



**Gitau v Republic (Criminal Appeal E024 of 2024)  
[2024] KEHC 15884 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15884 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E024 OF 2024  
DO CHEPKWONY, J  
NOVEMBER 21, 2024**

**BETWEEN**

**SPTE JOHN GITAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This is the Judgment of the Court regarding the appeal lodged by the Appellant, SPTE John Gitau, challenging his conviction and sentence of 30 years' imprisonment for the offence of Murder, contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Appellant was convicted by the Court Martial under Section 133(1)(B) of the *Kenya Defence Forces Act* 2012, for the unlawful killing of 87536 CPL Esuron Phoebe Kaile on the 6<sup>th</sup> of March, 2022, at Western Apartment, Evergreen Court Estate in Mihango area, within Kayole Sub-County, Nairobi County by stabbing her with a knife, knowing that the act constituted to an offence.
3. Being dissatisfied with the conviction and sentence, the Appellant filed this Appeal vide a Notice of Appeal dated 29<sup>th</sup> March, 2024, seeking to quash the conviction and set aside the sentence. The grounds of appeal primarily contest the propriety of the charge sheet, the sufficiency of the evidence adduced, the admissibility of certain evidence, the rejection of the Appellant's defense of self-defense, and the harshness of the sentence.
4. As A first appellate court, the court is obligated to re-evaluate and re-analyze the evidence that was adduced before the trial court, is guided by the principles set out in the case of Odhiambo –vs- Republic (2008) KLR 565 and Okeno –vs- Republic (1972) EA 32, where it was held that:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 and conclusions.”

5. Therefore, this court embarks to consider the evidence and proceedings before the trial court. The trial was conducted before the Court Martial and presided over by Hon. Boaz Ombewa, with the following members in attendance: Lt. Col. S.W. Katera, Maj. P.W. Musira, Maj. A.N. Wanyoike, Capt. K.M. Kasaon, and Lt. M.D. Hamisi. The Prosecution presented seventeen witnesses while the Appellant gave a sworn defence.

### **Summary of the Prosecution Evidence**

6. PW1, Hilda Kajuju, testified that on 5<sup>th</sup> March, 2022, she accompanied the Appellant and others for a drinking spree. They visited several locations, including Thika Road Mall and Utawala, and eventually returned to the Appellant’s house around 4:00 a.m. She stated that the group included herself, the Appellant, Morgan, Njoroge, and two others whose names she did not know.
7. At the house, she initially slept on the couch before moving to the bedroom. On the morning of 6<sup>th</sup> March 2022, she was awakened by the sound of an argument between the Appellant and a woman (later identified as the deceased). She heard the Appellant telling the deceased, “You know I don’t like drama. Who has told you to come to my place without talking to me?” That the Appellant then came to the room where she was and told her that the Deceased was a lady from Garissa who was a nuisance to him. At this time, the Appellant was holding the Deceased and stopping her from entering the room while the deceased responded angrily and asked PW1 in Kiswahili language; “Wewe ni nani? Hebu jiangalie. Wewe ni malaya. Jichunge sana.” (Translated into English language to mean “Who are you? Look at yourself! You are a prostitute! Beware!”)
8. PW1 stated that shortly after, she left the house and went going downstairs to join the other friends in the group who they had been with. She called the Appellant on phone, but it is the deceased who answered and threatened to come downstairs and confront her after which PW1 then left the premises altogether.
9. PW2, Joel Ochieng Odhiambo, the caretaker at the apartment, corroborated PW1’s account, stating that he was at the Appellant’s house when the deceased arrived at the Appellant’s residence on the morning of 6<sup>th</sup> March, 2022. PW2 testified that he left the premises shortly after the deceased arrived, as he did not want to get involved in the dispute. That later in the day at around 5:00pm, he learnt of the deceased’s death.
10. PW3, Morgan Ndaale, testified that he was a close friend of the Appellant and had known him for some time. On the evening of 5<sup>th</sup> March, 2022, the Appellant, PW1, PW5, himself and a few other individuals went out drinking at various establishments, and returned to the Appellant’s house in the early hours of 6<sup>th</sup> March 2022. The following morning, the Appellant asked him to go and buy some eggs for breakfast, which he did. They prepared and ate the eggs together. While they were in the house, there was a knock at the door and the deceased entered the house, feeling uncomfortable and concerned, especially since there was another woman, PW1, in the house,. He (PW3) decided to leave.
11. PW3 went on to state that he later went back to the house and asked the Appellant about the whereabouts of his girlfriend. The Appellant told him that she (PW1) had already gone downstairs. The deceased, overheard this and commented in Kiswahili Language; “Nakuona sana” (Translated in English Language to mean “ I can see you now” ) and he left the house. He met PW1 and PW2 downstairs. Shortly afterwards, the Appellant’s friend, Nesh, approached PW3 and asked him to retrieve a phone charger from the Appellant’s house. PW3 went to the house, knocked on the door, but received no response. He then got a charger from another house and they all left. PW3 testified



- that he returned and found both military and Civil Police Officers at the gate. He learnt from his wife that the deceased had been killed someone who happen to be the Appellant. The following day, he then recorded his statement at the Police station.
12. During cross-examination, PW3 confirmed that when he left the Appellant's house, the Appellant and the deceased were still inside. However, he could not recall what the deceased was wearing. He further stated that he was the caretaker at Plot A, while the Appellant was a tenant at Plot B, which was located opposite Plot A, where PW2 was the caretaker. He also confirmed that on the night of 5<sup>th</sup> March, 2022, he had drank with the Appellant, PW1, and some others whose names he could not recall. That they drank until around 3:00 a.m and he noted that the Appellant, in particular, was drunk. The following morning, he was still in the house with the Appellant, PW1, and PW2 when the deceased arrived. He stated that he did not hear any threats being made and observed that the Appellant remained calm throughout the interaction.
  13. PW4, PC Martin Njeru, testified that he was attached to the DCI, Kayole division and on 6<sup>th</sup> March, 2022, he was called to attend to a scene of a reported murder. That upon arriving at the Appellant's house, he began processing the scene where he observed blood stains on the sofa and the wall. Additionally, he found clothes soaked in a bucket in the bathroom which hat appeared to have been washed but still bore some blood stains. He also found a blood-stained knife at the scene. PW4 stated that he took photographs of the scene, which were later produced as evidence in court. The photographs captured the blood-stained areas and other items at the crime scene.
  14. In cross-examination, PW4 stated that he had been conducting crime scene processing since 2012, following his gazettement on 28<sup>th</sup> December, 2012. He emphasized that during the process of taking photographs and documenting the scene, he did not see the Appellant, as he was entirely focused on the crime scene itself.
  15. PW5, Corporal Evan Munene, testified that on 6<sup>th</sup> March, 2022, he received a call from PW1 asking him to hurry to the Appellant's house. On arrival, he went to the Appellant's house and found the Appellant with the deceased. And the Appellant then told him that "Mamaa has come to visit me and found Hilda." PW5 then went downstairs, where he found PW1 crying and together, they left the house and went to another location for a drink.
  16. It was his evidence that he and PW1 returned and parked near the Appellant's apartment. He called the Appellant, who promised to come downstairs, but he did not. After waiting for about an hour and a half and on realizing his phone battery was running low, PW5 sent PW3 to the Appellant's house to get a phone charger. PW3 returned, and told them that the Appellant did not open the door, and he had instead obtained a charger from another house.
  17. PW5 went on to state that at that point, the Appellant called and told him to go to his house alone. He went, knocked and the Appellant opened the door. PW5 stated that he peeped inside and saw blood on the wall. The Appellant who was dressed only in a boxer, informed PW5 that the deceased was no more. Shocked by the news, PW5 left the house and went back to the car, where he met PW1, PW3, and PW6. He asked PW3 to get out of the car, after which they drove off.
  18. PW5 stated that he was shaken while driving and decided to alight. He called Kenneth (PW6) and informed him of what had transpired. PW6 left the scene, leaving PW5 with PW1. Being a Military Personnel and feeling confused, PW5 called the Military Police and was advised to report the matter to Mihango Police Station. Throughout this time, PW1 was not aware of what had happened.
  19. PW5 further testified that the Appellant called him again and requested for Kshs.20,000.00 stating that he needed the money to run away because he had wanted to dispose of the deceased's body but could



not, since the deceased had informed her colleagues in Garissa that she was visiting him. According to PW5, the Appellant narrated how the deceased had confronted and told him in Kiswahili Language, “Leo tutajua kama ni hao malaya wako wa Nairobi ama ni mimi.” (Translated in English Language to mean “Today we shall know if it is your Nairobi prostitutes or me”). That the deceased then allegedly went to the kitchen, grabbed a knife, and attempted to stab the Appellant, but he dodged the attack, grabbed the knife, pushed the deceased against the wall, and injured her in the process.

20. PW5 testified that he had asked the Appellant why he did not call them for assistance or take the deceased to the hospital, especially since Kenneth (PW6) was a nurse and the Appellant responded that he had panicked and did not know what to do. By this time, PW5 had already made an official report to the Police and recorded his statement.
21. PW5 further stated that he agreed to meet the Appellant at Avery Lounge in Utawala along the Eastern Bypass and he went there with Police Officers. That when they arrived, they found the Appellant on the rooftop of the lounge. The Police arrested the Appellant, who then led them to the crime scene.
22. PW5 added that he recorded his conversations with the Appellant using his phone, a Tecno Camon G8, blue in color, with Serial Number 067642514N101129 and IMEI Numbers 350696160556651 and 350696116556669 for his second SIM card. He played the recordings in court as part of his evidence.
23. PW6, Corporal Kenneth Saina, testified that he was on a leave pass from Baragoi Military Camp and on 6<sup>th</sup> March, 2022, he went to meet the Appellant and found PW5 and PW1 already there. They were also waiting for the Appellant and he joined them. PW6 stated that while they were in the car, PW5 asked them to get into the car and they drove away for some distance. On the way, PW5 stopped the car and informed him that the Appellant had done “a mess”. On inquiring further, PW5 revealed to PW6 that the Appellant had murdered someone. Upon hearing this, PW6 immediately advised PW5 to report the matter to both Military and Civil Police and he left because someone else was waiting for him, and he had to attend to that matter.
24. When cross-examined, PW6 confirmed that he had known the Appellant since 2020 and to his knowledge, the Appellant had never exhibited violent behavior. He also stated that when he spoke to the Appellant over the phone, he sounded fine and did not indicate anything unusual. PW6 reiterated that after PW5 informed him about the alleged incident, he did not run away but left because he had another person waiting for him elsewhere.
25. PW7, Chief Inspector Samson Ogutu, testified that he was a Forensic Imaging and Acoustic Analyst, and on the 24<sup>th</sup> August, 2022, he received two sealed khaki envelopes from the Military Police Special Investigations Unit (SIU). He told court that the first envelope contained a smartphone branded Tecno Camon, labeled as Exhibit A, and the second envelope contained an Exhibit Memo form dated 5<sup>th</sup> August, 2022. The Memo form included a request to retrieve audio recordings from the phone. PW7 explained that he retrieved the audio files from the phone and transferred them to a 700-megabyte compact disk (CD), which he produced as evidence in court. The recordings captured a conversation between the Appellant and PW5, Corporal Evan Munene.
26. Further, PW7 provided a brief description of the contents of the audio recordings and quoted the Appellant as saying:

“Nikisema hii mwili nikificha, itajulikana tu bado ni mimi” Nipee tu 20k... mimi nianze safari, niache simu, nitupe kila kitu, nirudi kwa nyumba, nichukue passport alafu niende missing in action forever... vile nimeenda kumwangusha kwa ukuta hivi, nikashika kisu kwa shingo, nikasema siwezi kubali atoke hivo, na hii injury yote kwa shingo... nikamchinja kama mbuzi.” (Which translates in English Language as follows;



("If I decide to hide this body, it will still be known that it was me" Just give me 20k... so I can begin my journey, leave my phone, dispose of everything, go back to the house, take my passport, and disappear forever... When I pushed her against the wall, I grabbed the knife by her neck and said I couldn't let her leave like that, with all the injuries on her neck... I slaughtered her like a goat.")

27. During cross-examination, PW7 admitted that while extracting the audio files, he did not involve an independent third party to listen to or authenticate the recordings. He also stated that he did not subject the Appellant to a speech test to verify that the voice in the recordings belonged to him. He also admitted that he did not include the specific methodology used to analyze the recordings in his report. However, he clarified that the findings were based on his expert opinion and not personal opinion.
28. In re-examination, PW7 explained that he conducted a playback check of the audio files in the presence of the investigating Officer, who identified the voices as belonging to the Appellant and PW5. Based on this, he prepared a transcript of the recordings and backed up the evidence onto the compact disk.
29. PW8, Major Doctor Wasike Edward, testified that he conducted a post-mortem examination on the body of the deceased, which was done in the presence of two relatives of the deceased, being Mark Achuka Esuron and Esuron Boniaruk Jeremiah, and they identified the body before the procedure began. PW8 described the body as having had a deep cut at the back of the neck, extending horizontally from one side of the ear to the other. He also stated that there were additional injuries, including minor cuts on the neck, ear, and both hands. He told court that he had observed a cut between the thumb and index finger of the left hand measuring 1cm, and another on the third finger measuring 1.5cm. He noted a 2.5cm cut on the left index finger, a 7cm cut on the left scapula (shoulder bone), and a bruise measuring 10.2 cm. PW8 also noted that internally, the organs were intact, although he observed blood on the shoulder area but not on other parts of the body. That based on the injury patterns, PW8 concluded that the assailant was behind the deceased at the time of the attack, as the injuries predominantly affected the posterior (back) of the neck and the left side of the body. He further noted that the injuries on the left hand were consistent with defensive wounds, indicating an attempt by the deceased to protect herself. Further, PW8 testified that the injuries could not have been self-inflicted. He concluded that the cause of death was severe bleeding due to the deep cuts on the posterior neck, which severed muscles and blood vessels that reached the vertebrae bone.
30. On cross-examination, PW8 confirmed that he conducted the autopsy but did not sign the post-mortem report on the same day. He stated that he found no evidence of strangulation marks on the body.
31. In re-examination, PW8 reiterated that the cause of death was severe hemorrhage resulting from the deep cut wounds on the posterior neck. He maintained that the injuries were inflicted by an external party and could not have been self-inflicted.
32. PW9, James Michael Welimo, testified that he was a Government Chemist Analyst and stated that he examined various body samples taken from the deceased and conducted an analysis. From his findings, PW9 determined that no chemically toxic substances were detected in the said samples. PW9 produced his report and the Exhibit Memo Form in court and the same were marked as 'PMI 13' and 'PMFI 14'.
33. On being cross-examined, PW9 confirmed that he was the one who conducted the analysis on the samples. However, he stated that not all the samples were received by him directly, as some had already been submitted to the laboratory before he conducted his tests.
34. PW10, Corporal Peter Joakim Usiku, testified that he was an investigator, and on 6<sup>th</sup> March, 2022, while on duty, he received a call through his official number from PW5, Corporal Evan Munene,



- informing him that the Appellant had killed his girlfriend in his house. PW10 stated that PW5 narrated the events of the day to him, which were consistent with the testimony PW5 gave in court. Following this report, the Appellant was arrested at Avery Lounge and he then led PW10, other Police Officers, and DCI Officers to his house, where they found the deceased's body. PW10 described the body as lying with visible stab wounds and covered with a Maasai Sheet. He also said he observed blood stains on the wall and the floor and saw a knife, which appeared to be a regular kitchen knife, at the scene.
35. Under cross-examination, PW10 confirmed that PW5 was the one who suggested the meeting with the Appellant at Avery Lounge. He stated that he was present at the lounge during the Appellant's arrest, which was carried out by Police Officers in civilian attire. PW10 also confirmed that he accompanied the Appellant, along with PW5, Major Muraya, and DCI Officers, to the Appellant's house after the arrest. He stated that the knife found at the scene did not have any visible blood stains.
  36. PW11, Major Lewis Njoroge Muraya, testified that he was the Acting Commanding Officer, Alpha Academy, Embakasi, at the time of the incident. He stated that he received a call from PW10, Corporal Peter Joakim Usiku, informing him of a report made by PW5, Corporal Evan Munene, regarding the Appellant. PW10 relayed that the Appellant had allegedly killed someone. That upon receiving this information, PW11 advised that the matter be reported to the civil Police. He then proceeded to Avery Lounge in Utawala, where the Appellant was arrested. And after the arrest, the Appellant led PW11 and the accompanying Officers to his apartment, where the deceased's body, which had a deep cut at the back of the head, extending around the neck. PW11 also identified a kitchen knife, which was found near the sink in the toilet area.
  37. During cross-examination, PW11 confirmed that he was part of the group of Officers who accompanied the Appellant to his house. He testified that he personally saw the body of the deceased at the scene.
  38. PW12, Chief Inspector Isaiah Besengi, testified that he received a call about a Murder and proceeded to the Police Station where he found PW5, Corporal Evan Munene and he (PW5) narrated the events of the day to him which were consistent with his testimony in court. PW12 stated that he accompanied PW5 and other Officers to Avery Lounge in Utawala, where he pointed out the Appellant to them. The Appellant was arrested at the lounge and subsequently, he led the Officers to his apartment where they found the body of the deceased lying with visible injuries. PW12 confirmed that the body was covered with a Maasai sheet.
  39. On cross-examination, PW12 testified that during the initial interrogation of PW5, he was accompanied by other Officers, though he could not recall their names.
  40. PW13, Silas Esuron Kaleso, testified that he was the brother of the deceased and stated that he had spoken to the deceased the day before the incident and in the course of their conversation, the deceased informed him that she would be traveling to Nairobi from Isiolo. PW13 testified that he later received the news of his sister's death from a Kenya Defence Forces (KDF) Officer.
  41. PW14, Corporal Lucy Wangui Kabala, testified that she was attached to the DCI Kayole was among the Officers who went to Avery Lounge, where the Appellant was arrested. Following the arrest, she accompanied the team to the Appellant's house and she took an inventory of several items found at the scene which included a Maasai shuka, a knife, a khaki trouser, a black T-shirt, a jungle belt, and sandals
  42. When cross-examined, PW14 stated that she did not have the authority to record a confession, as this is required to be done by a Chief Inspector or Magistrate. She confirmed that although she was based at the DCI, Kayole station, the report regarding the case was made at Mihango Police Station. PW14 also confirmed that she accompanied the team to Avery Lounge and saw the Appellant there. She testified



that there were many Police Officers present in the house during the search. She also noted that the kitchen knife found at the scene did not have any visible blood stains.

43. PW15, Henry Kiptoo Sang, told court that he was a Government Analyst. He testified that on 25<sup>th</sup> March, 2022, he received several items for analysis and they included a kitchen knife, a black-and-red checked kikoi, a blue-and-white bedsheet, a short-sleeved T-shirt, a khaki trouser, a jungle green belt, an ocutainer, and a high vaginal swab. PW15 stated that upon analysing these items, he found no blood stains on the knife. However, the kikoi was moderately blood-stained, and the bedsheet was heavily blood-stained. He also reported that there were no traces of semen on the vaginal swab. Regarding the DNA analysis, PW15 testified that the blood samples matched the DNA profile of the deceased, with a probability of 1 in  $2.641 \times 10^{35}$ .
44. During cross-examination, PW15 stated that it is possible to profile DNA from blood-stained clothes if they are kept in a normal environment and are dry. He confirmed that in this case, the clothes he analyzed were all dry.
45. In re-examination, PW15 clarified that if wet clothes are received for analysis, standard laboratory procedure requires that they be dried first before any examination is conducted.
46. PW16, Chief Inspector Joseph Maina, testified that he was an investigator attached to the DCIO Kayole and was assigned to handle this case. He stated that after completing investigations, the Office of the Director of Public Prosecutions (ODPP) recommended that the Appellant be charged with the offence of murder and recommended that the second suspect, PW1, be treated as a prosecution witness. Following these recommendations, PW16 stated that the Appellant was charged accordingly.
47. PW17, Captain Kennedy Nyambane Ondimo, testified that he was attached to the Military Police Special Investigations Unit. He stated that he received the original Police file related to the case alongside with exhibits, the post-mortem report, the personal belongings of the deceased, witness statements, and the crime scene report. He also testified that the Appellant was arrested following investigations conducted by the relevant authorities. He confirmed that he reviewed the documents and exhibits related to this case as part of his role in coordinating with the investigations team.
48. During cross-examination, PW17 clarified that he received all the documents and exhibits relevant to this case and outlined the procedures followed to ensure proper handling and preservation of the evidence.
49. With the above evidence, the prosecution closed its case and the Appellant was then placed on his Defence whereby he elected to give sworn evidence. He testified as Defence witness 1 (DW1).
50. The Appellant testified that he enlisted in the military in 2015 and was based in Embakasi. He denied the charge of murder against him and stated that on 5<sup>th</sup> March, 2022, which was a Saturday, he was at his home when PW1 called him at around 3:00 p.m. They then planned to meet with some of his friends and together with PW1, proceeded to Kiambu, where they met his friend Robert Njoroge at Kibichoi area. Later, they headed to Utawala where they arrived at around 10:00 p.m. According to the Appellant, he called and invited PW3, a caretaker at an apartment opposite his residence to join their group. They then drank muratina until about 4:00 a.m. on the morning of 6<sup>th</sup> March 2022. Later, the group, consisting of the Appellant, PW1, PW3, Robert Njoroge, and another friend (Boi), returned to the Appellant's apartment at Evergreen Court, House No. 18. Upon arrival, PW1 went straight to the bedroom to sleep while the rest of them continued drinking until 6:00 a.m., when Njoroge and Boi left. The Appellant testified that he continued drinking until 8:30 a.m. and it is at this point he remembered that the deceased had called him the previous day. He called her back, but she did not pick



up the call. He then sent her a text message saying, “Hey Phoebe ukitoka church nicall” (translated in English Language to mean “Hey Phoebe, call me when you leave church”).

51. The Appellant went on to state that at around 10:30 a.m., PW3 complained of hunger and he sent him to buy eggs. PW2 also arrived, and they made and ate breakfast while PW1 remained asleep in the bedroom. That at around 11:30 a.m., there was a knock on the door and PW3 proceeded to open the door. The deceased entered the house. The Appellant asked her why she had come unannounced, but she did not respond. Instead, she noticed PW1’s shoes near the entrance and began questioning him about them. The Appellant stated that PW2 and PW3 left the house and he remained with the deceased. He testified that the deceased went to the bedroom where she found PW1 sleeping, and wanted to confront her, but the Appellant intervened and asked PW1 to leave.
52. The Appellant said that after PW1 left, he tried to calm down the deceased, but she was furious. He then called PW5, who arrived around 1:00 p.m. He introduced PW5 to the deceased and asked him to take PW1 out for a drink. PW5 agreed and left with PW1 to the parking lot.
53. According to the Appellant, the deceased became more upset and accused him of hosting other women in his house. She went to the kitchen, grabbed a knife, and asked him to choose between her and the “prostitutes.” The Appellant stated that as he was sitting on the couch when the deceased attempted to stab him, but he overpowered her and this led to a struggle. He claimed that during this struggle, he accidentally cut her left ear and cheek while holding the knife in his right hand.
54. The Appellant added that the deceased tried to stab him again but fell on the couch and injured herself in the neck. He stated that he used a Maasai shuka to try and stop the bleeding. And while attending to the deceased, he called PW5 and placed the call on loudspeaker. He claimed that PW5 refused to help because his car was unavailable.
55. The Appellant testified that he decided to go to Avery Lounge to collect PW1’s car, as PW3 had informed him it was parked there. While at Avery Lounge, he was arrested and he led the Police to his apartment.
56. During cross-examination, the Appellant confirmed that he lived alone in House No. 18 on third floor at Evergreen Court. He stated that he had lived there since June, 2020. He admitted that the deceased was his ex-girlfriend, whom he had met while working in Garissa and she had previously visited his house.
57. He confirmed that on 6<sup>th</sup> March, 2022, after Njoroge and Boi left, he remained in the company of PW1, PW2, and PW3. When the deceased arrived, she was upset about PW1 being in the house.
58. The Appellant demonstrated to court how the alleged struggle with the deceased occurred. He stated that he was seated when the deceased tried to stab him. He grabbed her right hand, causing the knife to cut her left ear. When asked to explain how the deceased made a full turn (360 degrees) to cut herself in the neck, the Appellant insisted that she accidentally injured herself while attempting to stab him from behind.
59. He admitted that he changed his bloody clothes and left to collect a car as he intended to take the deceased to the hospital. He denied pushing the deceased and maintained that she had fallen on her own.
60. In re-examination, the Appellant denied having intended to harm the deceased. He reiterated that his actions were in self-defense and that her injuries were accidental. He explained that he left the house to retrieve PW1’s car since it was not possible to carry the deceased to the hospital on his own. He maintained that his only intention was to help the deceased and that he had no malicious intent.



61. The trial court analyzed the evidence provided by the prosecution and the Appellant and upon considering the testimonies of all prosecution witnesses, the Appellant's defence, and the circumstances surrounding the incident unanimously found that the prosecution had proved the three elements of murder being the death of the deceased, the unlawful act or omission that caused her death and Malice aforethought on the part of the Appellant. The court found that the injuries sustained by the deceased were consistent with an intentional attack and were not accidental or self-inflicted. It also determined that the Appellant's account of events was inconsistent with the medical and forensic evidence presented. The trial court then convicted the Appellant for the offence of murder and sentenced him to thirty (30) years' imprisonment.
62. In his Notice of Appeal dated the 29<sup>th</sup> March, 2024, the Appellant challenged the conviction and sentence for being legally improper. However, in the submissions filed in support of this appeal, the Appellant's counsel casually sought leave to submit on among other grounds:-
- a. That. the trial Judge Advocate erred in both law and fact by convicting the Appellant on a charge that was duplex and ambiguous in nature to the prejudice of the Appellant;
  - b. That, the trial Judge Advocate erred in law and in fact when he convicted the appellant on a charge whose elements were not conclusively proved, disregarded the appellants testimony of self defence while ignoring the overall circumstances prevailing at the scene of crime to the prejudice of the Appellant herein;
  - c. That, the trial Judge Advocate erred in law and fact when he relied on an alleged confession consisting of self-incriminating evidence in Contravention of Article 50(2) (i) of *the Constitution* of Kenya, 2010 and that was inadmissible under Section 25(1) of the *Evidence Act* to the prejudice of the Appellant.
  - d. That, the trial Judge Advocate erred in law and fact when he relied on electronic evidence that was unverifiable, incomplete and that lacked authentication to the prejudice of the appellant herein;
  - e. That the sentence imposed by the trial Judge Advocate was manifestly harsh and excessive considering the circumstances of the alleged offence and the current jurisprudence in murder and related offences.
63. However, it is imperative to mention that parties are bound by their pleadings and since the Appellant did not include the highlighted Grounds of Appeal when filing the instant Appeal, he is legally barred from introducing new contentions in his submissions since this would amount to trial by ambush as against the Respondent. The Grounds of Appeal ought to have introduced before the hearing of the appeal to allow the prosecution ample time to respond on each ground but this was not done. For this reason, this court is justified at this stage to dismiss or expunge the Appellant's submissions for introducing factors, arguments and or evidence which were not anticipated at the hearing of the case. Be that as it may, having earlier pointed out that this court's duty is to re-evaluate and reassess the evidence presented before the trial court, this Court will address all issues with respect to this appeal, that may have arisen either at the hearing or in the Appellant's submissions to arrive at its own conclusion since, as required by law, this court must consider whether the trial court's findings were consistent with the evidence and the applicable legal principles.

### **A Summary of the Appellant's Submissions**

64. On the first ground, the Appellant submits that his trial and subsequent conviction were based on a defective and duplex charge sheet, which rendered the charges ambiguous and difficult to understand,



thereby prejudicing his defence. He contends that the charge sheet stated that he was charged with committing a civil offence contrary to Section 133(1)(B) of the *Kenya Defence Forces Act*, 2012, specifically Murder contrary to Section 203 as read with Section 204 of the Penal Code. According to the Appellant, the two offences referenced in these sections were not separately described, as required under Sections 134 and 135(2) of the Criminal Procedure Code (CPC). This, he argued, violated his right to a fair hearing as guaranteed under Article 50(2)(b) of *the Constitution* of Kenya, 2010.

65. On the second Ground of Appeal, the Appellant submitted that the prosecution failed to prove malice aforethought. He asserted that the deceased, who was a trained soldier, sustained fatal injuries while attempting to attack him. He argued that there was no evidence to establish that he acted with premeditated intent to cause harm or death.
66. The third ground focused on the alleged confession recorded on PWS's phone. The Appellant submitted that this confession violated Section 25A(1) of the *Evidence Act*, which mandates that confessions must be made to a Police Officer not below the rank of an inspector, or to a judge or magistrate in court. He further argued that the recording, later stored on a CD, was unverified and lacked proper authentication hence rendering it inadmissible.
67. Finally, the Appellant urged the court to review his sentence and consider a non-custodial sentence if it is not persuaded to quash the conviction. He implored the court to balance the public interest with the adverse effects the conviction and sentence would have on his family, who he stated were wholly dependent on him.

### **Analysis and Determination**

68. Having read through the proceedings of the trial court, I have also considered the evidence and submissions as highlighted above. The central issue for determination are:-
  - a. Whether the offence of Murder was proven as against the Applicant to the required standard of proof; and,
  - b. Whether the conviction and sentence meted by the Court Martial should be upheld.
69. However, before delving on the merits thereof, this Court will first address two preliminary issues raised by the Appellant, being, whether the charge sheet was defective and whether the evidence admitted contravened the laws of evidence, in particular Section 125 of The *Evidence Act*.
70. On whether the Charge Sheet was ambiguous, the Appellant contends that the charge sheet was ambiguous and defective, violating Section 134 of the Criminal Procedure Code (CPC), which mandates that a charge must clearly specify the offence and include the necessary particulars to enable the accused to fully understand the case against them. It was argued that a defective Charge Sheet undermines an accused person's ability to prepare an adequate defence, thus infringing on his/her right to a fair trial as guaranteed under Article 50 of *the Constitution* of Kenya, 2010.
71. In this Court's view, while assessing whether a Charge Sheet is defective, one court must also determine if the defect resulted in prejudice or a miscarriage of justice given that Section 382 of the Criminal Procedure Code provides that no finding, sentence, or order of a court shall be reversed or altered on account of an error in the Charge Sheet unless the error has occasioned a failure of justice. With that in mind, the charge in this case stated that the Appellant was Charged Sheet with "committing a civil offence contrary to Section 133(1)(B) of the *Kenya Defence Forces Act*, 2012, that is to say, murder contrary to Section 203 as read with Section 204 of the Penal Code.



72. The *Kenya Defence Forces Act* explicitly recognizes certain offences, including murder, as civil offences when committed by a member of the Armed Forces. Section 133(1)(B) of the Act provides the framework for prosecuting such offences within the military justice system. Therefore, in that sense, this Court finds there is no ambiguity or inconsistency in referring to Sections 203 and 204 of the Penal Code in conjunction with the *Kenya Defence Forces Act*.
73. Section 203 of the Penal Code defines murder as the unlawful killing of another person with malice aforethought, while Section 204 prescribes the penalty for murder. The *Kenya Defence Forces Act* merely designates such acts as civil offences, ensuring that members of the armed forces are subject to the same legal standards as civilians for crimes like murder. The dual reference to the *Kenya Defence Forces Act* and the Penal Code did not create any ambiguity. Instead, it contextualized the charge within the military setting while maintaining the substantive legal framework for Murder under the Penal Code. Thus, this court finds that the charge sheet satisfied the requirements of Section 134 of the Criminal Procedure Code by specifying the nature, date, and location of the offence, as well as the manner in which it was committed.
74. Furthermore, the Appellant did not demonstrate how the framing of the charge sheet caused prejudice or hindered his defence. He was represented by counsel, actively participated in the trial, and presented a detailed defence based on self-defence. There is no indication that the alleged defect in the charge sheet caused any miscarriage of justice. In the case of Yusuf –vs- Uganda [1968] EA 236, the court emphasized that a defective charge is only fatal if it prejudices the accused or results in an injustice. Similarly, in the case of Achoki –vs- Republic [2000] KLR 707, the court held that a defect is curable under Section 382 of the Criminal Procedure Code if no prejudice is demonstrated.
75. In conclusion, this court finds that the charge sheet was neither ambiguous nor defective as alleged. It clearly specified the offence of Murder and provided all the necessary particulars. The reference to both the *Kenya Defence Forces Act* and the Penal Code was appropriate and did not create any confusion or inconsistency. Therefore, the Appellant’s argument on this ground is without merit and is hereby dismissed.
76. On the second preliminary issue, the Appellant challenged the admissibility of the alleged confession recorded by PW5 on his phone, arguing that it violated the provision of Section 25A(1) of The *Evidence Act*. Section 25A(1) provides that “confessions are only admissible if made to a Police Officer not below the rank of Inspector, or to a Judge or Magistrate”. The Appellant contended that the confession, having been recorded by neither an authorized Officer nor meeting the procedural safeguards under The *Evidence Act*, was improperly admitted in evidence.
77. Under Section 25A(1) of The *Evidence Act*, confessions must adhere to strict legal requirements to safeguard the accused’s right to a fair trial and to ensure the reliability of the evidence. The Section explicitly states:-
- “A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved against such person unless it is made before a Judge, a Magistrate, or a Police Officer not below the rank of Inspector, and the accused person has been cautioned in accordance with the law.”
78. In this case, the Appellant’s confession was not made to a Police Officer, Judge, or Magistrate. Instead, it was a statement recorded on PW5’s phone during a private conversation between PW5 and the Appellant. The Appellant argues that this conversation cannot qualify as a legally admissible confession under Section 25A(1) of The *Evidence Act*. This court agrees with the Appellant that the recorded statement does not meet the requirements of a formal confession under Section 25A(1) of the Criminal



Procedure Code. However, not all statements made by an accused must meet these standards to be admissible. Statements made voluntarily to third parties can still be admitted and or considered by the court if presented within guidelines under Section 63 of The *Evidence Act*, which governs the admissibility of oral evidence based on witness testimonies or especially when they are relevant and corroborated by other evidence.

79. In this case, PW5 testified that the recorded conversation between himself and the Appellant was part of a dialogue voluntarily initiated by the Appellant, in which he described the events leading to the deceased's death and sought assistance to evade accountability.
80. Additionally, these recordings were however presented by PW7 who is a qualified Forensic Imaging and Acousting Analyst and met the requirement under Section 78A of The *Evidence Act*. Thus, it is this Court's finding that the exclusion of relevant evidence that is admissible under Section 78A of The *Evidence Act* and further corroborated by oral evidence would undermine the administration of justice. The Appellant's argument that the recorded statement should be excluded is therefore without merit and hence declined.
81. Turning to the underlying question for determination, which is whether the offence of murder was established to the required standard, murder, as defined under Section 203 of The Penal Code, requires the prosecution to prove three elements beyond reasonable doubt which are: (a) Unlawful Killing, (b) Causation, whether the accused caused the unlawful death, and (c) Malice Aforethought.
82. The court will proceed to analyze each element based on the evidence presented while referencing witnesses' testimonies, and assess whether the prosecution met the required standard of proof.

#### **(a) Unlawful Killing**

83. The prosecution presented evidence through PW8, Major Doctor Wasike Edward, the Pathologist, who conducted the post-mortem examination. He testified that the deceased died from severe hemorrhage caused by a deep cut at the back of the neck. This injury is said to have severed muscles, blood vessels, and reached the vertebrae bone. He also observed defensive wounds on the deceased's hands, indicating that she had tried to protect herself from an attack.
84. PW8's findings ruled out the possibility of self-inflicted injuries by stating that the pattern, nature, and severity of the injuries strongly suggested that the deceased's death was not accidental or lawful.
85. The Appellant claimed that the injuries were sustained during a struggle and alleged that the deceased attacked him with a knife. However, the presence of defensive wounds and the nature of the injuries contradicted his claim. PW8 specifically noted that the injuries were consistent with an intentional attack from behind, not accidental injuries sustained in self-defense. Therefore, this court concludes that the prosecution proved beyond reasonable doubt that the deceased's death resulted from an unlawful act.

#### **Causation**

86. On whether the Accused person caused the unlawful acts, the prosecution relied on both forensic and circumstantial evidence to establish that the Appellant caused the injuries that led to the deceased's death. PW8 (a Pathologist) testified conclusively that the deceased's death was caused by severe hemorrhage resulting from a deep cut on the back of the neck. The injury severed muscles, blood vessels, and reached the vertebrae, which indicated that the act was deliberate and forceful. According to PW8 additional defensive words as the deceased's hands showed that she tried to protect herself from an attack and thus, PW8 ruled out the possibility of self-inflicted injuries or accidental harm.



87. On the other hand, Pw1 and PW3 testified that they were present in the Appellant's house prior to the incident, and they observed escalating tension between the Appellant and the deceased. They testified that the deceased was agitated upon finding another woman (PW1) in the house. However, although neither of them witnessed any physical confrontation before leaving, the accused person does not deny that Pw1 and PW3 were present and know he was with the deceased when she sustained the injuries.
88. PW5 testified that the Appellant admitted to stabbing the deceased during a call made after the incident. This admission was further corroborated by a recorded conversation presented by PW7 which detailed the Appellant's account of the events and his subsequent attempt to cover up the crime. The Appellant relied on Section 17 of The Penal Code while arguing that his actions were justified because the deceased attacked him with a knife during an argument.
89. To determine whether the defense of self-defense applies, the court must examine three critical elements which are imminent threat, proportionality of force and necessity of the action taken. The Appellant claimed that the deceased had posed an immediate threat to his life by attempting to stab him. However, this claim was controverted by the forensic evidence. PW8 testified that the injuries on the deceased, including the defensive wounds, indicated that she was the victim of an attack rather than the aggressor. The evidence that the nature and location of the fatal neck wound showed it had been inflicted from behind, further undermines the claim of the deceased having been an imminent threat to the Appellant. Secondly, for the defense of self-defense to succeed, the force used must be proportionate to the threat posed. In this case, the deceased suffered a fatal neck wound, multiple cuts, and stab wounds on her shoulder. PW8 described the injuries especially the fatal neck wound as having been inflicted forcefully as opposed to an accidental cut which is consistent with a deliberate attack rather than reasonable force intended to neutralize a threat. PW8's conclusions are further consistent with testimonies of PW5 and PW7 with regard to how the fatal neck wound happened.
90. Thirdly, it is clear from the above discussion that the evidence by the prosecution is purely circumstantial and as is tried in law, circumstantial evidence must be cogent and unbroken, leading only to the conclusion of the accused's guilt. The principles set out in the case of R –vs- Kipkering Arap Koske [1949] 16 EACA 135, require that circumstantial evidence excludes any reasonable hypothesis other than the accused's guilt.
91. In this case, the chain of circumstantial evidence as presented by the prosecution meets this threshold that the forensic evidence (PW8 and PW15) directly linked the injuries to an intentional act, the Appellant was the last person seen with the deceased, and no evidence to suggest the involvement of a third party was presented, the Appellant's admission to PW5 and his actions after the incident, such as attempting to flee and concealing the deceased's body with a "masai kiko" corroborate the conclusion that he was responsible for the deceased's death.
92. The defense of self-defense alluded to by the deceased fails because firstly, the alleged threat was not supported by any evidence since the Appellant's account of events was inconsistent with the medical and forensic evidence presented. Secondly, because the force used was disproportionate and excessive in the circumstances and lastly, the Appellant had reasonable alternatives to avoid the situation including retreat or seeking for help from the group of friends he was with.
93. In conclusion, the evidence presented overwhelmingly points to the Appellant as the culprit of the deceased's injuries and subsequent death. The prosecution successfully discharged its burden of proving that the Appellant's actions caused the death of the deceased, and the claim of self-defense failed to meet the required legal threshold.



94. Lastly, on whether the Appellant had malice aforethought in causing the death of the deceased, an analysis of the evidence has been done to establish this. Under Section 206 of the Penal Code, malice aforethought can be established if it is shown that the accused:-
- a. Intended to cause death or grievous harm;
  - b. Acted with reckless disregard for human life; or
  - c. Committed the killing during the commission of a felony.
  - d. The evidence presented demonstrates malice aforethought:
95. In this case, PW8 testified that the deceased suffered a fatal neck wound, alongside other multiple injuries, including stab wounds on her left back and shoulder. He explained that the deep cut on the back of the neck severed vital blood vessels, indicating a deliberate and forceful attack. It is important to note that the fatal wound was inflicted on the posterior side of the neck, which according to PW8, is consistent with an intentional attack from behind rather than a defensive struggle.
96. PW5 testified that the Appellant called him after the incident and admitted to having killed the deceased. The recorded conversation between them corroborated the prosecution's case that the Appellant acted deliberately and sought to conceal his actions.
97. Thus, based on the above evidence of intent and the severity of the injuries inflicted on the deceased, it is confirmed that the Appellant acted with malice aforethought hence all the elements of Murder have been satisfied.
98. In the upshot, the court finds that the prosecution proved beyond reasonable doubt the three essential elements of Murder, being that the deceased died from an unlawful act, that the act was caused or committed by the Appellant and finally that the Appellant, in committing the said act had malice aforethought. Therefore, this Court also finds that the conviction of the Appellant for the offence of Murder was properly grounded on the evidence presented and thus satisfies the required standard of proof.
99. As regards the sentence that was meted against him, the Appellant was convicted of murder under Section 203 as read with Section 204 of the Penal Code and sentenced to serve thirty (30) years' imprisonment. The Appellant has challenged the sentence as being harsh and excessive and has urged the court to consider a non-custodial sentence or a reduced term. Amongst the mitigating factors he has advanced are that, his family is wholly dependent on him, that he is a first offender with no prior criminal or disciplinary record and that he is remorseful of his acts.
100. Guided by decisions especially the decision in the case of Francis Karioko Muruatetu –vs- Republic [2017]eKLR, where the Supreme Court emphasized the need for individualized sentencing based on the circumstances of each case, Courts have since imposed varied sentences for the offence of Murder which ranges from life imprisonment to twenty-thirty (20–30) years imprisonment, depending on the mitigating and aggravating factors.
101. A consideration of the circumstances surrounding the offence committed in this case, this Court finds that the thirty (30) year custodial sentence imposed by the Court Martial reflects the gravity of the offence while allowing for the possibility of reform. The sentence was meant to serve the principles of deterrence, proportionality, and justice.
102. The Court finds the sentence of thirty (30) years imprisonment meted against the Appellant is neither harsh nor excessive in the circumstances of this case as it adequately balances the seriousness of the



offence, the interests of justice, and the potential for the Appellant's rehabilitation. In view of this, the sentence that was meted against the Appellant is hereby upheld.

103. Therefore, the instant Appeal is found to be without merit and is hereby dismissed.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024.**

**D. O. CHEPKWONY**

**JUDGE**

