Republic v Biwott (Criminal Case E023 of 2023)
[2024] KEHC 16320 (KLR) (17 December 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E023 OF 2023

RN NYAKUNDI, J

DECEMBER 17, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

LILIAN BIWOTT ..... ACCUSED

JUDGMENT

1. The accused person Lilian Biwott is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the 14th October 2023 at Kimumu Estate within Eldoret Township in Moiben sub-county within Uasin Gishu County she murdered VICTOR KIPCHUMBA. The accused being represented at the trial by Learned Counsel Mr. Oduor whereas the Senior Prosecution Counsel Mr. Mark Mugun, stands in for the state under Art. 157(6) & (7) of *the Constitution*. The accused person pleaded not guilty to the charge. Seven (7) witnesses were called by the prosecution in support of its case and their evidence is summarised as follows:

2. PW1: APC BENARD OUMA testified that on 14.10.23 at around 1800HRS, he was the duty armourer. His task for that evening was to issue out firearms to officers who were on duty. He issued firearm S/No 245535 to the accused person who was to report on duty at KEBS offices in Uasin Gishu. At around midnight, he was informed that there was a shooting incident concerning the accused. He produced the Arms Movement Register as Exh 1.

3. PW2: NOELLA CHERUIYOT testified that she is an administration police officer based in Baringo but was previously in Eldoret West. She testified that the accused was her colleague and friend. As a result of that friendship, they would visit each other often and would keep secrets of each other. In 2023, the accused started visiting her house so that she can change into and out of her uniform. The accused did this so often that this witness gave her another set of keys so that she can access the house at will. She was aware that the marriage between the accused and the deceased was on the rocks. Several

times, she had noticed that the accused looked crestfallen and confided in her that the deceased had often quarrelled her and he called her nasty names.

4. PW3: ISMAIL SORGOR testified that he is the deceased uncle and by effect, a father-in-law of the accused. On 14/10/23 at around 0315HRS, he was notified that the deceased had been shot dead by the accused. He immediately left his residence and rushed to the homestead of the couple in Kimumu. By the time he got there, the body had been moved to a mortuary nevertheless, he went to the house. He noted that there were bullet holes in the floor, blood on the bed and window that bullets broke. He also confessed that his nephew's marriage had been rocked with a lot of wrangles, so much that he had been asked to intervene and counsel them. In one of those sessions, he was present when the accused threatened to open burst shot on the deceased, a military lingo meaning she would shoot the accused until the rifle magazine runs empty. As a former military-man, he understood this to mean as such which caused him to implore upon her not to do something as reckless as that. After that pronouncement, his family advised the deceased to move out of their matrimonial home. He was aware that the deceased complied with that advice and moved out of the matrimonial home.

5. PW4: SHARON JEPCHIRCHIR testified that she used to work for the accused and the deceased as the house help. On 14th October 2023 at around 2100HRS, she was in the bedroom and overheard the deceased having an argument with someone over the phone. In the course of that argument, she heard the deceased tell the person on the other end that the person is not at work but had gone for prostitution work. He then threatened to harm the children. It was at that point that she suspected that the deceased might be arguing with the accused on phone. She nevertheless called the accused to inform her of what she had overheard the deceased saying. After about an hour, the accused came home, knocked on the door and she opened it for her. She then noted that the accused was dressed in her police uniform and had a rifle with her. As she was doing this, the deceased was in their (his and the accused's) bedroom. She went back to her bedroom as the accused went to theirs. She overheard them having a conversation and after about 30 minutes, she heard a loud pop like that of a gunshot. She found the accused walking out and saw the accused hiding her gun near the flower bed before walking towards the main road. Sharon informed the caretaker of what had happened and when they peeped through the door, they saw the body of the deceased lying in the bed with a lot of blood on the floor. This witness also confirmed that the marriage between the accused and the deceased had turbulent times with each party accusing the other of infidelity. She also testified that the accused had previously tried to woo her but she rebuffed those advances and informed the accused of what had transpired. She further testified that although the deceased used to carry a knife with him, she had not seen nor heard that he had injured someone using that knife. She confirmed that the accused was a loving father and that on that material night, he had not taken the children aside to set in motion the threat to harm them.

6. PW5: DR BENSON MACHARIA testified that he was the medic who conducted a post-mortem examination of the deceased. On the external examination of the body, the deceased had six penetrating gunshot wounds which were as follows:

    i. The first was on the right wrist joint with a 3cm entry wound and an exit wound on the right rear elbow measuring 4 x 1cm.

    ii. The second entry wound was on the right shoulder measuring 0.5 cm with inverted edges with an exit wound measuring 5 x 3cm near the neck root causing blazing wound on the right side of the scalp.

    iii. The third gunshot wound had an entry wound measuring 0.5cm on the right chest wall posteriorly, exiting at the left chest wall lateral posterior with an exit wound measuring 4 x 3cm.

This wound on internal appearance, was found to have gone through the lower tubes of both lungs causing lung collapse and massive haemothorax then injured the thoracic spine.

iv. The forth gunshot wound measured 0.5cm on the right side popliteal exiting sound measuring 1cm on the right lateral knee.

v. A gunshot entry wound measuring 0.5cm popliteal exiting mid-thigh medially measuring 1 x 2 cm

vi. An entry wound measuring 0.5 cm on the right thigh laterally, exit wound measuring 9.5cm mid-thigh laterally causing a fracture in the right femur.

vii. A glazing wound measuring 4 x 2cm on the right wrist joint.

viii. A bruising wound 3 x 2cm on the upper left thigh

7. Dr. Macharia concluded that the cause of death was due to hypovolemic shock due to bleeding caused by multiple penetrating gunshot wounds. He produced the post-mortem form as Exh 4.

8. PW6: SENIOR SUPERINTENDENT FLORENCE testified that she was requested to examine a riffle, bullets, magazine, damaged bullets and cartridges. She was to confirm if the rifle and bullets work and if it did, whether the damaged bullets and spent cartridges were fired from that rifle. She confirmed that the rifle worked, the bullets were capable of being fired and that the spent cartridges were fired from that rifle. She produced her report, riffle, bullets, magazine, damaged bullets, exhibit memo and spent cartridges as Exh 5A-5F respectively. As a ballistic expert, she confirmed that the rifle could be set in either semi-automatic mode-where only one bullet is discharged when the trigger is pulled, or automatic mode-where the firearm would continuously discharge bullets as long as pressure is applied on the trigger. She also told the court that in police/ military lingo, a burst shot, such as the one described by PW3, is where the rifle is set on automatic mode.

9. PW7: CPL STEPHEN NZAU testified that he was the officer investigating this matter. On 15th October 2023 at around 0600HRS, the DCIO informed him of a murder incident that had occurred within Kimumu estate. He then rushed to the scene and established that the deceased's body had already been moved to MTRH morgue and the suspect, who was an AP officer, had been detained in custody. They visited the C.I.P.U where she was based at and was able to recover the arms movement register which the accused had signed after she took possession of an AK-47 rifle S/No 5900335 loaded with 30 rounds of ammunition. He also collected the duty roster for the day and the actual firearm recovered at the scene. He prepared an exhibit memo form which was dispatched to the Ballistic Experts in DCI Nairobi. He went with officers from scene of crime support who documented the scene. At the scene, he was unable to recover a knife which the accused said the deceased had used to attempt to stab her. At the time of recovering the riffle and the magazine, the magazine had 18 rounds indicating that 12 rounds had been shot. He further testified that he believed the riffle had not been set on automatic mode where burst shots were released, but on semi-automatic mode where the accused had to pull and release the trigger 1,2,3,4,5,6,7,8,9,10,11 and 12 times the 12 rounds were shot. His belief that the trigger was pulled and released 12 times is founded on the pattern shot. The bullets were not spread all over as is common when the riffle is set on automatic mode, but aimed at a singular point. It is for that reason that he believed that the accused committed the crime with malicious intent and therefore preferred the charges of murder against her.

10. That was the close of the prosecution's case and after the court considered the prosecution's evidence, it arrived at a conclusion that the accused had a case to answer.

11. Placed on her defence, the accused person testified and called one other witness. She was sworn as DW1 in and stated that she is a AP officer and that prior to her arrest, she resided in Kimumu within Uasin Gishu County. She told the court that she married the deceased under Keiyo Customary law sometime in 2013. They later conducted a civil marriage in 2018. She said that her marriage used to be blissful until she conceived their first-born child. The deceased started becoming physically and emotionally abusive. She notified his relatives about this change of behaviour to which the deceased was advised to desist from that. On her part, she was counselled to persevere as no marriage is perfect. She testified that she recalled incidences where the deceased had assaulted her, she reported the matters at the police stations and would eventually drop the charge at the instigation of her in-laws. At one point, the beatings were so intense that after a reconciliatory meeting, they were advised to separate. The deceased would later seek for forgiveness and she allowed him to move back home. Apart from the beating, she claimed that the deceased had caused here mental anguish by wooing their house-help and had fathered children from extra-marital activities.

12. Next was DW2- JOSPEHINE KIPSEI who testified that she is the accused's mother. The relevant parts of her testimony were a regurgitation of the accused's testimony. She told the court that her daughter's marriage had been in the headwinds for a while. She had several times been called upon to mediate and offer guidance every time the couple fought. According to her, the fights became too frequent that they advised the accused to move out of her matrimonial house and separate from the deceased. She was baffled that they had patched things up and lived together again. She admitted that each marriage has a challenge of its own and there cannot be one that is blissful all the time. She was not there on the night in question when the incident took place and cannot therefore say authoritatively what happened.

13. The parties through respective counsel filed their submissions which are summarised as hereunder:

Prosecution's written submissions

14. Senior Prosecution Counsel for the State, Mr. Mark K. Mugun, submitted that the prosecution had proved its case against the accused person, Lilian Chemaiyo Biwott, beyond reasonable doubt. It was submitted that on the night of 14th October 2023, the accused, who was an Administration Police Officer, while armed with an official firearm, shot and killed her husband Victor Kipchumba at their matrimonial home in Kimumu Estate within Eldoret Township.

15. The prosecution relied on the testimony of seven witnesses to establish its case. Drawing from the Court of Appeal decision in Anthony Ndegwa Ngari v Republic [2014] eKLR, counsel submitted that three elements of murder were not in contention: the fact of death, that death was caused by an unlawful act, and that the accused committed the act. The main issue for determination was whether the accused acted with malice aforethought.

16. On malice aforethought, counsel cited the case of Republic v Lucy Nyokabi Maura [2015] eKLR which established that the prosecution must prove deliberate intent through: the nature and use of the lethal weapon, the part of the body targeted, and whether the consequences were foreseeable. It was submitted that the accused used a rifle, which she fired twelve times, with six bullets striking vital parts of the deceased's body including the chest wall, shoulder, and thigh. The prosecution argued that a 50% accuracy rate could not have been by mistake.

17. Regarding the accused's claim of self-defense, counsel relied on IP Veronica Gitahi & Another v Republic Criminal Appeal No. 23/2016, submitting that as a police officer, the accused was bound by the *National Police Service Act* which requires officers to resort to non-violent means first and use proportional force only when necessary. It was argued that the deceased was unarmed and posed no immediate threat that would justify the use of lethal force.

18. The prosecution challenged the accused's version of events, noting that no knife was recovered from the scene despite her claims that the deceased had threatened her with one. Counsel pointed to the testimony of PW4 (the house help) who stated that there was a 30-minute gap between the accused's arrival and the shooting, suggesting premeditation rather than an immediate response to danger.

19. Drawing from Victor Nthiga Kiruthu & Another v Republic [2017] eKLR, counsel argued that the requirements for self-defence were not met as there was no imminent danger that could only be repelled by such force. The ballistics expert's testimony that the bullet spread pattern indicated deliberate single shots rather than automatic fire was cited to counter the accused's claim of accidental discharge.

20. Counsel concluded by referencing John Mutuma Gatobu v Republic [2015] eKLR to emphasize that while motive is not required to prove murder, the circumstances of this case, including the accused's conduct after the shooting - hiding the weapon and failing to seek medical help for the deceased - demonstrated clear malice aforethought. The prosecution therefore urged the court to find the accused guilty of murder as charged.

The Defence Submissions

21. Learned counsel for the accused Mr. Oduor submitted that the accused person faces a charge of murder contrary to Section 203 of the Penal Code. The central argument advanced was that the prosecution failed to prove all elements of murder against the accused beyond reasonable doubt.

22. It was submitted on behalf of the accused that based on the evidence of PW4 (Sharon Jepchirchir), PW2 (Ismail Surgor) and DW1, the deceased had been abusing the accused both physically and emotionally. The evidence demonstrated that on various occasions, there were reconciliation meetings between the accused and the deceased which were disapproved by the deceased. Of particular significance was that on 14.10.2023, when the accused arrived at their house, the deceased threatened to kill her children, prompting her to rush home from work to protect them.

23. Counsel emphasized that upon receiving a distress call, the accused found the deceased armed with a knife threatening the children. In the ensuing struggle and confrontation, several bullets were discharged from semi-automatic to automatic press. It was argued that this demonstrated the accused's state of mind at the material time.

24. Drawing from various authorities, including Republic v. Nzuki [1973] KLR 171, counsel submitted that for murder to be established, malice aforethought must be proved. Citing the case of Republic v. James Kioko Malungu [2021] eKLR, it was argued that where provocation exists, it can reduce murder to manslaughter, especially when coupled with self-defense.

25. Making reference to Palmer v. R [1971] AC 814, counsel contended that circumstances may justify self-defense even if the force used appears excessive. The defense emphasized that the accused's actions were necessitated by the need to protect her children, who were under imminent threat from the deceased.

26. In conclusion, counsel submitted that given the circumstances, including the history of abuse, the immediate threat to the children, and the deceased's aggressive behaviour, the prosecution failed to disprove the defense of provocation and self-defense beyond reasonable doubt. Consequently, it was argued that the accused should not be found guilty of murder.

27. The submissions extensively relied on established case law regarding provocation and self-defence as partial defences to murder, particularly emphasizing the need for the prosecution to disprove these defences beyond reasonable doubt when properly raised.

Analysis and Determination

28. I have carefully considered the evidence adduced by both the prosecution witnesses and the defence proffered by the accused person. The burden lies squarely on the prosecution to prove its case against the accused person beyond reasonable doubt. This doctrine on the standard and burden of proof is enshrined in Article 50(2)(a) of *the Constitution* and detailed in Sections 107(1), 108 and 109 of the *Evidence Act*. As Lord Sankey articulated in Woolmington v DPP (1935) AC 462:

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law..."

29. The evidential burden test vested with the prosecution is as formulated by the learned author in Cross and Tapper on Evidence 12th Edn (Oxford: OUP, 2010 (reprint 2013) thus:

> " "The test is to determine whether there is sufficient evidence in favour of the proponent of an issue, is for the judge to inquire whether there is evidence that, if untainted and uncontroverted, would justify men of ordinary reason and fairness in affirming the proposition that the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for unless their cross examination were utterly shattering, the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has been considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or opposition itself is itself conjectural his application must be dismissed. At this stage, the submission should succeed only if the circumstantial evidence raises no hypothesis consistent with guilt."

30. The court in Abdu Ngobi versus Uganda S.C.Cr. explained itself as follows on the treatment of evidence:

> " "Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weakness of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted. But if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incident as charged."

31. For the prosecution to secure a conviction on the charge of murder contrary to Section 203 of the Penal Code, it must prove four essential elements beyond reasonable doubt:

a) The death of the deceased (Victor Kipchumba)

b) That the death was caused by an unlawful act

c) That the accused committed the unlawful act that caused death

d) That the accused acted with malice aforethought

32. On the first element regarding proof of death, this is not in dispute. The evidence of PW5 Dr. Macharia who conducted the post-mortem examination established that Victor Kipchumba died from hypovolemic shock due to bleeding caused by multiple penetrating gunshot wounds. The doctor's findings revealed six penetrating gunshot wounds to various parts of the body including vital areas such as the chest wall, shoulder region, and thigh, with some of the injuries causing lung collapse and massive haemothorax. This evidence conclusively establishes the fact of death.

33. Regarding the second element on whether the death was unlawfully caused, it is a presumption in law that any crime of homicide is unlawful unless that presumption is rebuttable by an accused person by providing sufficient evidence that the homicide so committed and complained of by the Prosecution, was committed under the influence of self-defence in section 17 or provocation as stipulated in Section 207 and 208 of the Penal Code or that it was accidental or in execution of a lawful order. See the guidelines in R versus Gusambizi S/o Wesonga (1948) (15 EAC 65). The requirement that the killing is unlawful is an important element of the offence of murder contrary to section 203 of the Penal Code. For this purpose, the prosecution must prove that the accused by his own act or unlawful mission caused the death of the deceased without any justification, excuse or provocation. The accused has raised the defences of self-defence and protection of her children. This requires careful examination of the circumstances under which the fatal shots were fired.

34. Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya.

35. The common law position as regards the defence of self-defence was well articulated by the Court of Appeal in Nairobi in Cr App No 414 of 2012 Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR as follows:

> "25. 25. The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v Morgan (supra) it was held that:
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> 26. ".....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."

36. In R v Williams [1987] 3 ALL ER 411, Lord Lane, C J held:

> "In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was

an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."

37. PW4 Sharon Jepchirchir, who was in the house at the material time, testified that she overheard the deceased arguing over the phone, threatening to harm the children. Shortly thereafter, the accused arrived home in police uniform carrying her official firearm. Significantly, PW4's testimony reveals a crucial 30-minute gap between the accused's arrival and the sound of gunshots. This temporal gap bears heavily on the question of whether the accused acted in the heat of the moment in self-defence or after deliberation.

38. The accused, as a police officer, was bound by the *National Police Service Act* regarding the use of force. As was held in IP Veronica Gitahi & Another v Republic Criminal Appeal No. 23/2016, which was relied by Mr. Mugun for the state, law enforcement officers must exhaust non-violent means before resorting to force, and when force becomes necessary, it must be proportional to the threat faced. The forensic evidence from PW6, the ballistics expert, critically undermines the accused's claim of defensive action. Her testimony established that twelve rounds were discharged, with the rifle being operated in semi-automatic mode rather than automatic burst fire. This required distinct, separate trigger pulls for each shot, a fact that suggests deliberate, controlled action rather than panicked defensive firing.

39. The nature and distribution of injuries, as detailed in Dr. Macharia's evidence, is particularly telling. The six penetrating wounds show a 50% accuracy rate, with shots striking vital areas including the right chest wall posteriorly and the thoracic spine. The precision of multiple shots to vital areas, coupled with the controlled firing pattern, strongly suggests purposeful action rather than defensive reflex.

40. The accused's claim of the deceased being armed with a knife finds no corroboration in the physical evidence. PW7, the investigating officer, testified that despite a thorough search, no knife was recovered from the scene. This absence significantly weakens the foundation of the self-defence claim. The discharge of twelve rounds from a service rifle, resulting in multiple precision hits to vital areas, appears manifestly disproportionate to any threat that may have existed. I am persuaded by the common law principles of Palmer v Republic (1971) AC 814 in which the court held:

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."

41. The history of domestic violence, while established through multiple witnesses including PW2 Noella Cheruiyot and PW3 Ismail Sorgor, must be viewed in the context of premeditation rather than justification. PW3's testimony about the accused's previous threat to "burst shot" the deceased takes on

particular significance when considered alongside the ballistics evidence showing controlled, deliberate shooting rather than panicked defensive fire. This prior threat, followed by the methodical manner of shooting, strongly suggests premeditated action rather than spontaneous self-defence.

42. It is evident from the characterization of the defence, the accused invited this court to place reliance on the power of self-control and test it against the doctrines of self-defence and provocation by giving more weight to the grossly insulting language or gestures on the part of the deceased prior to the day of the crime and on the fateful day itself. With regard to the principles on self-defence as construed from the domain of English law, I think I have said enough save that a few remarks on provocation as defined under Section 207 and 208 of the Penal Code requires summation and how it applies to the facts of this case. The term provocation as defined in Section 208 of the Penal Code as used in reference to an offence of which an assault is an element means and includes any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his/her immediate care or to whom he/she stands in a conjugal, parental, filial, or fraternal, relation, or in the relations of master or servant to deprive him off the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other. The defence of provocation may be raised to mitigate the unlawful act for the offence or in the case of murder the element of malice aforethought. The essence of it is that culpable homicide which will otherwise be murdered may be reduced to manslaughter if the accused person who causes death does so in the heat of passion caused by sudden provocation. Whether the conditions required by section 208 of the Penal Code hereof, were or were not present in the particular case is a question of fact and the question whether any matter alleged is or is not capable of constituting provocation is a matter of law. The court in the case of Mancini v. The Queen 1942 AC 1, remarked that to retort in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a dagger or firearm or any such device commonly defined in our Penal Law as a dangerous weapon. In short the mode of retaliation must bear a reasonable relationship to the provocation if the offence of murder is to be reduced to manslaughter. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to law emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man had 'time to cool.' The distinction therefore is between asking 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did? (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence the provocation was in fact enough to lead a reasonable person to do what the accused did? And, if so, 'Did the accused act under the stress of such provocation?" (See also R v. Lesbini (1914) 3 KB 1116.) Emphasis mine.

43. In contextualizing these principles, I am of the considered view that consequences of verbal provocation, or insults or even an ordinary retaliation by a punch should not arouse a man or a woman of ordinary reason to lose control and to suddenly arm himself/herself with a dangerous weapon

capable of occasioning maim or grievous harm against another human being and at the end of it all, raises the defence of provocation. I hold the strong view that the law expects a reasonable man or woman to endure abuse or insult without resorting to fatal violence against another human being to threaten, infringe or violate the right to life guaranteed in Art. 26 of our Constitution. I am not even convinced that the letter and the spirit of the law on provocation envisaged that a sudden confession of adultery by one spouse to another without more should constitute provocation of a sort which might reduce the offence of murder under Section 203 of the Penal code to that of manslaughter in Section 202 of the Penal Code. There are further observations to be made by this court in this case which are relevant on this discourse of the defence of provocation. First and foremost, the accused person relied on the historical character of the accused person during the subsistence of the marriage which she described as exhibiting cruelty, inhuman treatment and episodes of assault on suspicion that she was guilty of infidelity. This was also given credence by the evidence of her witness DW2 who happened to be her mother alluding to some facts of a sour relationship with features of domestic violence. She went further to testify as to the steps undertaken by the two families towards achieving reconciliation. The second observation is to be found in the testimony of the accused person on the events leading to the deprivation of her self-control to act in the manner she did by engaging in physical violence as a measure to protect the right to life of her children. As learned counsel for the accused person put it, that by the conduct of the deceased in the circumstances of this case, she was rendered unusually susceptible to the provocation bearing in mind the prior experience of her encounter with the deceased. This court has had the advantage to weigh both the prosecution and the defence case bearing in mind that the standard and burden of proof as articulated in the Miller v. Minster of Pensions (1942) ALLELR 342 case, in criminal cases never shifts to the accused person unless in the very exceptional cases prescribed in Section 111 of the *Evidence Act*. It is however instructive to note that even in this criteria the prosecution is held to the higher threshold clearly stated by Lord Denning in the above case law. In the defence of self and provocation, the accused person must be presumed to possess in general the power of self-control of a reasonable man unless he/she demonstrates that his/her power of self-control was or is weakened because of some particular characteristic of human fallibility curated in himself/herself for that matter. It is not every trait or disposition of an accused person that can be invoked to modify the concept of the reasonable man. A disposition to be unduly suspicious or to lose one's temper readily will not suffice or transitory state of mind such as a mood of depression, anxiety, excitability, or anger may also not be sufficient and be regarded as a basis to invoke provocation or self defence in murder cases. The special difficulties however arise in this case that there is no cogent evidence on how the accused person duly trained as a police officer that any such provocative words or acts would have diminished her mental cognitive accountability to arm herself with a firearm loaded with a magazine full of ammunition and surprisingly pulled the trigger to release 12 gunshots all targeted to her spouse. That applying the test of an ordinary person standing in the shoes of an accused person could not have in the circumstances committed the unlawful acts of killing the deceased.

44. There is another question of law that arises in this case. It is still the law in Kenya that if someone kills another as a result of an act done in the course or furtherance of a felony involving violence and the victim dies, the offence committed is murder and no question of manslaughter arises unless credible and cogent evidence rebuts the prosecution case by the defence of self and provocation which is also the principle in Art. 26(3) of *the Constitution*. In fact, it is even an absurdity when police officers in the course of their duties to disarm the robbers who are not even armed with any dangerous weapon and retaliations by way use of a firearm, they seek refuge in the conceptual framework of provocation as defined in Section 208 of the Penal Code. The effect of reducing such offences under Section 203 of the Penal Code to manslaughter as defined in Section 202 of the same Code may amount to a travesty of justice to the victims. It is therefore the finding of this court that there is insufficient material to

make a finding that there was a reasonable possibility as the accused was provoked by the conduct of the deceased resulting in a loss of self-control. There is simply no issue of provocation to be considered by this court in favour of the accused person. I am convinced and persuaded that neither of the two scenarios graphically painted by the accused person in relation to the various stages before, during and after the commission of the crime could distinctively amount to provocative behaviour that would have induced her to lose her self-control.

45. In this case, the critical questions that may be asked are these: Was the accused's life in immediate and imminent danger? Were there reasonable grounds to believe so. Was it that the accused had nowhere to run to but to defend herself and property by using a firearm against her spouse, the deceased. Was the accused overpowered by the deceased to persuade her to pick the loaded firearm and have it used to inflict serious bodily harm. Again, all these questions from the prosecution evidence are answered in the negative establishing the fact of the unlawfulness of the acts of omission and commission in killing the deceased on the night of 14th October, 2023. That settles one of the elements to prove the offence of murder beyond reasonable doubt.

46. On the critical element of malice aforethought as defined under Section 206 of the Penal Code, the evidence presents a compelling picture of premeditation and it is a manifestation of the following provisions:

> "(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) An intent to commit a felony,
>
> (d) An intention by the act or omission to facilitate the flight escape from custody of any person who has committed or attempted to commit a felony."

The factors in which such inference can be drawn, were laid out in the case of R vs. Tubere S/o Ochen (1945) 1 E.A.C.A. 63; when the deceased had been beaten to death with a stick. Justice Sir Sheridan stated that:

> "With regard to the use of a stick in cases of homicide, this court has not attempted to lay down a hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used, and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an interference of malice will flow more readily from the use of say, a spear or knife than from the use of a stick; that is not to say that the court take a lenient view where a stick is used. Every case has of course to be judged on its own facts"

47. Although in definition of terms, under Section 206 of the Penal Code there is no reference to express malice aforethought or implied malice aforethought but my interpretation of the section does import such concepts in reference to the definition given by the legislature. In so far as express malice aforethought is concerned for example can be stated to be found in the characteristics and elements, the intent to kill which includes an intent to inflict grievous bodily harm and whether it is limited to an intent which was directed against the very person who was killed or includes an intent to inflict such

harm upon another. It should be remembered that malice aforethought is a subjective condition of the mind of an accused person and is only discoverable or manifested only by words and conduct of an accused person from which a trial court must draw inferences and logical conclusions towards making a finding as to the existence or non-existence of malice aforethought. For example, the deliberate selection and use a deadly weapon is a circumstance which manifests or indicates a formed design by the accused person to kill in the absence of evidence showing a contrary intent. A true presumption of evidence is a rule of evidence which calls for certain particular specifics individualized on a case to case basis which the trial court must detect and analyse in the sense of an inference of its probative significance to secure judgment for the prosecution as defined in Section 107(1) and 108 of the *Evidence Act*. In the sense of implied malice, may also display any one of the manifestation defined in Section 206 but the import of it is to complement express malice aforethought.

48. In addition, the Tanzanian Court in Enock Kipela vs. Republic, Criminal Appeal No. 150 of 1994 (unreported) on the same principles to manifest malice aforethought stated:

> " Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors including the following: (1) the type and size of weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending on the facts, of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attacker's utterances, if any, made before, during or after the killing and (7) the conduct of the attacker before and after the killing."

49. In the present case, the accused, being a trained police officer, was well aware of the lethal capabilities of her service rifle. The ballistics evidence from PW6 demonstrates that each of the twelve shots required a conscious, separate pull of the trigger. This methodical discharge of ammunition, achieving a 50% hit rate on vital areas of the body, manifests a clear intention to cause death or grievous harm.

50. The accused's conduct before and after the shooting further illuminates her state of mind. PW4's testimony about the 30-minute interval between the accused's arrival and the shooting suggests an opportunity for reflection rather than immediate defensive action. More significantly, after the shooting, the accused concealed the weapon near the flower bed before leaving the scene, a conduct that is inconsistent with someone who believed they had acted in legitimate self-defence. While the law recognizes domestic violence as potentially relevant to defences of provocation or self-defence, the evidence here shows a level of calculation that transcends these defences. The accused's background as a law enforcement officer is particularly relevant; she was trained in the use of force continuum and the principle of proportional response. Her choice to discharge twelve rounds in a controlled manner, rather than employing less lethal alternatives or seeking assistance from fellow officers, speaks to a deliberate choice to employ lethal force.

51. The mental element of murder was succinctly stated in the comparative dicta in DPP v. Smith (1960) 3 ALL ELR 161 thus:

> " The court observed that the presumption of intention means that, as a man is usually able to foresee what are the natural consequences of his act, so it is as a rule reasonable to infer that he did foresee them and intended them. Although however that is an inference which may be drawn on the facts in certain circumstances must be invariably drawn, yet if on all the facts of a particular case is not a correct inference, then it should not be drawn. It matters not what the accused in fact contemplated as the probable result or whether he ever contemplated

at all, provided he was in law responsible and accountable for his actions, i.e. was a man capable of forming an intent, not insane within the McNaughten rules and not suffering from diminished responsibility. On the assumption that he so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case have contemplated as the natural and probable result."

52. The question which arises from the facts of this case is whether there is evidence on the part of the prosecution to prove the fact that the accused person knew that it was highly probable that the act of using a firearm loaded with ammunition would result in the death or serious bodily harm of a victim herein referenced as the deceased. A review of the prosecution witnesses based on the rule of circumstantial evidence point to the aspect that the accused person acted with the knowledge that it was highly probable that the death or grievous bodily harm will result upon the gunshots targeting the deceased were to find entry to the various parts of his body. Accordingly, this state of mind of the accused before and during the attack can be defined as species of malice aforethought. The court in Cunliffe v Goodman (1950) 1 ALL ER 720,724 was on point on this issue, if the following statement is anything to go by:

> " An intention to my mind connotes a state of affairs which the party intending does more than more than merely contemplate. It connotes a state of affairs which on the contrary, he decides so far as in him lies to bring about, and which in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition."

53. Therefore, the prosecution in their various perspective of the testimonies of PW1-PW7 proved beyond peradventure that the state of mind of the accused person must have been not only that she foresaw the risk of death or serious bodily injury would occur as a consequence of her shooting but also willed the possible consequences of her conduct. In fact, the accused person was reckless as deducible from her acts of loading the firearm with ammunition that any step taken targeting the deceased would cause death or severe bodily harm. There are no two ways about this, when one considers the facts of this case which do establish beyond reasonable doubt and actual intention to cause death.

54. As we have just seen from the post mortem report dated 23rd October, 2023, Dr. Macharia PW5 extensively elaborated serious bodily harm suffered by the deceased in the course of examining his body which had been taken to the mortuary at Moi Teaching and Referral Hospital at the behest of Corporal Stephen Nzau of CID Uasin Gishu County. The situational analysis of how the victim was assaulted with a gun in the circumstances of this crime of murder is self-evident given the findings made by PW5 indicative of the following:

> Six penetrating wounds, right wrist joint 3 CM in diameter with burning exit 4x1 CM near elbow right. Exit has everted edges; entry right shoulder 0.5 CM in diameter with inverted edges with abused edges exit 5x3 cm wound near the neck causing glazing wound on the scalp right side; 0.5cm entry wound right chest wall posteriorly exiting left chest wall lateral posterior 4x3 CM; entry 0.5 CM right popliteal exiting wound 1CM in diameter lateral to knee right side; entry 0.5CM Popliteal exiting mid thigh medially 1x2 CM; 0.5 CM entry right thigh laterally exit wound 9x5 CM mid thigh anteriorly causing fracture right femur; 4x2 CM glazing wound right wrist joint; bruising wound 3x2 CM left thigh (upper); Wound No. 3 has gone through lower lubes of both lungs causing lung collapse ad massive hemothorax has also gone through anterior exit of thoracic spine bruising wounds anterior abdominal wall 4x3 CM other body organs in the cardiovascular digestive genitourinary

systems are normal. The doctor concluded that the cause of death was hypovolemic shock due to bleeding due to multiple gunshot wounds.

55. It is trite law that malice aforethought under Section 206 (a) and (b) of the Penal Code can be inferred from the chain of circumstances initiated by the offender as against the victim. This is what in my view the court had in mind in Robert Onchiri Ogeto v. Republic (2024) KLR 19 thus:

> " The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possess the motive – see Karukenya & 4 others v Republic (1987) KLR 458. By section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can reasonably inferred that when the appellant stabbed deceased with a knife on the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder."

56. Usually, for a trial court to establish manifestation of malice aforethought it should not lose sight that an assailant like the one in the shoes of the accused person in this case will not declare her intention to cause death or grievous bodily harm but the threshold set out in the Tubere case are good indicators to ascertain existence of malice aforethought. It goes without saying the type and size of the weapon is of significance, how it has been used and applied and the force exerted in inflicting serious bodily harm, the vulnerability of the body parts targeted and multiple injuries sustained by virtue of that attack needless to say an inferential finding can be drawn with certainty that the killing of the victim of the offence of murder was executed with malice aforethought. The firearm used in this case is a lethal and dangerous weapon when used and targeted against another human being in violation of Art. 26 of *the Constitution* on the right to life as read with Section 203 of the Penal Code.

57. In addition, from the totality of circumstances from the controlled nature of the shooting, to the precision of hits on vital areas, to the concealment of evidence afterward, demonstrates beyond reasonable doubt that the accused acted with malice aforethought as contemplated under Section 206 of the Penal Code. While the court acknowledges the complex history of domestic discord, the evidence shows that this was not a case of self-defence or provocation, but rather a premeditated act carried out with the clear intention to cause death or grievous harm.

58. This court has meticulously examined the totality of evidence presented, weighing both the prosecution case and the defences raised. While the background of domestic discord and the accused's claims of self-defence have been carefully considered, they cannot override the compelling forensic and eyewitness evidence that points inexorably to a calculated act. The methodical discharge of twelve rounds, the tactical precision of the shots, the deliberate targeting of vital organs, and the subsequent concealment of evidence paint a clear picture of premeditated action rather than defensive response. As a law enforcement officer, the accused was not only aware of the deadly consequences of her actions but was specifically trained in the principles of proportional force and the sanctity of human life. The prosecution has systematically and convincingly established each element of the offense beyond reasonable doubt, meeting the threshold required in such a serious charge.

59. Thus by the accused killing her husband in the specifics of this incident, she did not act with reasonable self-defence under Section 17 or provocation in Section 207 as read with Section 208 of the Penal Code and the defences were therefore not available to her for this court to entertain a benefit of doubt to rule in her favour so as to benefit with a lesser offence of manslaughter or as a whole for an acquittal for the offence as prosecuted by the state.

60. This death was executed by pure malice which refers to a person's intent to injure or kill another person. Malice can either be expressed or implied. In the instant case, from the evidence, when the accused deliberately armed herself with a firearm loaded it with ammunitions knowing it as being lethal given her background as a police officer her objective was to take her husband's life. I am unable to be convinced that the killer's action who is the accused in this case was not trying to defend herself or to stop the deceased person also known to her as a spouse to prevent him from violating her right to life. There is no evidence of that manifestation on self defence or provocation. Put in another way malice aforethought in this case is within the dimension of an unlawful Act being planned in advance with the intention to kill or grievously harm another individual.

61. It matters not what the accused in fact contemplated as the probable result when she went for a firearm and loaded with ammunitions or whether she ever contemplated at all, provided she was in law responsible and accountable for her actions. She was a human being or an adult capable of forming an intention or intent not insane within the M'Naghten Rules and not suffering from diminished responsibility. In this case the accused did not arm herself with a firearm to frighten away the deceased but at this stage, she had the necessary intent established by the prosecution evidence that her next move would cause death or serious bodily harm to the victim.

62. Drawing together all strands of evidence; forensic, ballistic, circumstantial, and testimonial, I am inexorably driven to the conclusion that the accused person, Lilian Biwott, acting with clear premeditation and malice aforethought, committed the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Given the strength of the evidence adduced by the state within the mandate of the Director of Public Prosecutions under Art. 157(6) & (7) of *the constitution*, the burden of proof of beyond reasonable doubt has been discharged to ordain this court to find the accused guilty of all the elements of the offence of murder contrary to Section 203 of the Penal Code to enter a plea of guilty and conviction as per law established. Having so found the accused guilty followed with an order of conviction, the proceedings shall proceed further to admit evidence on mitigation and aggravating factors for purposes of sentencing under Section 204 of the Penal Code.

63. The sentencing verdict hearing be and is hereby scheduled for the 16th December, 2024. The legal counsels seized of this matter to file brief written submissions on these topical issues.

Ruling On Sentence

64. The accused person Lilian Biwott is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the 14th October 2023 at Kimumu Estate within Eldoret Township in Moiben sub-county within Uasin Gishu County, murdered VICTOR KIPCHUMBA.

65. The accused pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The prosecution discharged its burden of proof beyond reasonable doubt resulting to a conviction by this court vide its judgment dated 4th December, 2024.

66. This sentence is about the right to life provided for under Article 26 of *the constitution*. *The constitution* is very specific that every person has the right to life and a person shall not be deprived of life intentionally except in the manner authorised by this constitution or other written law.

67. The accused person through her counsel was directed to file submissions on the mitigating factors for this court to impose an appropriate sentence. Learned Counsel Mr. Oduor filed submissions on sentencing dated 13th December, 2024, which I shall now proceed to consider. The submissions are anchored on the Supreme Court decision in Francis Muruatetu & Anor vs. The Republic [2017]

eKLR which declared the mandatory death sentence unconstitutional and provided guidelines on factors to consider in sentencing for capital offenses.

68. Learned counsel for the accused submitted that following her conviction for the murder of Victor Kipchumba on the night of October 14th, 2023, at Kimumu Estate in Eldoret Township, the court should consider various mitigating factors in determining an appropriate sentence.

69. In addition learned counsel for the accused also addressed in mitigation and invited me to take into account that the accused is a mother and following the death of the deceased the children have only her to look up to for their survival rights. It was also the submissions by learned counsel that cumulatively the personal circumstances of the accused amounted to substantial and compelling circumstances to justify the court to blend the law with mercy.

70. It was submitted for the accused that pursuant to the Supreme Court's decision in Francis Muruatetu & Anor vs. The Republic [2017], which declared the mandatory nature of Section 204 of the Penal Code unconstitutional, the court has discretion in sentencing. Counsel drew the court's attention to paragraph 58 of the said judgment, emphasizing that courts must consider mitigating factors when sentencing persons found guilty of murder.

71. On the issue of age, learned counsel submitted that the accused was 33 years old at the time of the offense, qualifying her as a youth. It was further submitted that she was a first-time offender, with no evidence presented to court suggesting any prior criminal record.

72. Regarding character, counsel submitted that both prosecution witnesses PW1 and PW3, who were the accused's fellow police officers, testified to her being a strong-willed, loving, and God-fearing person. It was argued that despite having access to firearms during previous domestic disputes, the accused had never threatened or used them against the deceased.

73. On the matter of gender-based violence, learned counsel submitted that evidence from both prosecution and defense witnesses demonstrated that the accused had endured prolonged physical and mental abuse in her marriage. It was submitted that on the fateful day, according to the testimony of PW4, the deceased was armed with a knife and had threatened to murder their children before taking his own life.

74. Counsel further submitted that while six bullets struck the deceased, evidence showed that all twelve rounds discharged resulted from a single trigger pull, countering any suggestion of premeditation.

75. On the question of remorse, it was submitted that the accused had demonstrated genuine contrition by initiating cultural cleansing rituals and attempting to enter into a plea bargain with the deceased's family. Learned counsel drew the court's attention to the accused's rehabilitation efforts while in remand, including her participation in paralegal training programs.

76. In conclusion, counsel made an earnest plea regarding the accused's three minor children, submitting that a custodial sentence would effectively orphan them, having already lost their father. It was therefore urged that the court should consider either a non-custodial sentence or a hybrid sentence combining a shorter custodial term with a non-custodial component, primarily considering the best interests of the minor children.

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

    a. Age of the offender

b. Being a first offender

c. Whether the offender pleaded guilty

d. Character and record of the offender

e. Commission of the offence in response to gender-based violence

f. Remorsefulness of the offender

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

h. Any other factor that the court considers relevant.

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

That sentences are imposed to meet the following objectives:

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

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

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

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

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

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

79. The fundamental principles of sentencing were expounded in Titus Ngamau Musila alias Katitu (Criminal Case No. 78 of 2014), which drew from Santa Singh v State of Punjab [1978] 4 SCC 190 the court established that:

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

80. The fundamental challenge in sentencing lies in balancing the interests of both the convicted person and the crime victims. In Kenya's jurisdiction, despite established sentencing principles and objectives, there are persistent concerns about inconsistency and disparity in sentences, particularly in cases with similar facts that yield markedly different outcomes under judicial discretion. While the concept of "individualized cases" is often cited to explain these variations, it's crucial that judicial discretion be exercised with clear, well-reasoned justification before reaching a final verdict.

81. The principle of proportionality remains central to Kenya's sentencing policy, requiring that sentences reflect both the offense's severity and the offender's personal circumstances. However, this approach leaves limited room to consider potential future reoffending or ongoing public safety risks. The constitutional framework, particularly Articles 50(2)(q) and 25(1)(a), demands that punishment must balance both the specific circumstances of the crime and the offender's situation.

82. An examination of recent trial court decisions reveals that this balancing act sometimes falls short, especially in serious cases like murder, where the exercise of judicial discretion may not fully align with fundamental criminal law principles. It's noteworthy that Kenya's Criminal Justice System has moved away from mandatory minimum sentences in accordance with constitutional rights provisions. Consequently, while sentencing policy guidelines and statutory prescriptions exist, unfettered judicial discretion has become the exception rather than the rule.

83. In light of the constitutional issues surrounding mandatory life and death sentences, particularly their conflict with Article 26, we must develop a more robust deterrent approach when sentencing violent crimes like murder under Section 203 of the Penal Code. The judiciary bears a fundamental responsibility to safeguard human life from violations by others. Our nation possesses comprehensive penal legislation that effectively governs citizen and resident behaviour, providing clear guidelines for criminal sanctions, especially concerning violations of the constitutionally protected right to life.

84. If we fail to properly interpret and apply these laws for society's benefit, communities may resort to vigilante justice, implementing their own understanding of fairness. The escalating murder rate in our country has reached crisis levels, presenting a serious threat to the constitutional right to life. Trial courts, particularly those handling life-threatening violent crimes, must grapple with a crucial question: should perpetrators of such serious offenses escape with minimal consequences through lenient sentencing?

85. This creates a delicate balancing act for trial courts. They must weigh the constitutional rights of all parties, including victims of violent crimes such as murder (Section 203) and manslaughter (Section 202). Given the current inconsistencies, disparities, and disproportionate outcomes in our sentencing jurisprudence, it is time to reconsider our approach through a suggested permissible bandwidth matrix for serious offenses like murder.

86. In considering the appropriate sentence in this case, this court must carefully weigh both aggravating and mitigating factors while acknowledging the broader societal concern regarding domestic violence. The court must balance the accused's personal circumstances, society's interests, and the nature of the crime including the circumstances of its commission. The accused, Lilian Biwott, a trained law enforcement officer who was well-versed in the proper use of force and firearms, deliberately used her service weapon to end her husband's life.

87. The evidence reveals several deeply troubling aggravating factors. First, the methodical nature of the killing: the accused fired twelve rounds in semi-automatic mode, requiring separate, conscious trigger pulls for each shot. As established by PW6, the ballistics expert, this was not a panicked response but rather controlled, deliberate action. Second, the accuracy of the shots, with six rounds striking vital areas of Victor Kipchumba's body, including his chest wall and thoracic spine, demonstrates lethal intent. Third, as testified by PW4 Sharon Jepchirchir, there was a crucial 30-minute gap between the accused's arrival and the shooting, suggesting premeditation rather than immediate defensive action. Fourth, the accused's post-crime conduct of concealing the weapon near the flower bed before leaving the scene indicates consciousness of guilt rather than the actions of someone who believed they had acted in legitimate self-defense.

88. While defense counsel has emphasized the history of domestic discord and presented mitigating circumstances, including the accused's claims of prior abuse and threats to her children, the court must consider that as a police officer, the accused had multiple legal avenues available to address domestic disputes. Instead, she chose to use her position of authority and access to a service weapon to commit this crime.

89. The principles articulated in S v Matyityi (2011) 1SACR are particularly relevant when examining the accused's claims of remorse. The court in the said case stated as follows:

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

90. The forensic evidence, particularly Dr. Macharia's post-mortem findings revealing six penetrating gunshot wounds to various parts of the body, stands in stark contrast to any claim of remorse. The systematic nature of the injuries, from the right wrist to the thoracic spine, causing lung collapse and massive haemothorax - speaks to an intent to cause maximum harm rather than an act of self-defence or momentary loss of control.

91. When it comes to sentencing the accused/convict before me certain key factors are of significance. That the sentence I am about to impose must be appropriate given the circumstances of the case in which the deceased was prematurely and unlawfully killed. This is not a case where the accused person did not have any other escape route to ensure that the right to life of her spouse was not terminated in a manner which was tragic, cruel, and degrading by use of a firearm mainly issued to her for purposes of securing our borders and other citizens. It did not have to be manipulated as a dangerous weapon against her own husband and father of her children. It is also instructive to note that an appropriate sentence should reflect the severity of the crime while at the same time giving full consideration to all the mitigating and aggravating factors submitted by respective actors with an interest of ensuring the ends of justice are made. In the interests of society, the purpose of sentencing as alluded above are deterrence, prevention and rehabilitation and also retribution. The legal mechanism in place to deal with gender-based violence more so at the domestic arena in our society are seemingly inadequate in light of the continued rampant unlawful deaths being reported from every corner of this Republic. The impact of a violation of the right to life to the victim, to the families, to the friends, and society is immeasurable. Our Nation newly created in 2010 by the promulgation of *the constitution* is committed to the creation of a society which is free from violence and puts a high premium on a person's bodily integrity under Article 26 of *the constitution* which forms the foundation the principles of our existence as a constitutional democracy adhering to the rule of law.

92. The specific facts of this case displays violence and viciousness of the attack on the deceased. The fact that the accused killed the deceased in other disregard to life and his survival as manifested from the nature of multiple injuries and the propensity she had against her own spouse is something which places her on a different pedestal with other like offenders in the same class. It was heartless, barbaric, cruel, and degrading treatment on another human being. These are factors which indeed weight upon me as I bring this trial to a conclusion.

93. Every citizen has a right to live and the right to live means to live with dignity, security, and enjoying all survival and welfare rights until his or her days as proclaimed by the creator are diminished or terminated for any such reason prophesied by the giver of life and not through unlawful human intervention. A person once born should live as a person and no less unless as prescribed by the law of this motherland or any such action contemplated in his or her star configuration. The right to life and the dignity of it hovers over our constitution and enabling statutes like a guardian angel. The making of human worthy and humanness of a person, as Architectured by the creator, remains one of the fundamental rights in our constitution and is absolutely non negotiable that other human beings will take the law into their own hands by unlawful means to violate that very same right of existence. One should take the legal mantra in International Law more so the UDHR all human beings are born free and equal in dignity and rights, that they are endowed with reason and conscience and should act to one another in a spirit of brotherhood and sisterhood. This is what was expected of the accused person to take appropriteat means during the family conflict to act with reason and conscience to preserve the right to life of her own spouse.

94. This case is a wakeup call on the lack of trust in the institution of marriage. It is considered a taboo to continue staying in a marriage even if it is not functioning as envisaged in our traditions and legal system. The conflicts in a marriage union have remained to be matters in the private space only to be listened to within the four walls of a home. A deeply rooted culture of perseverance hoping for the change of circumstances in the future has come to contribute to incidents of gender based violence either as against the women or men on the other hand. Although it has been perceived women and girls pay the heaviest price of the domestic based gender violence but the consequences of it has not spared the male gender. This is how this case is conceived as the accused person killed her husband in the name of protecting their children when there was evidence that their life was in any imitate danger. Time has come for married couples to set themselves free from marriages which have failed the test of creation, than to continue living in a state of gender-based violence which realistically, ends ones life as it happened to the victim, and husband to the accused. Marriage should not be a graveyard as it happened to this young family. By dint of this offence of murder committed by the accused the whole generation of the Kipchumba's has been shuttered. It is clear from the averments from the defence that the accused and the deceased marriage was besieged with incidents of conflicts and problems. It also appears from this latest incident of homicide against the deceased the accused had difficulties controlling her temper necessitating to arm herself with a firearm to deal with the issue of their relationship challenges once and for all. This is unfortunate incident ended the life of her husband. Domestic violence has been a scourge in our society and should not be treated lightly but deplored and severely punished. That is how I view this offence that was committed by a partner in a marriage union against her other half.

95. Although this case, strictly speaking is going to affect the primary caregivers of the children of the marriage, it is not a parameter which is capable of influencing judicial discretion in imposing the custodial sentence against the accused. In my considered view it would be ideal for the children to be brought up by a parent but as circumstances demonstrate they are presently being taken care of by the grandmother, no one can rule out that the children's and the accused relationship is still that of trust. The duty of the sentencing court is to acknowledge the interests of the children is not to permit

errant parents unreasonably to avoid appropriate punishment. It was put in S v Swart 2004(2) SACR 370 (SCA) " In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each, according to the circumstances, Serious crimes will usually require that retribution and deterrence should come to the fore and that that the rehabilitation of the offender will consequently play a relatively smaller role."

96. Having carefully weighed all factors, including the accused's position as a law enforcement officer, the premeditated nature of the crime as evidenced by the 30-minute deliberation period, the methodical discharge of twelve rounds, and the precision of the fatal shots, this court finds that the aggravating circumstances substantially outweigh the mitigating factors presented. Taking into account the sentencing principles and objectives, including the guidelines established in Muruatetu, and the gravity of this offense, the accused is hereby sentenced to 35 years' imprisonment with a saving clause that Section 333(2) of the Criminal Procedure Code shall apply for the period spent in pre-trial detention.

DATED AND SIGNED AT ELDORET THIS 17TH DAY OF DECEMBER, 2024

In the Presence of

The accused

Mr. Mugun for the State

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R. NYAKUNDI

JUDGE