wounds. PW4 PC Moses Wafula testified that they found the deceased's body lying in the bedroom with fatal injuries to the arm and head. By consent of the State and Defence Counsel herein, the Investigating Officer produced the Exhibit Memo Form requesting analysis of the exhibits, which led to PW5 Chief Inspector Alfred Mbalani's forensic ballistic examination. This examination conclusively established that the spent cartridges recovered from the scene were fired from the G3 rifle registered to the accused person, marked as Exhibit (A1). The evidence further established that the fatal injuries were consistent with gunshot wounds, contributing to the deceased's death.
46. The evidence presented by PW2 indicated that the accused was armed with a rifle when he entered the deceased's premises. PW4's testimony about prior arguments between the accused and the deceased regarding their relationship and unpaid bills potentially establishes motive. Furthermore, the nature of the injuries gunshot wounds to the head and arm and the use of a deadly weapon (G3 rifle) are indicative of an intention to cause death or grievous harm. In the circumstances, I am persuaded that the prosecution has established the presence of malice aforethought in this case.
47. Having analyzed all the required elements of the offense of murder; the death of the deceased, that the death was caused by an unlawful act, and that the act was committed with malice aforethought, the court must now determine whether the accused person is criminally responsible for these acts. This determination requires careful consideration of all witness testimonies, forensic evidence, and the defense presented by the accused before reaching a final conclusion on criminal liability. The evidence



adduced was based on visual identification. In the case of *Wamunga v Republic* [1989] KLR 424 the court stated that:

“Where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

48. In the case of *Republic v Turnbull & others* [1976] 3 ALLER 549 the court drew special attention to questions to be asked when it comes to identification of a perpetrator of the offence by a victim. It stated thus:

“The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them as his actual appearance?..... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

49. The evidence adduced was based on visual identification by multiple witnesses who knew the accused prior to the incident. PW2 Nelly Amoiti clearly identified the accused as a police officer known to her who frequently visited their residence. Her testimony placed the accused at the scene armed with a G3 rifle. PW3 CPL Domiano Lotian likewise identified the accused hurrying with a G3 rifle moments before gunshots were heard. PW4 PC Moses Wafula, a colleague of the accused, also placed him at the bar earlier in the day. The identification evidence is further strengthened by the forensic ballistic report from PW5 Chief Inspector Alfred Mbalani, which conclusively linked the spent cartridges recovered from the scene to the accused's service rifle. The conditions for identification were favorable adequate lighting, close proximity, and prior acquaintance with the accused, eliminating any reasonable possibility of mistaken identity. Given these circumstances, I am satisfied that the prosecution has established beyond reasonable doubt that it was indeed the accused who was at the scene and in possession of the murder weapon at the material time.
50. Having thoroughly analyzed the evidence presented by the prosecution and the defense offered by the accused, this Court finds that the prosecution has successfully discharged its burden of proving all the essential elements of the offense of murder beyond reasonable doubt. The evidence conclusively establishes that Susan Kasiru Emure died from gunshot wounds inflicted by a G3 rifle that was in the possession of the accused, Wilfred Kibichiy. The accused's defense that he discharged his weapon only to ward off suspected goat thieves is contradicted by the compelling eyewitness accounts and forensic evidence linking his service weapon to the bullets recovered from the scene. The circumstances of the shooting, following an argument over unpaid bills and their relationship, the accused arming himself with his service rifle, and the targeted injuries to the head and arm demonstrate the presence of malice aforethought as defined under Section 206 of the *Penal Code*. The accused's actions were neither justified nor excusable under the law. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the offense of murder against the accused person beyond reasonable



doubt. I therefore record and enter a finding of guilty and conviction against the accused as charged. The sentencing hearing is scheduled for 12th March, 2025.

Ruling On Sentence

51. The accused person, Wilfred Kibichiy, having been convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the court is now called upon to consider an appropriate sentence in accordance with established legal principles and sentencing guidelines.
52. The mandatory nature of the death penalty has been outlawed by the Supreme Court in the now famous case of Francis Karioko Muruatetu and Another v Republic and Others 2015 eKLR. The court stated:
 - “ 45. To our minds what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.
 46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the constitution does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of the Constitution are not exhaustive.”
53. The court further pronounced:
 - “ 58. We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of the Constitution.”
54. In mitigation, learned counsel in his oral submissions told the court that the accused regrets the offence, that he is a first offender and also takes into account that the accused was a former police officer who maintained a clean record. Learned counsel urged this court to extend leniency when exercising discretion to impose sentence against the accused person.
55. On the other hand, Mr. Lele for the family submitted that the court should take into account the unlawful conduct of the accused person which was not justified or excusable. According to learned counsel Mr. Lele, the shooting of the deceased was not even accidental for the accused person premediated the consequences of his actions. According to Mr. Lele, the accused’s conduct psychologically and physically traumatized the family where the children of the deceased were



orphaned at a very young age. Mr. Lele invited the court to pass a sentence commensurate and proportionate to the unlawful acts of the accused.

56. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines to be the following:

- 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.

57. In determining an appropriate sentence, I must take into consideration both aggravating and mitigating factors. The Supreme Court in the Francis Muruatetu case provided guidelines in respect of re-hearing sentence for the conviction of murder charge to include:

- “(a) Age of the offender;
 - (b) Being a first offender;
 - (c) Whether the offender pleaded guilty;
 - (d) Character and record of the offender;
 - (e) Commission of the offence in response to gender-based violence;
 - (f) The manner in which the offence was committed on the victim;
 - (g) The physical and psychological effect of the offence on the victim’s family;
 - (h)) Remorsefulness of the offender;
 - (i) The possibility of reform and social re-adaptation of the offender;
 - (j) Any other factor that the Court considers relevant.
- ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the [Penal Code](#) before the decision in Muruatetu.”



58. 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.”

59. In weighing the relevant factors of this case, I find several aggravating circumstances that must be considered. First, the accused was a police officer, entrusted with the responsibility to protect citizens and uphold the law. The position of trust held by the accused significantly increases the gravity of this offense. This betrayal of public trust demands a sentence that reflects the seriousness with which society views such violations.

60. Second, the evidence presented at trial established that the accused used his service firearm, a G3 rifle, to commit this offense. The misuse of an official weapon issued for the protection of citizens represents a particularly serious breach of duty. The forensic evidence conclusively linked the bullets recovered from the scene to the accused's service weapon, leaving no doubt as to the instrument used in this homicide.

61. Third, the manner in which the offense was committed shows particular aggravation. The court has found that the accused, following a dispute over unpaid bills and their relationship, deliberately returned to his residence to retrieve his service rifle, then returned and shot the deceased in the head and arm. This sequence of events demonstrates calculation rather than a spontaneous act of violence.

62. *The constitution* of Kenya imposed a duty on the state or its organs, citizens including the police not to perform any unlawful acts or omissions that infringes on entrenched rights under chapter 4 such as the right to life in Art.26 of the same constitution. This also includes the right to security and dignity of the person in Art. 28 and 29 of the same Constitution. The state obligation in this respect extends beyond this umbrella duty to secure the right to life protected and guaranteed in Art. 26 of *the Constitution* by putting in place effective criminal justice actors, legal framework and other procedural protocols to prevent and deter the commission of offences against any other person within our borders. Accordingly, the National Police Service with its agents and employees are mandated by *the Constitution* to ensure that they exercise their powers to control and prevent crime in a manner which legitimately restrains any misuse of firearms and ammunition lawfully issued to any of the Police officers like the accused person before court to infringe the right to life of any human being or citizens whom they may come into contact with for one reason or another. The facts of this case establish to the satisfaction of this court that at the time of the commission of this offence, the accused knew or ought to have known at the time of discharging the ammunition from the magazine through the barrel of the gun there was real and immediate risk to the life of the deceased. This evidence was never controverted by the accused person. He gave general explanations which were more evasive while he was positively identified as the perpetrator of this violent crime. This is a case where the circumstances of this homicide justified imposition of death penalty, but given the reluctance by the executive to sign the necessary instruments for execution of the sentence, I find it not necessary to pass this sentence against the accused person.



63. I take cognizance of both the aggravating and mitigating factors as advanced during the sentencing hearings. Turning to their assessment of these critical factors which must be weighed in the process of the court exercising discretion to arrive at a fair, just and proportionate sentence for the crime in question, one is bound to ask the question, what is remorse? In my view, it connotes repentance, contrite heart and inner soul searching geared towards seeking forgiveness from the victim of the offence and the public at large. In my assessment, the mitigation applicable in this case stated in court does not seem to come from the appreciation and acknowledgement by the accused of the extent of his poor judgment which caused the death of the deceased without any justification or excuse. Therefore, what he said in court of being remorseful or that he regrets the offence, to me it is a mere ritual lacking the factual basis for this court to make a finding that this was a true, genuine contrition of his criminal conduct as a consequence of which that the aggravating factors outweigh any mitigation alleged to exist by the accused person to contribute towards the reduction of sentence under Section 204 of the *Penal Code*.
64. With regard to the final verdict, there are other compelling sanctions in the circumstances of this case which will also attain the objective of the ends of justice. As for the accused, he breached constitutional and statutory duty to prevent, combat and investigate crime to maintain public order to protect and secure the inhabitants of this Republic, their properties and to uphold and enforce the law. I am mindful in passing this sentence, that it was part of the accused's work to ensure the safety and security of the deceased. Therefore, in balancing the competing interests and rights of the deceased who lost her life prematurely leaving behind a young family and the interest of the public as part of the key pillars in the Criminal Justice system, I sentence the accused person to 45 years' custodial sentence also underpinned under Section 333(2) of the *Criminal Procedure Code* that the committal warrant commencement date be and is hereby scheduled to be 28th January, 2021.
65. 14 days right of Appeal explained.

DATED AND SIGNED AT ELDORET THIS 4TH APRIL, 2025

.....

R. NYAKUNDI

JUDGE

In Presence of:

Mr. Kakoi, Prosecution Counsel

Mr. Lele, Advocate watching brief for the family.

