**PTE Dennis Murimi Njoki (155402) v Director of Military Prosecutions/Defence Court Martial Administrator (Criminal Appeal E027 of 2021) [2023] KEHC 19908 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19908 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL E027 OF 2021**

**RN NYAKUNDI, J**

**JULY 10, 2023**

**BETWEEN**

**PTE DENNIS MURIMI NJOKI (155402) ..... APPLICANT**

**AND**

**THE DIRECTOR OF MILITARY PROSECUTIONS/DEFENCE COURT MARTIAL ADMINISTRATOR ..... RESPONDENT**

**JUDGMENT**

Coram: Before Hon. Justice R. Nyakundi

Wambugu Kariuki & Co Advocates for the Appellant

1. The appellant herein was charged before a Court Martial in Court Martial Case No.1 of 2020 with 4 counts namely; murder contrary to Section 203 as read together with Section 204 of the Penal Code and three counts of Stealing contrary to Section 88(1) (a) as read together with Section 88(2)/ of the *Kenya Defence Forces Act*.

   On the 13th of April 2021, the court convicted the appellant on manslaughter and sentenced him to 30 years imprisonment and further found him guilty of one count of stealing and sentenced him to 2 years imprisonment with the sentences running concurrently.

   Aggrieved by the said decision, the appellant has lodged an appeal against the conviction and sentences. The appeal raises three grounds, which are as follows:

   i. The court failed to take into account the appellants pre-sentencing report and/or personal records of work/service at Moi barracks, the mitigation presented and precedents set by the High court as a result of which the court sentenced the Appellant to thirty (30) years imprisonment which was very harsh and legally/factually unjustified. The court martial ought

to have set the Appellant free/at liberty after finding him not guilty of murder particularly because the appellants constitutional rights were violated.

ii. The court found the appellant guilty of count No. 4 of the charge sheet when there was no evidence at all for alleged stealing of Kshs. 10,000/=. The conviction was against the sound advise of the Judge/Advocate (The Hon. K.K Ng'ang'ar) as a result of which the appellant was convicted and sentenced to imprisonment for two (2) years.

iii. The proceedings, arrest and prosecution of the Appellant violated many instances the Appellants constitutional right.

**Analysis and Determination**

2. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses and assess their demeanour. In Kiilu & Another vs. Republic [2005] 1KLR 174 the Court of Appeal stated that:

    1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

    2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

2. In that light, I have time and again had the occasion to go through the record of the proceedings, the Judge Advocate's advice, submissions by learned counsel as well as authorities cited. I take note that the appellant has put heavy reliance on my decision in Kajiado High Court Case No. 4 of 2016, Republic v Ismail Hussein Ibrahim.

    In this case, the trial court found that the prosecution had not proved the charge of murder against the Appellant to the requisite standard of beyond any reasonable doubt. The court convicted the appellant on manslaughter and sentenced him to 30 years imprisonment and further found him guilty of one count of stealing and sentenced him to 2 years imprisonment with the sentences running concurrently. This court is therefore called upon to consider afresh the evidence on record while considering the issues raised in this appeal. Below is the court's analysis of the evidence that was adduced before the trial court and the determination of the issues raised in the grounds of appeal.

    Upon perusal of the pleadings, submissions and record of appeal I have identified the following issues for determination;

    1. Whether the court erred in finding the appellant guilty of the offence of stealing kshs. 10,000/-

    2. Whether the appellant's constitutional rights were violated

    3. Whether the sentence was harsh and legally unjustified

**Whether The Court Erred In Finding The Appellant Guilty Of The Offence Of Stealing Kshs. 10,000/-**

3. The judge advocate in this matter acquitted the appellant on the 2nd and 3rd charges and convicted him on the 1st and 4th charge. The appellants' contention is that there was an advice from the judge advocate that the charge was not proven to the required standard and therefore the trial court did not have the discretion to find the appellant guilty. Section 175 of the *Kenya Defence Forces Act* states;

   (1) In proceedings before a court-martial, rulings and directions on questions of law, procedure or practice shall be given by the Judge Advocate.

   (2) Any rulings or directions given under subsection (1) shall be binding on the court.

4. I have perused the record of appeal and at page 672, paragraph 84, the judge advocate stated that the charge against the accused in count IV had not been proved beyond reasonable doubt. It is evident that the direction of the judge advocate was that the court should acquit the appellant of the charge in count IV. The trial court erred in finding him guilty contrary to the advice of the judge advocate.

   The appellant was accused of stealing contrary to section 88 1 (a) as read together with section 88(2) of the KDFA 2012.

   The appellant submits that there was no evidence tendered by the prosecution to prove to the charge of the theft of Kshs. 10,000/=. According to the appellant, the court martials completely ignored the advise of the Judge/Advocate and convicted the appellant for the offence and sentenced him to two years imprisonment.

5. According to PW15 Caroline Mwikali Munyiri, she cannot recall the person who withdrew Ksh. 10,000. Further, PW20 231671 Chief Inspector Alex Mwongera the forensic document examiner testified and observed that the signature of the record of transaction was similar and indistinguishable with the specimen signature of the accused. However, on cross examination he stated that he cannot tell whether it was the accused or the deceased who signed the record of transaction.

   The defence on the other hand in the sworn testimony of the accused presented that there is no way he could have known the deceased's pin bearing in mind that they had known each other for a period of two months. The defence also questioned the credibility of the work conducted within a single day the exhibits were presented.

   Lord Diplock in the case WALTER– V- REPUBLIC [1969] explained reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in your own affair, you may allow to influence you one way or the other. It also can be said that it is a doubt that can be given or assign reason as opposed to speculation.

6. According to the advise by Judge Advocate, there was still a cast of a huge shadow of doubt as to whether the prosecution has solved the conundrum of accessing the ATM card and PIN by the accused which were integral in completing a transaction, and effectively link the accused to the said withdrawal. It was evident that the causal link of the withdrawal of the money by the appellant was not established.

   I also take note that blurriness was cast on the diligence and competence of PW20 231671 Chief Inspector Alex Mwongera who received the exhibit memo on a day with respect to this case, and within that day completed the examination of the specimen and even proceeded to prepare a report.

Bearing the above in mind I do find that the prosecution failed to prove its case on this count beyond reasonable doubt. I agree with the advise by the Judge Advocate that the charge was not proved beyond reasonable doubt in light of the criminal justice system.

My finding is therefore that the appellant is not guilty of the offence and I proceed to acquit him.

**Whether The Appellant's Constitutional Rights Were Violated**

7. The appellant contended that his constitutional rights under articles 47, 49 and 50 of *the Constitution* were violated during the proceedings.

Article 47 of *the Constitution* provides as follows;

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1)

and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

8. The appellants' contention is that the decision to place him in custody and the failure to allow him to be present during the taking of pictures of the crime scene was a violation of his rights under article 47. Further, that the failure to give him written reasons to justify his absence when the evidence would be used against him was a violation of his constitutional rights.

The first port of call in determining this issue is establishing whether the taking of the pictures as evidence constituted administrative action. To give effect to Article 47, Parliament enacted the *Fair Administrative Action Act*. Section 2 of the act defines an "administrative action" to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The decisive question that arises is whether a court judgment, ruling or orders made by a court of competent jurisdiction such as the decision under challenge in this case can be classified as an administrative action or decision. A quasi-judicial body is a non-judicial body which can interpret law. A court of competent jurisdiction is a judicial body that conducts criminal proceedings and therefore the same cannot be perceived to be an administrative action. In the premises, I find that there was no violation of the appellants' rights under article 47(1) of *the Constitution*.

Article 49 of *the Constitution* provides as follows;

(1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of—

i. the reason for the arrest;

ii. the right to remain silent; and

iii. the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

9. The appellants' contention is that his rights under article 49(1)(c) were violated. The violation is said to have occurred when he was not allowed to be present during the post mortem of the deceased. Further, that it was alleged that he was represented at the post mortem by one Dennis Muteithya yet he was not aware of the same. I have perused the proceedings and note that the pathologist testified that the accused was represented by his unit as it was a provision of the rules. It is my considered view that the appellant has misinterpreted the provision on representation under article 49 of *the constitution* as the same is with regards to representation in a court of law, not during a post mortem. In practice the accused persons are rarely if ever present for the post mortems of the deceased. Therefore, the appellants' rights under article 49(1)(c) of *the Constitution* were not violated by his absence at the post mortem.

Article 51(1) of *the Constitution* provides as follows;

> (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

As the appellant has failed to prove that there were any rights under the bill of rights that were violated by the proceedings, it follows that his rights under article 51(1) were not violated.

**Whether the sentence meted upon the appellant was harsh and Legally/Factually unjustified.**

10. The appellant in this case was charged with the offence of murder contrary to section 203 of the penal code which defines murder as the unlawful killing of a person or persons with malice aforethought.

In the case of Republic Versus Andrew Omwenga 2009 EKLR the court held:

> It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b)That the accused committed the unlawful act which caused the death of the deceased and (c)That the accused had the malice aforethought".

11. This court has therefore taken time to re-examine the evidence in light of these essential elements required to be proved by the state against the accused person. I agree with the finding of the trial court that the appellant is guilty of the offence of manslaughter. I will therefore proceed and consider the offence of manslaughter and the appropriate sentencing.

    Under section 205 of the penal code, the offence of manslaughter is punishable by the maximum penalty of life imprisonment. However, this represents the maximum sentence which is usually reserved for the worst of such cases. I do not consider this to be a case falling in the category of the most extreme cases of manslaughter. It was indicated by the prosecution that the accused is a first offender. I have for that reason discounted life imprisonment.

12. The case beforehand presents a conundrum of the charge of murder. According to the record of proceedings, it has been evidently shown that the accused shot the deceased to death. The prosecution presented twenty-nine (29) witnesses in establishing their case for charges levelled against the appellant. The trial court convicted the accused with the offence of manslaughter given the fact that the element of Malice aforethought was not proved to the required standard.

    The appellant pleaded the defence of self-defense. The appellant stated that when he heard the footsteps, he rose to see what was happening. At that point he realized it was a person and asked "who are you halt". Subsequently, the appellant stated the person threw a panga at him. According to him, the panga ultimately fell a few meters from where he and deceased were.

    The following events according to the appellant are that he decided to injure the accused on the right shoulder but unfortunately the bullet hit the right side of the chest of the deceased. Ultimately, the accused was arrested and taken out of the scene of the crime. The appellant observed that he did not leave the machete at the place as captured by the photographs.

    The law regarding self-defence is to be found at section 17 of the Penal Code which states as follows;

> 17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

13. The Court of Appeal considered the law regarding self defence in Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014] eKLR stated as follows;

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

but also that such belief was based on reasonable grounds. But in DPP v Morgan (Supra) it was held that:

> .....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.

14. In IP Veronica Gitahi and Another v Republic MSA CA Criminal Appeal No. 23 of 2016 [2017] eKLR the Court of Appeal once again reiterated the common law position regarding self-defence as follows:

> The common law position as regards the defence of self defence was well articulated by the Privy Council in Solomon Beckford v. The Queen [1987] 3 All ER 425. After a comprehensive review of previous decisions, the Council rejected the view that for an accused person to be availed the defence of self defence, his belief that he was in imminent danger should not only be genuine but also based on reasonable grounds. Instead they approved the view that if the accused person held the belief, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant and that the accused had to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view reasonable or not.

15. Self defence is therefore a justification in the application of force recognized by the common law.

In Republic V Andrew Mueche Omwenga [2009] eKLR, the court had the following to say:

> The law generally abhors the use of force or violence. There are, however, instances where the use of reasonable force is justified. For instance, an accused charged with an offence may seek to plead that he acted as he did to protect himself, or his property or others from attack or to prevent a crime or to effect a lawful arrest. Such pleas when successfully raised provide a justification for the accused's conduct thereby rendering his act lawful. Since the use of lawful force is not an offence, the accused will be acquitted of the offence as the element of actus reus (the unlawful act) will be missing.
>
> A person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it. This defence therefore turns on two requirements: one, that the force must be necessary and secondly that it must be reasonable.
>
> It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it. In Beckford Vs R [1988] AC 130 Lord Griffiths stated (at p.144) that "a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike." The danger the accused apprehends, however, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means.

16. In Mokwa Vs Republic, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force.

What is reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. In the words of Lord Morris of Borth-y-Gest in the said English case of Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in John Njoroge Vs Republic, Cr. App. No. 186 of 1987:-

It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation....If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction."

17. I should here point out that like in all other criminal cases, where accused raises the defences of self defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. Where the accused raises defences of self defence or provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was not provoked or that he did not act in self defence. In other words the prosecution must disprove the defences of provocation and self defence and it must discharge this burden beyond reasonable doubt—Joseph Kimanzi Munywoki Vs Republic, Cr. App. No. 31 of 2003 CA Nairobi), [2006] eKLR. In the case of Beckford Vs R [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-

> It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."

18. As I have said before, not all homicides are unlawful. As the principle in the case of Republic Versus Guzambizi S/o Wesonga 1948 15EACA 65 articulates Death is excusable by law in circumstances of reasonable defence to self, property, as a result of accident or misadventure or in protection of life or property of a third party.

In proving the cause of death section 213 of the penal code provides acts and circumstances which an inference as to death can be inferred by way of evidence to prove the cause of death. This was the holding in the case of Republic Versus Smith 1959 2ALLER 193 where the court held interalia that: "If the victim's death is traceable to the injury inflicted by the accused it will avail him nothing to show that the deceased's death might have been prevented by proper care or treatment". That is why in our courts it is firmly established that proof of death and cause is by way of medical or circumstantial evidence. (See Benson Ngunyi Ndundu Versus Republic CACRA No. 171 of 1984).

I have evaluated the record of proceedings at the trial court and I am satisfied that the deceased died through an unlawful act capable of causing physical injury leading to his death. That to me by itself was an inherently dangerous act.

19. Once again, manslaughter is punishable by a maximum sentence of life in prison. This is, however, the maximum penalty that is normally reserved for the most serious of such situations. This does not, in my opinion, fall into the category of the most heinous examples of manslaughter. It is clear from the record that the appellant is a first-time offender.

The Judiciary Sentencing policy guidelines are silent on the path to take in manslaughter cases hence the reference point in the determining of a custodial sentence for offences of manslaughter would be case law. In V M K v Republic [2015] eKLR, 10 years imprisonment was given for manslaughter. Courts are inclined to impose life imprisonment where a deadly weapon was used in committing the offence.

In this case therefore I have taken into account the fact that the convict is a first-time offender, as one of the factors mitigating his sentence. The aggravating factors though on the face of it demonstrate a conduct which deserves a severe custodial sentence this court cannot lose sight of the guidelines on the legal parameters in defence of self by an assailant. What is more prominent in the case of the appellant are issues around the question of the test of a reasonable man in his shoes at the time the offence was committed. It is also true that the appellant was armed with an assault rifle which finally was cocked, unlocked and fired against the victim. Traditionally the plea of self defence is only accepted when the lethal response of the accused was deemed to be immediate, directly following the untoward threats or acts of the aggressor who later became the victim of homicide. If there is no sufficient evidence most favourable to the appellant for the court to form an opinion that a reasonable man/person in the shoes of the appellant so provoked could be driven through transport of passion and loss of self-control to the degree to sustain on continuous violence then the verdict of manslaughter is not applicable. In the case at bar the advocate judge's judgement manifested evidence in support that the provocation was sufficient to lead a reasonable person to do what the appellant did in retaliation. In the defence of self or property or a third person whose right to life is under imminent danger a distinction should be made between an act which is morally justified and one which is a prerequisite for criminal liability. Again in this Appeal the proposition formulated by the prosecution denote of a man who acted in the heat of passion induced by the actus reus of the attacker and in that provocation he made use of a deadly instrument of a firearm to fatally injure the victim. Whether there were well conceivable circumstances accompanying the use of a firearm with actual violence is deducible from the prosecution case. Likewise, Montesquieu in his seminal work, the spirit of the law came to a similar conclusion:

> With individuals the right of natural defence does not imply a necessity of attacking. Instead of attacking they need only have recourse to proper tribunals. They cannot therefore exercise this right of defence but in sudden cases, when immediate death would be the consequence of waiting for the assistance of the law"

20. The principle proportionality merits consideration here. Prima facie it appears in the defence of self that the principle proportionality may provide a suitable solution for the entire issue, in which a court has to assess the excessive force applied against the aggressor to justify an absolute defence. Therefore, the severity of the danger posed with the aggressor is of significance if he succumbs to death due to the physical injuries inflicted. In my appreciation of the facts of this case as reflected from the record of the trial court there is a rationale of private defence prescribed in section 17 of the penal code due regard be given to the question of the requirement of a certain minimum severity of danger. On this appeal the distinction between self defence and necessity to respond with excessive force is both interesting and significant in making a finding on the guilty of the appellant. It should be noted that the significance of

the probability that once the appellant released his firearm against the victim that the event of death will accrue definitely constitutes an important factor in the evaluation of the danger and the requirement on necessity. It is necessary to be precise and to examine the act of the appellant itself through the filter of the requirement of self defence and that of necessity the shooting of the aggressor was above the borderline of excessive force. This dominant trend ordains this court not to interfere with the conviction of the appellant.

As a consequence of the conviction for the offence of manslaughter contrary to section 202 as read with section 205 of the penal code is punishable to life imprisonment. In the instant case the trial court exercise discretion to impose a custodial sentence of thirty (30) years imprisonment. It is clear and simple from the memorandum of appeal that the appellant is aggrieved with the verdict on sentence for being incompatible with the principles of sentencing and the supporting resentence report, the aggravating and mitigating factors submitted at the time of trial.

21. In making this analysis I would substantially confine myself to the settled principles on sentencing while exercising an appellate jurisdiction. In Shadrack Kipkoech Kogo –vs- R Eldoret Criminal Appeal No. 253 of 2003 the court of Appeal stated thus: " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere with must be shown that in passing the sentence, the sentencing court took into account an irrelevant fact or that what a wring principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered. ( See also in Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question for sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to ursurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can be properly be described as "shocking", "starting" or "disturbingly inappropriate."

Accordingly, this court must accept the limited jurisdiction exercisable when It comes to the salutary principle of interfering with the sentence imposed by the trial court. Some of the features that characterize that discretion falls within the purview if the dictum in this case: Francis Karioko Muruatetu & Another v Republic (2017) eKLR observed as follows:

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

22. In this appeal the emerging factual matrix reflects commission of a serious offence by the appellant whose blameworthiness was mitigated by the canon of self defence. This was reinforced and supported by the mitigation factors offered by the appellant, the particular aspect that he was a 1st offender, no previous record of being involved in violent crimes, the said age factor, the high probability of rehabilitation and reform, the individual circumstances when the offence was committed as taken into account a trial court. In my view the court would be embarking upon a perilous if due regard is not given to the aggravating and mitigation of the individual case before approaching the task of imposing the appropriate sentence. The presence of any significant mitigating factors justifies exemption of passing a long and lengthy custodial sentence. We are not told that the appellant had no reasonable prospect of reform. It is also clear that the offence in question though depriving the victim's right to life prematurely there is no account of its design and manner of it's execution to have been motivated with malice aforethought. Some attention ought to have been paid to the sensibilities of the surrounding circumstances in which the offence was committed. Each of the set circumstances, must be measured and weighed by the court against the justification and the broad principles of sentencing. When considered in a nutshell there can be considerable overlap between specific deterrence and other goals of sentencing like rehabilitation and reintegration of the offender in society and thereafter to strike a balance to ensure the crafting of sentence is not punitive, harsh or excessive. Research has shown the deterrent effect of incarceration is uncertain as it focuses more on society and the offender. In my view, it is time more emphasis on sentencing is based on a hybrid system geared not only deterrence of the offender but more incremental focus on restorative justice approaches to sentencing. The totality of all this the combined aspect of all factors on the custodial sentence imposed against the appellant was unduly long and harsh. As much the serious harm inflicted upon the deceased resulting in the death is immeasurable, the sentence of 30 years is not a measure of the value put on the life of the victim.

23. In this appeal weighing one factor one after another I am persuaded to interfere with the custodial sentence and have it substituted with a lesser sentence of 6 years imprisonment with effect from the date of pre-trial detention. The warrant of committal to prison shall be amended accordingly by the Deputy Registrar of High Court at Eldoret.

Orders accordingly. 14 days Right of Appeal explained

**DATED AND SIGNED AT ELDORET THIS 10TH DAY OF JULY, 2023**

In the presence of:

Mr. Wambugu Kariuki for the Appellant

Appellant Present

**.....**

**R. NYAKUNDI**

**JUDGE**