Republic v Wahome (Criminal Case E009 of 2021)
[2024] KEHC 10051 (KLR) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10051 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL CASE E009 OF 2021

RN NYAKUNDI, J

AUGUST 8, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

SIMON MAINA WAHOME ..... ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 19th August, 2021, at Nakwamekwi village in Turkana Central Sub-County within Turkana County murdered Susan Amatapal

2. The accused pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The lead prosecution counsel in these proceedings Mr. Kakoi for the state whereas the defence was under retainer of Learned counsel Mr. Ondabu duly appointed under article 50 (2) (h) of *the Constitution*.

3. The burden of prove at all material times is vested with the state and it never shifts to the accused person at any one time except in the surrounding circumstances defined under section 111 of the *Evidence Act*. However, notwithstanding that legal position, it is the duty of the state to disapprove the doctrine of presumption of innocence guaranteed as a right to the accused person beyond reasonable doubt.

4. In this respect, the prosecution summoned 6 witnesses in support of their case to prove each element of the offence. The case for the prosecution as prosecuted by learned prosecution counsel, comprised of the following factual matrix.

5. First to take the witness stand was Peter Ekatorot (PW1). In his evidence PW1 told the court that he is a security guard attached to Bob Morgan Security service and apparently the deceased was his sister. That on 19th August, 2021 his sister by the name Margaret passed through his house in company of her husband Simon Maina. In the fullness of time on that material day, PW1 narrated that the three of them left for the homestead of their sister by the name Susan herein the deceased in these proceedings.

According to PW1, on arrival at the house of the deceased he was found to be unconscious and her face and head were swollen. It was agreed that the deceased be taken to hospital for examination and treatment. This led to her being admitted at the ICU in Eldoret Hospital for care and management. However, after six days they were informed that the deceased had succumbed to death.

6. Next in line in support of the prosecution case was Margaret (PW2) who affirmed that on 19th August, 2021, in company of her husband and PW1 they proceeded to the home of the deceased only to find her having sustained injuries to the head. She was therefore taken to Lodwar Hospital and later referred to Eldoret Hospital as a referral case from the initial medical facility.

7. In the same breadth, PW3 (Ekal Asimit) was summoned and on reflection he told the court that on 16th August, 2021 one Maina went to his house and inquired whether the deceased was in the house. He answered in the negative and further told the court that later he overheard people saying that the deceased was in ICU and in a few days she was declared dead. PW3 further alluded that the deceased had told him that Maina was her boyfriend and indeed they were cohabiting together during her lifetime.

8. Further on this trajectory, to establish the guilt of the accused person, PW4 longolol Adipo testified as a landlord to the deceased. He recalled that on 16th August, 2021 the accused went to his house and demanded that if the deceased was not in her house he was going to kill her that same day. In PW4's evaluation the accused appeared to be annoyed and in anger. In the days which followed PW4 was informed that the deceased had been taken to the hospital and was under ICU. It did not take long before she was pronounced to have succumbed to death.

9. The prosecution further summoned the evidence of PW5 by the name Dr. James Ekuru, a medical doctor in charge of Clinical services at Lodwar Referral Hospital, who testified on behalf of Dr. Kidalio, who on the face of the record conducted the postmortem examination, subject matter of this trial. The key features as explained by PW5 as founded by Dr. Kidalio, was to the effect that on examination of the deceased, the following features manifested:

> "-Right Temporal Scalp Ecchymoses with surgical wound (sutured) drain.Surgical wound (sutured) on the right Lumbar RegionSkull fracture with subdural Haematoma (right temporal region)"
>
> As a result of the examination, the pathologist formed the opinion that the cause of death was a severe head injury with massive subdural Hematoma & raised intracranial pressure. To that extent, PW5 produced the postmortem report dated 6th September, 2021 as exhibit 1 on behalf of Dr. Kidalio.

10. PW6 was No. 107348 PC John Ngoto took the witness stand with a narration that on the 19th of August, 2021 a case bodily harm was reported by the brother to the complainant now deceased. He testified that he attended the crime and on investigation it was established that one Simon Maina Wahome, the husband to the deceased was the one who inflicted the fatal injuries. He activated a search and arrest of the accused person as a suspect for the offence of murder. The entire investigation the established that the accused person was the perpetrator. That is in so far as the summary of the prosecution's case is concerned.

11. At the close of the prosecution case, which from the record was before the session judge, Sergon as he then was as the presiding judge at Lodwar High court. On 1st March, 2023 a ruling was delivered in which the judge pronounced himself as follows:

> " I am satisfied that prosecution has made out a prima facie case. Consequently, the accused has a case to answer hence is placed on defence."

12. Following that decision, the accused elected to give a sworn statement of defence, in which he stated as follows:

That the deceased was a person well known to him as they cohabited as man and wife. The Accused gave a narration that on the 19th August, 2021 it was a Wednesday at about 10PM, the deceased came home drunk and that she appeared to have suffered physical injuries. the accused decided to place her on the top of one of the beds in the room as he also retired to sleep on another bed in the same premises. According to the accused in the morning the deceased was trembling and for him he concluded that the intoxication was the cause of that condition. He therefore told his boys to go to the shop to purchase some milk and sugar to be used as first aid to resuscitate the deceased. When her condition did not improve the accused sent for means of transport to escort her to Lodwar referral Hospital and simultaneously informed the relatives of the new development on the wellness of the deceased. It was only after few days that the deceased succumbed to death. He denied any involvement in causing the unlawful death of his spouse.

Analysis And Determination

13. At the end of both the prosecution and the defence case, directions were given to both counsels to file written submissions but on perusal of the record, none of them complied with the order.

14. The offence of murder under section 203 of the penal code comprises of the following ingredients;

    i. Death of a human being

    ii. Unlawful causation of that death

    iii. The said unlawful causation having been one with malice aforethought

    iv. The participation of the accused in causing the said death

15. The Prosecution is under duty under article 50(2) (a) of *the Constitution* to dislodge the doctrine of presumption of innocence protected as aright in favor of an accused person. To discharge that evidential burden, the threshold outlined in section 107, 108 and 109 of the *Evidence Act* is central to the prosecution case. Primarily, Section 107(1) reads as follows:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

16. That justification of the burden of prove has been articulated at various levels of our superior courts as stated in the following authorities: Republic v Nyambura and four others (2001) KLR 355, Semfukwe and others versus Republic (1976-1985) EA 536, Modokaa Versus Republic (2000) KLR 411, Dhalay versus Republic (1995-1998) 1 EA 29. The essentials of all these authorities is well understood in

reference to the persuasive case in Woolmington v DPP (1935) MAC 462. This is the locus classicus statement on the burden of proof beyond reasonable doubt in criminal cases.

> " Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilty subject .... To the defence of insanity and subject to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or what the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

17. A casual examination of the evidence reveals that this was purely a death to be proved by circumstantial evidence by the prosecution witnesses. The characteristics of circumstantial evidence are well laid down by the court of appeal in the case of Abanga Alias Onyango Vs. Republic Cr. Appeal No. 32 of 1990. The court stated thus:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
>
> ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;
>
> iii. The circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

18. The court also held in the case of Simon Musoke vs. Republic 1958 EA 75 thus:

> "It is also necessary before arriving the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"

19. It is trite that a fact in issue may be proved by direct or circumstantial evidence. The direct evidence does not require any inference to be drawn from the evidence and this includes eye witnesses and confessions. The second level of admission evidence under the *Evidence Act* is circumstantial evidence as stated in Abanga & musoke cases (supra). For a person to be convicted of an offence in our legal system there must be sufficient evidence to satisfy the court of the guilt of the accused. In brief circumstantial evidence constitutes a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. Therefore, circumstantial evidence is an evidentiary fact from which a trial court can draw an inference rendering the existence or non-existence of a fact in issue more probable. See section 107(1) and 108 of the *Evidence Act*. The court in Uganda Vs Ajok (1974) HCB 176, reaffirmed the position on circumstantial evidence in the following statement:

> "Circumstantial evidence is very often the best evidence. It is evidence by surrounding circumstances which by intensified examination capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. However, circumstantial evidence has to be approached with caution because, as pointed out by lord Normand in the case of Teper V. R (1952) AC 480, 489. "Evidence of this

kind may be fabricated to cast suspicion on another... 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 weaken or destroy the inference."

20. Having given a layout of the law herein above, I am called to determine whether the elements of the offence of murder have been established in the present case.

21. Has death been proved? PW5, Dr. James Ekuru testified on behalf of Dr. Kidalio, who on the face of the record conducted the postmortem examination, subject matter of this trial. The deceased person sustained a Right Temporal Scalp Ecchymoses with surgical wound (sutured) drain, Surgical wound (sutured) on the right Lumbar Region and a Skull fracture with subdural Hematoma (right temporal region. From the examination, the Doctor concluded that the cause of the death was a severe head injury with a massive subdural Hematoma & raised intracranial pressure. Such evidence is conclusive on the first element.

22. The next element that ought to be established by the prosecution is whether the death was caused by unlawful acts of omission and commission. The right to life is protected under Article 26 of *the constitution*. According to the postmortem report by PW5, the cause of death was identified as severe head injury with a massive subdural Hematoma & raised intracranial pressure. In which circumstances can an accused person be blamed for causing the death of another human being? In answering the question, I am guided by the provision of 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 inquiry 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 to his mode of living

    c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused

    d. He by any act hastens the death of a person suffering under any disease or inquiry 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.

23. The pieces of circumstantial evidence tending to implicate the accused as demonstrated by the witnesses in support of the prosecution case were:

    a. The accused person in company of one Margaret, the sister to the deceased went to the brother PW1 to make a report that he has left the deceased at home lying unconscious. Following that report PW1 and PW2 left for the homestead being occupied by the accused and the deceased whom they cohabited together as husband and wife. To their astonishment, PW1 and PW2 arrived at the home of the deceased which she shared with the accused person only to establish that she had suffered injuries to the temporal scalp, Lumbar region and fractured skull. These same injuries caused the deceased to admitted initially at Lodwar and thereafter referred to Eldoret Referral Hospital, where on admission after six days she succumbed to the

identified injuries confirmed by the pathologist in his postmortem report dated 6th September, 2021. What is intriguing in the circumstances of this case is the manner in which the accused person conducted himself after the commission of the offence to create a narrative of an alibi defence. His conduct is deducible from the time he went to report to PW1 and PW2 about the condition of the deceased. What is interesting about this piece of this evidence? It was his responsibility to first expose the deceased to a medical facility for examination to establish the cause of the concussion. That conduct is suspect and shows of a man who committed the offence but trying to exonerate himself from the chain of causation, which culminated in the death of the deceased.

24. Take the case of the accused having an encounter with PW4 and the nature of the communication as revealed by PW4 in his testimony, that he had threatened to kill the deceased, if she was not at home.

25. The accused person had companionship with the deceased. He then had a higher responsibility to guarantee her security and safety. The fact that only shortly after they accused left for the home of PW1 on an allegation that he has left the deceased at home but unconscious. Indeed, the hypothesis created by the accused person can be pierced by the testimony of PW1, 2 and PW5 that a trail at the scene revealed to the effect that the deceased had suffered serious injuries to the head.

26. The incriminating circumstances of the accused conduct having committed the crime leads to the only reasonable inference that the accused took part in the murder. The fact that the accused gave a false account of how the deceased sustained the injuries goes to strengthen this view. As stated in the case of Gusambizi Wesonga v Republic (1948) 15 EACA 65, the court stated that "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 caused under justifiable circumstances, for example in self-defense or in defence o property."

27. As clearly proven, by the prosecution evidence, the death of the deceased was as a result of the injuries sustained on the right temporal scalp and fractured skull with subdural hematoma as detailed in Exhibit 1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that they fall within the exceptions of article 26(3) on preservation of the right to life in our constitution, which provides that a person shall not be deprived of life intentionally except to the extent authorized by *the constitution* or other written law. For this case unfortunately, on scrutiny of the circumstantial evidence, given by PW1, PW2, PW3, PW4, PW5 and PW6, there is no iota of evidence that in killing the deceased, the accused person was acting in self-defense under section 17 or his unlawful acts were precipitated by provocation from the deceased as provided for in section 207 and 208 of the Penal Code.

28. In the context of this case, the last seen theory can be invoked as the evidence shows that the accused person was in the company of the deceased at the time when the injuries were inflicted. Before adverting to go and report to PW1 and PW2 on the condition of the deceased, there is sufficient reasonable certainty on the facts proved to connect the accused with the death and the cause for the death of Susan. It is trite law in our jurisprudence thus if a person is last seen with the decease, he must offer an explanation as to how and when he or she parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he/she does not discharge that burden by failing to offer an explanation on the basis of facts within his special knowledge, the chain of events proved against him carries the day. Having bestowed thoughtful consideration to the rival evidence and taking into account the totality of the circumstances, there is not major discrepancy with regard to veracity and authenticity of such sworn statement by the prosecution witnesses.

29. In light of the above evidence, I hereby invoke the last seen theory and in view of the fact that no cogent evidence was ever given by the accused person. For any intervening factor the time gap from the time the accused has an encounter with PW4 and later at the homestead of PW1 and PW2 trying to seek assistance from these two bloodline witnesses with the deceased, a possibility of a third party or other intervening factors have been ruled out.

30. As a consequence of the analysis, the element of the act being unlawful has been proved beyond reasonable doubt. See the case of Joseph Kimani Njau v Republic (2014) eKLR.

31. The core of homicide cases as defined in section 203 of the Penal Code is the fact proven that in executing the murder the accused had malice aforethought clearly manifested in the definition under section 206 of the penal code, which states that:

> " Malice aforethought Malice aforethought shall be deemed to be established by evidence proving anyone 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.

32. From the above manifestations, malice aforethought in law means the intentional doing of an unlawful act. The manner of the killing, the weapon used, the conduct of the accused person before and after the homicide, the gravity and the severity of the injurie sustained by the deceased are circumstances to be drawn in making a finding against the perpetrator that in committing the crime, he harbored malice aforethought. See the case of Rex v Tubere s/o Ochen (1945) 12 EACA 63. In malice aforethought under section 206 of the Penal Code, there are two major perspectives. First, there is express malice aforethought which is said to mean death caused without justification or excuse or any mitigating circumstances sufficient to reduce the homicide to manslaughter. It also refers to an intent to kill the very person killed or great bodily injuries upon him or her.

33. What inferences does a trial court has to bear in mind in establishing whether the homicide was actuated with malice or not?

34. It is to draw positive conclusions from the condition of the mind by the words and conduct of the accused person in the whole chain of events at the crime scene. There is also what we call implied malice. This is where the state is required to make out a prima facie case of murder through the deadly use of force, and the death of the deceased is the ultimate outcome. In this sense, it is presumed malice from the circumstances of the case.

35. In my view, in the instant case the prosecution through the testimonies of PW1 PW2, PW3, PW4, Pw5, PW6 cumulatively shows the following characteristics:

a. Vulnerable parts of the deceased were targeted by the accused person, the injuries as prescribed by the pathologist in the postmortem report dated 6th September, 2021 were all intended to cause grave damage to the head of the deceased, the conduct of the accused person before but more significantly after the attack points to a guilty mind to establish malice aforethought. Why the conduct of the accused before, during and after the assault important? The inference that comes to my mind for a trial court to rule out malice aforethought the conduct of the perpetrator of the transactions from which death eventually occurred is crucial, likely to raise a reasonable doubt that the death which took place might have been involuntary.

36. The evidence on record is that both accused and the deceased were husband and wife having cohabited together as proven by PW1, PW2 and PW4. The accused knew the deceased very well. There is no evidence of a grudge between the deceased and the accused. Here is a husband instead of taking his wife the deceased to the nearest hospital, which action maybe could have saved the life of the deceased but in an unexplained circumstance, he elected to first seek assistance from PW1 and PW2. The defence rebuttal that the deceased came home while highly intoxicated and placed her on one of the beds to sleep as the accused took a turn to go and sleep in the other bed within the same room. Such injuries as found to have been inflicted, could only be from the last person seen or to be in company of the deceased. In the premises then, I am unable to agree with the defence theory that the injuries suffered by the deceased were inflicted elsewhere than her homestead. There is sufficient evidence of malice to support a murder conviction in this case.

37. Finally, the question is whether the accused person was positively identified and placed at the scene of the crime.

38. First and foremost, identification evidence comprises of the following features:

It means an assertion by a person to the effect that an accused was or resembled visually or otherwise a person who was present at or near a place where the offence being prosecuted was committed. In the second line of defence, is an act of omission or commission connecting the accused to that offence in question.

39. In the case R. v. Turnbull [1976]3 ALL ER 549 the following guidelines were issued by the court on the circumstances in which the identification evidence proves a fact in this element beyond reasonable doubt:

i. For how long did the witness have the accused under observation?

ii. At what distance?

iii. In what Light?

iv. Was the observation impeded in any way, such as by passing traffic or a press of people?

v. Had the witness ever seen the accused before and how often?

vi. What time elapsed between the observation and the subsequent identification to the police?

40. Were there any discrepancies between the initial description given by the witness and the actual description of the accused?

In the case of *Kariuki Njiru & 7 other v Republic Criminal Appeal No. 6 of 2001*, the court held that "evidence relating to identification must be scrutinized and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. To determine whether identification is truthful, that is, not deliberately false the court must evaluate the

believability of the witness who made an identification. In doing so, the court may consider the various factors from evaluating the believability of a witness testimony. Regarding whether identification is accurate, that is not an honest mistake the court must evaluate the witnesses' intelligence and capacity for observation, reasoning and memory and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question."

41. In the case before me, emphatically the accused and the deceased cohabited as husband and wife in the same house. On the material day PW1, PW2 and PW4 testified to the effect without isolating one element of circumstantial evidence with another, the identity of the accused person is not in dispute. In fact, even from his defence he admitted being the last person who place the deceased on her bed to sleep although acknowledging that she was unconscious. The struggle I have with such a rebuttal is that he was the last person and a spouse to the deceased. He tells of a story that the deceased was a habitual drunkard and on the fateful day she came home and found the accused person. One wonders at what time did she suffer concussion is she made it all the way from the drinking club to her house. The other circumstances on identification are within the chain of circumstantial evidence by PW1 and PW2 in support of the prosecution case. This is a case of recognition and even testing it with the greatest care, there is no doubt of any error or mistaken identity of the accused person.

42. The long and short of it is that the element of identification was proved beyond reasonable doubt. The issue is purely on recognition of the spouse to the deceased whom they have been cohabiting together during her lifetime before the untimely death.

43. In overall, the case against the accused on each element of the offence of murder as expressly provided for under sections 203 as punishable under section 204 of the Penal Code has been proved beyond iota of doubt acquitting the prosecution that the accused cannot rely on the doctrine of presumption of innocence in article 50(2) (a) of *the Constitution*. From the evidence the right of presumption of innocence has been deconstructed for the accused to be found guilty, convicted of the offence of murder contrary to section 203 as punishable under section 204 of the Penal Code. This paves way for the sentencing hearing constituting submissions on aggravating and mitigation factors, victim impact statement together with pre-sentence report.

Verdict On Sentence

44. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 19th August, 2021, at Nakwamekwi village in Turkana Central Sub-County within Turkana County murdered Susan Amatapal.

45. The accused pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The prosecution discharged its burden of proof beyond reasonable doubt resulting to a conviction by this court vide its judgment dated 16th May, 2024.

46. In imposing a proper sentence, I am alive to the of the fact that the case of Francis Muruatetu Versus Republic (2017) eKLR set the parameters of sentencing an offender found culpable under Section 203 of the Penal Code. The applicable factors 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. Remorsefulness of the offender

g. The possibility of reform and social re-adaptation of the offender

h. Any other factor that the court considers relevant.

47. I also must not lose sight of the principles in the 2023 Judiciary of Kenya Sentencing Policy Guidelines which expressly provides as follows:

That sentences are imposed to meet the following objectives:

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

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

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

d. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

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

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

48. The central principles on sentencing is amplified in the cases of Titus Ngamau Musila alias Katitu-crminal Case No 78 Of 2014 quoting from the case of Santa Signgh V State Of Punjab [1978],4 SCC 190 .... Stated as follows:

> " Proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances extenuating or aggravation of the offence. The prior criminal record, if any, of the offender, the age of the offender the record of the offender as to employment, the background of the offender reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for rehabilitation of the offender, the possibility of return of the offender to a normal Life in the community, the possibility of treatment or training of the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence"

49. It is further observed that the nagging question in sentencing is on how to balance the competing interests as between the convict and the victims of the crime. Notably for our jurisdiction, even with the outlined principles and objectives of sentencing concerns are raised as to the level of disparity, inconsistency and disproportionate cluster of sentences with maximum differenciation as between on the verdict rendered in almost similar facts of the case with another under the penumbra of unfettered judicial discretion. If the so called maxim individualized cases or circumstances, is the applicable canon which brings about the inconsistency and disparity, it is time judicial discretion is measured correspondingly with clear reasoning before the final verdict is determined.

50. The principle of proportionality dominated Kenyan sentencing policy. It stipulates that the actual sentence imposed should be proportionality of not only to the gravity of the offence committed but also the personal circumstances of the particular offender. There is little scope for taking account of the probability that the offender will reoffend at some future unspecified date or that he/she presents

a continuing danger to the public. In my view, the selection of a particular punishment to be imposed to an individual offender is subject to the constitutional principles of proportionality from my reading Art. 50(2)(q) and Art. 25(1)(a) of *the Constitution*. By this I mean that the imposition of a particular sentence must strike a balance between the particular circumstances of the commission of the relevant offence and the relevant circumstances of the person sentenced. As it happens now, a glance of several decisions emerging from our trial courts, striking this balance when it comes to particular kind of offences, as measured with the particular individualized circumstances of the offender one cannot fail to notice the exercise of judicial discretion sometimes fails to answer various questions as to whether the sanctions so imposed in serious offences like murder meet the threshold of the dominant principles of criminal law.

51. I bear in mind that Kenya's Criminal Justice System has outlawed mandatory minimum sentences underpinned within the rubric of constitutional imperatives in the Bill of Rights. Certainly, that open ended discretion therefore even within the prospectus of the sentencing policy guidelines and statutory law on the prescribed specific sentences by the legislature to a particular offence, is no longer the norm but the exception.

52. I find sentencing verdict in heinous crimes like murder contrary to section 203 which touch on the right to life under Art. 26 of *the Constitution* not given due regard to the language which has been used in Art. 259 of *the Constitution* for courts to interpret *the Constitution* in a purposive manner to give effect to the letter and spirit of the law. As observed, there is an upsurge of homicide cases in the country and may be it is time the principle of just punishment which is the bedrock of sentencing in respect of criminal offences like murder be revisited so as not to occasion prejudice or injustice through the victims of the offence and the common good of our society. I echo the words from the comparative jurisprudence in the case of the state of State of Punjab Vs, Saurabh Bakshi (2015) 5 SCC 182 which jurisdiction we share a common law heritage. The court pronounced itself as follows;

> " The eminent thinker and author, Sophocles, said centuries back: "Laws can never be enforced unless fear supports them." The statement has its pertinence in a way, with the enormous vigor, in today's society. It is the duty of every right-thinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If anyone defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionality established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilized manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending in the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalized. In this context, one may recapitulate the saying of Justice Benjamin N. Cardozo "Justice though due to the accused, is due to the accuser too." And, therefore the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices."

53. In the recent past, courts have been swayed in factoring in decisions on compensation arrived at particularly when considering the parameters of plea bargain agreement as expressly stated in Section 137 A-O of the Criminal Procedure Code. The question to ponder is whether those minutes from the Council of Elders from the Nandi Ethnic group, or the Njuri-Ncheke of Meru County or the elders from the Kikuyu ethnicity touching on compensation between the accused and the victim is a dominant factor to be taken into account by the trial court in exercising discretion towards sentencing reduction.

54. I am a strong believer in Alternative Dispute Resolution mechanisms as provided for in Art. 159 (2)(c) of *the Constitution* but in addressing the issues surrounding the violation of Art. 26 of *the constitution* on the right to life, courts should be astute to avoid barriers and hindrances that will impair both the underlying spirit of the same constitution and applicable penal laws. The saving clause then will be for trial courts to bear in mind that if such a factor on compensation to influence reduction of sentence should not hinge the mockery of justice by an overreach of the realm of misplaced sympathy. The same comparative dicta made the following observation on this principle:

> " Needless to say, the principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case. in our opinion, it is a fit case where we are constrained to say that the High Court has been swayed away by the passion of mercy in applying the principle that payment of compensation is a factor for reduction of sentence to 24 days. It is absolutely in the realm of misplaced sympathy. It is, in a way mockery of justice. Because justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system."

55. Given the background of unconstitutionality of mandatory life and death sentences, in the context of *the constitution* as a whole in the violation of Art. 26, there is need for a strong deterrent test being applied to sentencing schemes involving violent crimes like murder contrary to Section 203 of the Penal Code. I am of the considered view that the Judiciary indeed obliged to take action to protect human life against violation by others. This country has one of the best penal laws which regulate behavior of our citizens and residents and which give prescriptive guidelines on the imposition of criminal sanctions and those who hacked unlawfully, specifically on the violation of the right to life protected and guaranteed by *the constitution*. Without proper interpretation of the law for the common good, our society is likely to take the law into their own hands to enforce justice within their domain as they understand it within their communities. The level of crimes like murder in our country has reached alarming proportions and poses a threat to the preservation to the right to life.

56. The question therefore which should worry the trial courts particularly those adjudicating on violent crimes which endanger life and existence of being should go scot free and be allowed to escape the consequences of the unlawful act by getting away with lenient sentences. This is a balancing act which trial courts must carry out subject to the rights vested in every person in our constitution including the victims of violent crimes like murder contrary to section 203 of the Penal Code and Manslaughter contrary to section 202 of the Penal Code. In this sense, given the disparity, inconsistency and disproportionate realized in the development of our jurisprudence in the sentencing regime, time has come to revisit the issue under the suggested permissibility of bandwidth matrix of sentences for serious offences like murder.

57. I have in mind the doctrine of a convict serving a particular imposed sentence for a minimum period prescribed by the court without being eligible for parole or release or on the other hand the terminable

sentence so imposed to provide for a residual clause of a minimum period which the convict must serve before any review can be undertaken by the court more so if he/she has exhausted the right of appeal to the apex court.

58. Turning to the instant case and taking into account aggravating and mitigating factors, it is observed the concerns raised from every corner of our society regarding domestic violence perpetuated either spouse or a male boyfriend to the victim to the crime. In sentencing the accused, the court takes into account his personal circumstances, the interest of society, the crime and the circumstances surrounding its commission. From the judgment this is clearly a case of gender-based violence. The women of Kenya in the class if wives and girlfriends deserve to enjoy the guaranteed right to life in Art. 26 of *the Constitution*. This Constitutional dictate calls upon society to value a woman's life and that right should not be at risk and at the mercy of their spouses or lovers for that matter.

59. As the court in S V Kekana (2014) ZASCA remarked, though from the Republic of South Africa, the words resonate very well with our own local circumstances. Thus; domestic violence has become a scotch in our society and should not be treated lightly. It has to be deplored and also severely punished. During the sentence hearings, legal counsel for the accused submitted that he is remorseful for the offence and is a first offender, that there are high chances of rehabilitation and therefore factors to be taken into account towards reduction of a lenient sentence. If I was to so hold the scope of regret and remorse of an offender as submitted during the sentencing hearings, it is inescapable not to be guided by the principles elucidated in the persuasive authority in S v Matyityi (2011) 1SACR in which Ponnan JA stated:

> " There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself as having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuiness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; where he or she does indeed have a true appreciation of the consequences of those actions."

60. For the foregoing reasons, aggravating factors outweigh the mitigation factors offered by the convict in this matter of murdering his wife. As a consequence, all aspects of the sentencing principles and objectives taken into account including the guidelines in the Muruatetu case, the accused is sentenced to 30 years' imprisonment with effect from 13.9.2021in consonant with Section 333(2) of the Criminal Procedure Code.

61. Orders Accordingly. 14 days Right of Appeal

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST 2024

R. NYAKUNDI

JUDGE

In the Presence of

Mr. Kakoi for the State

Accused