Republic v Waithera (Criminal Case E050 of 2020)
[2024] KEHC 12983 (KLR) (14 October 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E050 OF 2020

RN NYAKUNDI, J

OCTOBER 14, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

NANCY WAITHERA ..... 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 the 9th day of August, 2020 at Munyaka Estate in Ainabkoi sub-county within Uasin Gishu County, the accused person jointly with others not before court murdered George Okoth.

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 was Mr. Mugun for the state whereas the defence was under the retainer of Learned counsel Ms. Koech Lelei

3. At the hearing it was incumbent upon the prosecution to prove all the essential ingredients of the offence of murder beyond reasonable doubt. To prove its case the prosecution led evidence from 3 witnesses namely; Maurice Muthee, Henry Kamau, Chesoni Erick and Inspector Edward Daru.

4. The duty vested with the state is to proof the offence of murder contrary to section 203 as punishable under Section 204 of the Penal Code. The provisions stipulate that any person who of malice aforethought causes the death of another by an unlawful act or omission shall be guilty of murder. The ingredients set to be established beyond reasonable doubt comprises of; (a) the death of the deceased, (b) the death being unlawfully caused, (c) that in the context of the case, (d) it was actuated with malice aforethought contrary to section 206 of the Penal Code and finally, (e) there is evidence to place the accused person at the scene of the crime. First and foremost, before analysing the evidence, it is incumbent upon this court to lay the law on the standard and burden of proof. The foundation on

the burden and standard of proof is articulated in the provisions of sections 107, 108 and 109 of the *Evidence Act* which provides 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.

5. The standard of proof of beyond reasonable doubt is defined by the dicta of various cases broken down into elements for the trial court to identify how it fits in within the scope of the given facts and circumstances of the case. In Miller Vs Minister of Pensions (1947) 2 ALL E.R. 372 at page 373 to page 374, Lord Denning stated quite succinctly that: -

> " The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable,' the case is proved beyond reasonable doubt; but nothing short of that will suffice." See also Mbugua Kariuki v Republic (1976-80 IKLR 1085 and the case of Okethi Okale & Ors. V. Republic (1965) EA 555.

6. This doctrine on the standard of proof is not necessarily that can be equated with military precision or utmost certainty or 100% proof. It is a standard which is convicting and persuasive to the extent that when considering the evidence adduced there is a higher threshold that the elements of the offence are in existence as defined by parliament and the culpability of it point towards the accused. Kenny's Outlines of Criminal Law (16th Edn), at P. 416:

> " A larger minimum proof is necessary to support an accusation of crim than will suffice when the charge is only of a civil nature ..... in criminal cases the burden rests upon the prosecution to prove that the accused is guilty 'beyond reasonable doubt.'
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> When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need to do no more than show that there is a reasonable doubt as to the accused. See R. V. Stoddart (1909) 2 Cr. App. Rep 217 at P. 242
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> ..... (1) in criminal cases the presumption of innocence is still stronger and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof."

7. In discharging this duty, the prosecution case can either place reliance on direct or circumstantial evidence and the end of it all, the trial court must consider the totality of the evidence adduced by

the prosecution together with any defences pleaded by the accused person. I now find it plausible to dispose of this case by determining the sufficiency of the evidence and the elements of the offence for the charge of murder beyond reasonable doubt. When dealing with a murder case, the state must proof death as a result of the voluntary act of the accused and malice.

Proof of death of the deceased

8. It is trite that proof of death is by way of medical evidence commonly referred to as a post mortem report. In the quest of discharging that burden PW3 Dr. Chesoni Erick, a pathologist by profession, on oath told the court that he conducted a post mortem in respect of the deceased. In his evidence PW3 gave evidence to the effect that on examination of the deceased body he established that the deceased had suffered external injuries measuring nine centimetres primarily to the head. The same skull injury was also impacted by a fracture of the bones which extended to the base of the skull. The aftermath of it according to PW3 was massive bleeding and in his opinion the cause of death was severe head injuries. he relied on the post mortem report as exhibit 1. I should point out that this is evident going by the principles in Kimweri V Republic (1968) EA 452 and Ndiba v Republic (1981) KLR 103 that within the meaning attached to proof of death, the deceased's right to life under Art. 26(1) of *the Constitution* was prematurely terminated

Whether the death was unlawfully caused

9. It is a requirement of the law under Section 203 that the state proves causation of the offence beyond reasonable doubt. The first point is that, at least in the case of murder and necessarily culpable homicide, it is hastening of death that is prohibited. The test of adequate causation in section 213 of the penal Code lays down a framework of the conduct that is legally a significant cause of a prohibited consequence. That if the prohibited consequence is probable in the ordinary cause of events to lead to the conclusion that the unlawful acts of assault of an accused person became the proximate cause of the death of another human being. The elements of Section 213 focuses on the following characteristics:

> " The accused would be held responsible for another person's death although this act is not the immediate or sole cause under the following circumstances:
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> a. He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death;
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> 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.
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> c. He by actual or threatened violence cause such other person to perform an act which causes the death of such, an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused:
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> d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
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> 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."

10. There are two psychological factors which render a person or an offender responsible for his voluntary acts in committing a crime. Firstly, the free choice, decision and voluntary action of which is capable

of undertaking or carrying out and secondly his capacity to distinguish right and wrong, good and evil before committing the act. At best, the law recognizes that every homicide is unlawful unless lawfully justifiable or excusable as expressly stated in Art. 26(3) of *the Constitution*. See the position laid down in the case of R V. Gusambiza S/o Wesonga (1948) 15 EACA 65.

11. In our legal proposition, ordinarily the prosecution must establish a causal nexus between the conduct of an accused and the criminal consequence as a pre-requisite of Criminal liability. The evidence before court has to be proved beyond reasonable doubt that the accused was the one who assaulted the deceased and had him struck with a piece of wood. Secondly, that the accused in unlawful act notably used a dangerous weapon which inflicted multiple injuries which formed the basis of his death. Unlawful in this sense refers to some conduct purposed by unlawful means by use of force and threats to cause grievous harm to that other person. The actus reus element required is the intention to cause death or grievous harm to the victim of the murder.

12. The other key characteristic in determining causation issues is linked to the use of a dangerous weapon to assault the deceased which can also manifest the foreseeability that the action taken in totality can be brought within the ambit of Section 203 of the Penal Code. An accused person's conduct is taken to be an actual contributory cause of the death of another human being when that conduct forged a link in the chain of causes as defined in Section 213 of the penal code which actually brought about the death. In other words, when the conduct sets in motion or continued in motion the events which ultimately resulted in the death of the deceased. The essentials of unlawful acts to occasion death is reasonably foreseeable when the death is conclusively found to be reasonably related to the offender's conduct. Therefore it is no defence to causing the victim's defence that the medical or surgical treatment contributed to the death of the deceased. The persuasive dicta in Hain v. Jamison, 28 NY 3d 524 529 was that:

> "When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. Thus, where the acts of a third person intervene between the defendant's conduct and the Plaintiff's injury, the causal connection is not automatically severed. Rather, the mere fact that other persons share some responsibility for Plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury. It is only where the intervening act is extraordinary under the circumstances not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct. That it may possibly break the causal nexus."

13. The findings of causation this case can be found in the testimony of PW1 who told the court that on 9th August,2023 the accused in company of two other young people did assault the deceased with a piece of timber targeting the head on allegations that he had eaten her Githeri meal. It was also the evidence of PW2 Henry Kamau that on the material day he had assigned some work to the deceased, preparing some shelfs for a customer for he was a qualified carpenter. It was at the time when PW2 wanted to the location where the deceased was undertaking his carpentry work he learned of the assault to his ahead. During the discussion PW2 confirmed that the assailant to the grievous harm was the accused person who sells cereals within the vicinity. The witness in the circumstances also affirmed that the bone of contention was the allegation of the accused of the theft of two tins of beans. The injuries suffered by the deceased were captured in the post mortem report produced by PW3 where he identified the main cause of death as severe head injury. From these circumstances, it will be correct to say that applying the ordinary approach of the common law to a question of causation, the prosecution has logically and conclusively established this element beyond reasonable doubt.

14. The third stage of the test is as to whether the prosecution has discharged itself of the burden of proof of beyond reasonable doubt. This is a technical term and has a technical meaning as it is manifested in Section 206 of the Penal Code which defines it as follows:

> " (a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
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> (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
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> (c). An intent to commit a felony.
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> (d). An intention to facilitate the escape from custody of a person who has committed a felony.

15. The meaning of this term under Section 206 is of the utmost importance for it is the presence or absence of it which determines whether an unlawful killing is murder or manslaughter. The key components of it to infer that malice aforethought is the unlawful act which occurs within the context of constructive malice. This is primarily an intention to kill any person or an intention to cause grievous harm to any person. The element of intention has the meaning attributed to it in the case of Woollin (1989) AC82 as applied in Mathews and Alleyne (2003) No. 2 Criminal Appeal R. 30 thus:

> " Grievous bodily harm, at one time broadly interpreted to mean any harm sufficiently serious to interfere with health and comfort, must now be given its ordinary natural meaning. 'Grievous' means 'really serious' and the word really probably adds nothing but emphasis to the fact that the harm intended must be (actually or really) serious.
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> Constructive malice is where a person kills another in the course ofr furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.
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> For purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from the legal custody, shall be treated as a killing in the course or furtherance of an offence."

15. The very critical elements of malice aforethought in a crime of murder are deducible as defined in Rex v Tubere S/o Ochen (1945) 12EACA 63; the court gave the following guide of circumstances from which an inference of malicious intent can be deduced:

a. The weapon used i.e. whether it was a lethal weapon or not;

b. The part of the body that was targeted i.e. whether it is a vulnerable part or not;

c. The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and

d. The conduct of the accused before, during and after the incident i.e whether there was impunity.

16. Every person in law is taken to have intended the natural consequences of his/her act. For example, if a person picks a fire arm, a panga, a sword, a huge piece of wood, manipulates it and uses it against another person, aimed at the multiple organs of that other human being including vulnerable parts like the head, chest, to inflict harm to that person and the person dies or he/she is seriously injured the law presumes that the assailant intended the natural consequence of his/her action.

17. The facts of this case are very clear from the testimony of PW1 who said that the accused person conspired with two other persons who are not before court while she had armed herself with a piece of wood went for the body of the deceased, hit him on the head and the resultant of it was grievous harm contemplated in Section 206(b) of the Penal Code. It was being alleged that the accused person was annoyed by the deceased for it had been alleged that he had stolen two tins which were used to make a Githeri meal. This testimony was corroborated by PW2 who testified that he had employed the deceased as one of his carpenters to make wooden furniture on a case to case basis. On this material day the deceased has been tasked with making of shelfs and on PW2 going to pay his daily wages he realized that he had been assaulted apparently by the accused person whom he positively identified at the scene. PW2 observed that due to the injuries, the accused was limping from the effect of the injuries inflicted. According to PW3 Dr. Chesoni who conducted the post mortem report, it came out clearly on examination that the deceased person had suffered serious injuries to the head extended to the base of the skull. Having taken part in the post mortem examination, PW3 presented the report as exhibit No. 1 in accordance with the provisions of the *Evidence Act*.

18. The investigating officer PW4 inspector Edward visited the scene with other police officers, collected the body of the deceased who had sustained several physical injuries and had it taken to the Moi Teaching and referral hospital mortuary to have a post mortem carries out. As it is the policy in support of criminal law administration, when such offences take place, he also recorded statements from the witnesses to have the accused arraigned in court for the offence of murder. It is clear nevertheless that the accused person Nancy Waithera gave sworn evidence and denied the offence. She went further to allege that on the material day while at her shop, she was called by one Samuel Ng'ang'a about a customer who wanted four tins of beans. She requested to have a conversation with the customer and later decided to go to the shop. On arrival at the shop he found out that the customer had already left with the four tins of beans without fulfilling the necessary obligations of payment. That is when she followed up for the payment of the beans taken by the customer. It was his defence that the person who allegedly stole the beans was beaten by members of the public and she had nothing to do with the incident.

19. The defence further adduced the evidence of DW2 Agnes Kielo. She told the court that on 9th August, 2020 at about 4:00PM she was from church and while walking along the way, there was a thief of beans from Nancy's shop. That the people around within the vicinity went after him and he received some beating for committing the offence.

20. The last witness for the defence was Samuel Ng'ang'a who narrated that on the material day a customer came seeking to be sold four tins of beans as the son to the accused, he decided to place a telephone call to her to approve the transaction. In a short while he went to check on a particular activity not far away from the shop and on coming back, the customer had left with the four tins without payment. It was the case for the witness that the accused never assaulted the deceased but it was members of the public who took it upon themselves to punish the deceased. What the defence case is about, hinges on the doctrine of self-defence under Section 17 and provocation in Section 207 and 208 of the Penal Code. Provocation in our law is some act, or series of acts, done (or words spoken) (by the dead man to the accused) which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused subject to passion as to make him or her for the

moment not master of his mind. First it requires that the accused should have killed while she had left her self-control and that something should have caused her to lose her self-control. Secondly in my view, the fact that something like the theft of beans could have cause her to lose self-control is not enough for the law expects people to exercise control over their emotions. The tendency of victims of offences to trigger violent rages or childish tantrums is a defect in character rather than an excuse to commit the heinous crime of murder adequately protected and guaranteed by in Art. 26 of our constitution. This is a case where the accused knew that there is a serious risk that death will ensue from her acts and continued to commit those acts deliberately and without lawful excuse which exposed the deceased to the risk and resultant of death. The defence has shifted blame from the accused to that of members of the public without first addressing the eye witness evidence of PW1 Maurice Muthee and that of PW2 whose evidence was on the dying declaration of the deceased. The clear exposition of this principle can be found in Section 33 of the *Evidence Act* which states:

> "statement by deceased person, etc., when statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases –
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> a. Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases as which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question; ....."

21. The principles governing dying declarations were considered by the Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR. The court held that: -

> "Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.
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> Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in Choge v. Republic (supra):
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> "The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a

hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

22. Further, in the case of Moses Wanjala Ngaira V Republic [2019] eKLR where it held inter alia: -

"

> " 19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from Choge v Republic [1985] KLR 1, citing the predecessor of this Court in Pius Jasanga s/o Akumu R (1954) 21 EACA 331:
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> "In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.
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> In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (Republic v Muyovya bin Msuma (1939) 6 EACA 128. See also Republic v Premanda (1925) 52 Cal 987.)
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> The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:
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> "The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R v Okulu s/o Eloku (1938) 5 EACA 39; R v Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).
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> It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla (1945) 12 EACA 67; R v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171)."

23. In a nutshell the presumption in law is that a person who is about to die will not lie in his mouth when he is about to meet his maker. The guidelines on dying declarations can be properly appreciated in the principles set out in the comparative law in Khushal Rao v. State of Bombay (1958 SCR 552) summarized in the following manner:

    i. That it can't be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated.

    Each case must be determined on its own facts keeping in view the circumstances in which dying declaration was made.

    It cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence.

    A dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence.

    A dying declaration recorded by the Magistrate in question answer from stands on a much higher footing.

    In order to test the reliability of dying declaration court has to keep in mind the circumstances like the opportunity for observation of the dying man i.e. sufficient light when crime was committed, capacity to remember the facts, statements are consistent and the statement has been made at the earlier opportunity and was not the result of tutoring by interested parties.

24. The evidence about the aforesaid evidence is clearly captured by the evidence of PW1 and that of PW2, the employer to the deceased. There are no glaring material contradictions between the statements made by the deceased before PW2 as against the statements on oath by PW1. The entire incident is attributable to the allegations of theft made by the accused person on the deceased. On the other hand, the defence tended to exonerate the accused person being the principal offender to the offence in which the deceased met his death.

25. In my considered view, acceptability of a dying declaration made by the deceased is greater because the declaration was made to PW2 in extremity when he was on the verge of death. It ascertained the evidence on the commission of the crime and the positive identification of the accused within the scope of the guidelines in Abdullah Bin Wendo V. Republic (1953) EACA 166, Roria V. Republic (1967) EA 583 and in Maitanyi V. Republic (1986) 1 KAR 75. It is thus clear that besides the dying declaration made by the deceased it is also necessary to make reference to the facts and circumstances upon which PW1 heard the screams, specifically rushed to the scene, observing the accused joined by the other two men assaulting the deceased. There is no challenge laid to the prosecution case from the testimony by the defence witnesses taken at its highest or lowest on credit worthiness. In light of the evidence discussed above and being mindful of the evidence related to proof the elements of murder contrary to section 203 of the Penal Code, I find the accused guilty of murdering the deceased. It is overwhelming evidence that the deceased George Okoth right to life protected and guaranteed under Article 26 of *the Constitution* was prematurely terminated by the unlawful Act of the Accused acting in concert with other persons not before court. That the very nature of the evidence adduced by the prosecution, multiple injuries were inflicted by the accused person as evidenced by the post-mortem report. It is paramount principle of law that if an accused person without due care and attention as to the preservation of right to life effectively uses any device dangerous weapon or by any other such means targets the physical body of another human being and occasions grievous harm which ultimately causes the death of that other person it is a manifestation of malice aforethought.

26. The actual circumstances from which the conclusion guilt is to be drawn, which have a strong bearing with the accused person include the trigger of raising an alarm which prompted members of the public to rush towards the direction of the deceased who allegedly had stolen some tin of beans from the grocery of the accused person. the surrounding chain of events, are that the worker to the accused person reported that some buyer had approached her to secure a tin of beans but on being supplied, he was reluctant to make the necessary payment. In essence, necessitating the worker to report to the accused person as the owner of the shop to take remedy action. It is at that moment the accused person then solely sought assistance from the members of the public with a possibility of either recovering the tin of beans or equivalent of the value of the property. The cruelty and harassment inflicted against the deceased person was in response to the distress screams from the accused person. This is not a case entirely of mob justice but on the basis of the accused's acts of omission and commission precipitated culpability homicide against her on the material day. This conduct of the accused destroys the presumption of innocence and in my view it is considered as relevant and material in so far as the case for the prosecution is concerned. Indeed, there is plausible and reliable evidence that the offence of murder against the accused person was committed as manifested by direct and circumstantial evidence tendered by the prosecution.

27. Consequently, I am satisfied and I find that the accused the death of George Okoth with malice aforethought. I find her guilty and I convict her of murder contrary to section 204 of the Penal Code.

Verdict Of Sentence

28. ....

1. The convict was convicted for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The circumstances leading to the offence have been captured in the main judgment of this case. A brief rehash is however necessary for purposes of sentencing the convict. It was alleged and established that Nancy Waithera while at Munyaka Estate in Ainabkoi sub-county within Uasin Gishu County, jointly with others not before court murdered George Okoth. Without a doubt, the offence of murder brings tragedy; the tragedy is not only on the victim's side but also extends to the convict who has rather chosen to waste away the precious gift of life. The far reaching consequences of her actions extend to her individual life as well because she will never realize the full potential of her life; she is going to moulder in prison.

2. The court is now called upon to sentence the convict, a task which is many at times difficult. In imposing an appropriate sentence, I will not lose sight of 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.

3. Besides the recommended considerations in the said case, I am also cognizant of the objectives that sentences ought to meet as prescribed in the 2023 Judiciary of Kenya Sentencing Policy Guidelines which expressly provides as follows:

> " That sentences are imposed to meet the following objectives:
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> a. Retribution: To punish the offender for his/her criminal conduct in a just manner.
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> b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
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> c. Rehabilitation: to enable the offender reform from his criminal disposition and become a law-abiding citizen.
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> 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.
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> e. Community protection: to protect the community by incapacitating the offender.
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> f. Denunciation: To communicate the community's condemnation of the criminal conduct."

4. In compliance with the proposed factors and objectives, this court called for a Pre-Sentence Report which I have endeavored to summarize as hereunder:

5. The Probation officer considered the convict's family background, personal History, circumstances of the offence, attitude towards the offences, views of the Victim(s) and community towards the offender and the offence.

3. The findings as reported by the officer are that the convict is a wife and a mother of four children. That she is a class drop out and engages in hawking and casual jobs for a living. She denied committing the offence but she was sorry that the event that led to the demise of the victim happen at her stall after she confronted him of stealing. She prays for the court's leniency and forgiveness from the deceased family. She stated that she tried reaching out to the Victim's family concerning compensation but they could agree.

4. According to the report, the convict's family spoke well of her citing that she is a humble and calm person who rarely gets into conflicts with other. Her husband added that she has been financially, physical and emotionally helping him in raising their children.

5. On the victim's part, they stated that they have been gravely affected by the demise of their kin. In that they lost their brother, the children lost their father and the sole breadwinner. The local administration and other neighbors shared the view that the convict has never been in any conflict save for the present matter. The area chief also noted that there has never been

any hostility towards the offender from the community. They all did not express any objection towards the offender's prayer for a lenient sentence.

6. With such a background, the Probation Officer recommended that the convict is a suitable candidate for a non-custodial sentence notwithstanding the gravity of the offence.

7. In mitigating for a lenient sentence, Learned Counsel Ms. Lelei stated that the court ought to consider that the convict is a first offender and that she is remorseful for the offence and therefore a non-custodial sentence should be considered.

8. As for the State, Senior Prosecution Counsel Mr. Mugun urged the court to take account of the fact that there are no previous records relevant to the facts of the case as against the accused person.

9. Having taken into account the circumstances leading to the commission of the offence herein the recommendation by the Probation Officer and the mitigation as advanced by Counsel, the mitigating circumstances have been outweighed by the aggravating and therefore I share the view that a custodial sentence will achieve objectives of sentencing. I have come to the logical conclusion that the convict should serve 15 years' imprisonment. There is a right of appeal within 14 days.

DATED AND SIGNED AT ELDORET THIS 14TH DAY OF OCTOBER, 2024

R. NYAKUNDI

JUDGE

In the Presence

Ms. Lelei for the accused

The accused person

Mr. Mugun for the state