REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 41 OF 2018

LINUS THEURI NDUNG'U.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 242 of 2013 (Hon. H. Adika, Senior Resident Magistrate) on 11 October 2018)

JUDGMENT

The appellant was charged with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code cap 63. The particulars were that on the 17th day of December 2012 at Kiawara village in Nyeri County, he unlawfully killed Gladys Wanjiru Gichohi.

He was also charged with the offence of attempted suicide contrary to section 226 as read with section 36 of the Penal Code. In this second count, the particulars were that on the 17th day of December 2012 at King'ong'o prison staff quarters in Nyeri County, he attempted to kill himself by shooting himself with a rifle.

The appellant also faced a third account of attempted murder contrary to section 220 (a) of the Penal Code and here the particulars were that on the 17th day of December 2012 at Kingongo prison staff quarters in Nyeri County he attempted unlawfully to cause the death of Anthony Muthama by shooting him with a rifle.

He pleaded not guilty to the three counts upon arraignment.

In his judgement the learned trial magistrate held that the prosecution had proved its case beyond all reasonable doubt on all the three counts; accordingly, the appellant was convicted on each of them. However, before sentencing the appellant the learned magistrate sought for a probation report on the appellant apparently to guide him on the proper sentence to mete out. Upon considering the report, the magistrate sentenced the appellant to life imprisonment on the first and third counts; he held the life sentence on the third count in abeyance though. As far as the sentence on second count is concerned, the learned magistrate made the following remarks:

> ***"I have gotten the report by the probation officer. This report includes the victim impact report. This is a case where a Kenyan citizen lost her precious life. This is not lost on this court. The accused person is charged with three offences. I will deal with the second count first. This is the one for attempted suicide. The accused person attempted to take his own life. From the report he had problems which he was dealing with. He injured himself severely and the marks are therefore (sic) for all to see. Like I had mentioned in the judgment there is no doubt that he committed this offence. However, given the reasons of his unstable state of mind, I will acquit him in this count under section 35 (1) of the Penal Code with no conditions."***

The appellant has now appealed against both the conviction and sentence. He raised four grounds of appeal and which, as far as I understand them, are as follows:

1. The learned trial magistrate erred both in law and in fact in convicting the appellant on the offence of manslaughter without considering the surrounding circumstances.

2. The learned trial magistrate erred both in law and in fact in failing to consider the mitigating factors tabled by the defence.

3. The learned trial magistrate erred both in law and in fact in convicting the appellant on highly contradictory evidence by the prosecution witnesses.

4. The learned trial magistrate erred both in law and in fact in convicting the appellant on uncorroborated evidence by the key witnesses.

The record shows that **Joseph Mwangi Gichuhi (PW1)** testified that he was the deceased's brother and that on 17 December 2012 at about 11:00 P.M., he was at his home at Kiawara together with his wife, **Beatrice Wanjiru (PW2)** when the deceased twice flashed his phone. Alarmed that the deceased may have been in some danger, he and his wife decided to walk to the deceased's house; they lived in the same neighbourhood and the deceased's house was about 100 metres from where they lived.

As they approached the deceased's house, they heard two gun shots in a space of about one minute. They then saw the appellant walking away from the plot where the deceased's house was; he emerged from the deceased's house armed with a machine gun. According to his evidence, there was sufficient electricity light, bright enough for him to identify the appellant.

He even called the appellant and asked him whether he had killed the deceased. Although the appellant heard him he simply walked away without any response. He heard the appellant call his (the witness's) mother telling her that since she had stopped the appellant from marrying the deceased he had killed her and he was himself going to commit suicide. He knew the appellant because he had cohabited with the deceased for some time, for about five years; however, at the time of the shooting incident the two had separated.

When he peeped through the deceased's window, which apparently was open, he noticed the deceased's lifeless body on her bed; the bed was next to the window. Her two children were in the house but he managed to take them out of the house through the same window. The house was locked from inside.

The witness then called and informed the officer in charge of Nyeri police station of the incident. Police officers from the station respondent and came to the scene; they took the deceased's body to the mortuary.

In cross-examination, the witness testified that the deceased and the appellant had long-standing differences and that is why they lived separately. He testified further that the appellant's parents had been against the appellant's marriage to the deceased; however, since there were children between them, the issue of their custody and upkeep was taken up at the children's office and in court.

Like her husband, **Wanjiru (PW2)** confirmed that the deceased had rung her husband's phone twice at 11.06 P.M. on 17 December 2012. She could see her sister- in-law's residence from the gate of her house. She too heard the two gun shots and also saw the appellant walk from the deceased's residence while armed with a gun. She testified that there were lights from floodlights bright enough for them to recognise the appellant. She had known the appellant for four years. When they found the deceased bleeding on her bed, she screamed for help.

When the police arrived they broke the deceased's door and collected the body from the house. The appellant, according to her, was a regular visitor to their home.

She also testified that the deceased moved into the house in which she was killed when she moved out of the matrimonial house which she shared with the appellant.

The complainant in the third count corporal **Anthony Muthama (PW3)** testified that he worked with the prison's department and he was based at Nyeri main prison at the material time. At about 11.00 PM, he, together with his colleagues Felix Nyaga and Isaac Nyaga were on their usual patrol within the prison premises when they heard gunshots. As they moved along they heard somebody's voice apparently in distress. They saw someone on the ground in uniform. As they lit their torches, he shot at them. He was hit on the leg with a bullet.

They took cover but after about 15 minutes they learnt from one Kanyi that the person who had shot at them had gone to the office. He went to the office and found the appellant there; it was established that he was the one who had shot at them. He was taken to Mathari hospital where he was treated and discharged.

Felix Gitonga Nyaga (PW4) testified that on 17 December 2012, he was on duty together with his colleagues, Muthama (PW3) and Isaac Munene Nyaga. Sergeant Albanus Kimanga called him to alert him of an incident at the prison's staff quarters. They went there and found somebody lying down screaming. The person shot at them when he saw them. Muthama (PW3) was hit on the leg and injured.

It was his evidence that he was only a month old at the station when the incident happened and therefore he did not know the appellant well.

Inspector of police **Makundi Mariach Demo (PW5)** produced a ballistics examination report. The report was prepared by one Johnson Mwongera who, for reasons given during the trial, he was not available to produce the report himself. The record shows that the report was admitted in evidence with the concurrence of the appellant's learned counsel.

According to the ballistics exhibit memo form the following items were sent to the ballistics laboratory for examination:

1. Exhibit marked 'A' G-3 rifle

2. Exhibit marked 'B' magazine loaded with 13 live ammunition

3. Exhibit marked 'C1-C4' Empty Cartridges

The purpose for examination was to ascertain the following:

1. Whether Exhibit 'A' was capable of firing

2. Whether Ehibits 'C1-C4' were fired from exhibit 'A'

3. Whether the 13 live ammunition could be fired from Exhibit 'A'

In his report, the ballistics expert opined that the G-3 rifle could fire and the ammunition (exhibit 'B') could be fired from the rifle. He eventually came to the conclusion that both the rifle and the ammunition were Firearm and Ammunition respectively as defined under the Firearms Act cap. 114.

He also opined that the four cartridges were fired from one gun which, in this case was the G-3 rifle serialized as no. 93011276 and which, as noted, was marked as Exhibit 'A'.

Sergeant Peter Mulubi Injendi (PW6) testified that he was working at Nyeri main prison on 17 December 2012; at 10:30 PM he was on duty. As he went around checking on his officers at their work stations he could not find the appellant. He was expected to be in the guard room at the time where he was supposed to be sleeping after he had completed his two and half hours shift. He noted the appellant's absence.

He received a phone call from the watchtower that there had been gunshots. Soon thereafter constable Kanyi informed him that his neighbour, who apparently was the appellant, was the one who was shooting. With this information he together with his colleagues proceeded to the appellant's house. Before they reached the house, corporal Peter Kiarie called him and informed him that the appellant had been disarmed and was in the office. He finally came to see the appellant at the entrance to the prison. He had shot himself in the lower jaw and was bleeding

They took the appellant together with corporal Muthama who had been shot on the leg to hospital. Police officers from Nyeri police station, including the officer in charge of the station, arrived at the scene at about 12:30 A.M.

The gun together with 13 rounds of ammunition were handed over to the police. He testified that the gun's serial number was 930111276 and it had been had been assigned to the appellant.

Corporal Joshua Ochieng Agola (PW7) testified that he was the commander on the material night and in that capacity, he was in charge of deploying 49 officers.

It was noticed during change of shifts that the appellant was missing. It was later reported that gunshots had been heard from the direction of his house. He eventually found the appellant and corporal Muthama lying in front of the prison's show room; they were both injured. He instructed that both be taken to the hospital. Muthama was treated and discharged while the appellant was transferred to Armed Forces Memorial hospital in Nairobi.

The investigation officer was inspector of police **David Makau (PW9).** On 18 December 2012 he proceeded to the deceased's house from where he observed blood splattered all over the house. The deceased's body had been removed. He also went to the appellant's house where he noticed traces of blood on the floor. The appellant had shot himself in the chest and in the mouth. The appellant told him that he had shot himself twice. Four cartridges had been recovered at Kiawara where the deceased had been killed. He also recovered 13 bullets handed over to him at the police station. He arranged for examination of the exhibits by a ballistics expert.

Dr. Obiero Okoth (PW10) testified that he performed the post-mortem on the body of the deceased on 20 December 2012 at Nyeri Provincial General Hospital. He observed that the body was dressed in blood stained cloths and that the deceased was about 29 years old.

The body had multiple gunshot wounds. Internally there was haemothorax and rapture of vessels. There were abdominal injuries and spine injuries as well. The pathologist opined that the cause of death was multiple injuries due to gunshot wounds. The post mortem report was admitted in evidence.

The appellant opted to give sworn testimony when he was put on his defence. It was his evidence that he used to work as a prison officer at King'ong'o Government of Kenya prison. On 17 December 2012, he reported to work at 6.30 P.M. and was to change shifts at 10.30 P.M. He had been at the deceased's house and they had agreed that she would come to his house at the staff quarters at 10.30 P.M. She did not turn up and so he went to her house at Kiawara. He called her out; initially she did not respond but later she responded and told him that the owner of the house was in the house. She disowned him.

They had a long argument and the deceased even told her that her husband was back. As they argued, he heard a male voice from the house threatening him. The appellant pushed the window open. He could not tell what happened after that because he found himself in hospital. He, however, added that he did not intend to shoot the deceased whom he regarded as his wife. He had married her with two children. Their differences had taken them to the children's court. He also admitted having attempted to commit suicide and, in the process, shot himself; however, he stated that it was because his mind was not stable.

On the question of attempted murder, he could not recall whether he tried to kill anybody. It was his evidence that there was no grudge between him and his colleague whom he shot in the leg.

Section 202 of the Penal Code under which the appellant was charged in the first count reads as follows:

202. Manslaughter

(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life

or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

There is a thin line between the offence of murder and manslaughter; the difference has largely to do with the nature of the act (or omission) in light of the applicable law to particular circumstances. In R **versus Jarmain (1945) 2 ALL ER 613 at page 615** the Court of Criminal Appeal made reference, with approval, to the judgment of Charles, J., the trial judge in the appeal of which it was seized, in drawing the distinction between the two offences; the trial judge had noted as follows**:**

> ***'It has been laid down many times by myself and other judges, and as recently as three years ago [in R. v. Larkin [1943] 1 All E.R. 217, at p. 219], that where an act upon which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person and quite inadvertently the doer of that act causes the death of another person, then he is guilty of manslaughter. Now, that is if the act is unlawful, but if, in doing that same dangerous and unlawful act, he is doing an act which amounts to a felony, he is guilty of murder and not manslaughter. Such are the general terms of the law.***

Applying the law to the appellant's case, there is no doubt, and indeed it was proved beyond doubt that the deceased Gladys Wanjiru Gichohi died on 17 December 2012 and that she died of gunshot wounds on her vital biological organs. The pathologist (PW10) not only conducted a postmortem on the deceased's body but he also certified her death. As far as the cause of the death is concerned, it was his opinion that, the deceased died of "multiple injuries due to multiple gunshot wounds".

The evidence that the fatal injuries were inflicted on the deceased while in her house was also not controverted. The deceased's brother (PW1) and her sister-in-law (PW2) who went to her house immediately after she had been shot were unanimous in their evidence that they found the deceased dead in her house. According to PW2, she was bleeding, apparently from the gunshot wounds. Their evidence that the deceased's body was collected from her house by police officers and taken to the mortuary was also not disputed.

There was no evidence and neither was there any suggestion that the deceased was at any one time armed with the type of weapon that caused her injuries or that the injuries to which she succumbed were self-inflicted.

It is thus beyond peradventure that the deceased not only died but also that she died as a result of an unlawful act of another person.

The major question that follows is whether the appellant was the author of the unlawful act. In answering this question, it is necessary to point out at the very outset that the evidence against the appellant was largely indirect or circumstantial evidence.

As far as I can gather the circumstantial evidence with which the trial court was presented was this: soon after the shooting of the deceased, the appellant was seen walking away from her residence armed with a machine gun. He was positively identified by Gichuhi (PW1) and his wife, Wanjiku (PW2). They easily recognised him because he is a person they had known for years and though it was at night, the electricity light was bright enough for them to recognise him. It is worth noting that the appellant himself admitted in his defence that indeed he was at the scene of crime at the time of the shooting except that he could not tell what transpired after that. It was his evidence that he only found himself in hospital, after the incident.

The other evidence that linked the appellant with the deceased's death was the gun with which the deceased was shot. It was the evidence of sergeant Injendi (PW6) that on the material night, the appellant had been assigned a G-3 rifle serial number 930111276 at his work place at the Nyeri Main Government of Kenya prison. As one of the prison wardens who were working in shifts that particular night, he ought to have handed over the gun at 10.30 P.M. and waited from the guardroom his next shift which was due two and a half hours later. However, by 10.40 P.M., the appellant was neither in the guardroom nor had he surrendered his gun. It was the appellant's own evidence that rather than go to the guardroom, he had gone armed to the deceased's house.

The gun together with the cartridges found at the scene of crime and the live ammunition with which the gun was loaded were all submitted for forensic analysis. The results of the analysis pointed to the crucial facts that the gun was in sound mechanical condition and it was from the same gun that the cartridges found at the scene were discharged. It was therefore logical to conclude that this was the same gun that was employed to shoot the deceased.

Considering that the gun was in the appellant's possession, it was also a legitimate conclusion that the deceased was shot by the appellant.

As earlier noted, the appellant, himself fell short of confessing that he shot the deceased; in the pertinent parts of his defence, he stated as follows:

> ***"I went to work on 17th at 6.30 P.M. I was from my 2nd wife's home. I was working at Kingongo G.K. prison. I was at work upto 10.30 P.M. There was disagreement with my second wife. I went home to eat supper at 10.30 P.M. We had agreed that she comes to my house at the staff quarters but she did not come. I had rented a house for her. So I went to that house in Kiawara. When I got there I called her name but she did not respond. She then told me to go as the owner of the house was in the house. she said she did not know me.***
>
> ***I told her that I was the one paying the house. (sic). She told me that her first husband was back. We talked about many things while I was outside. She did not open the door. We were arguing. A male voice from the house and said if he got outside I will know I don't know. I did not wait for him to come out. I was standing at the door. I knocked the window and it opened. There was darkness in the house. I do not know whether I got angry and I do not know what happened. I found myself at KNH.***

It is apparent from the appellant's own testimony that he was armed at the time he went to the deceased's house; at least, he had not surrendered his gun after the first session of his night shift.

It is also clear from his evidence that he did not dispute the prosecution evidence that he shot the deceased. All I gather from his defence is that he could not tell what followed in the midst of his altercation with the deceased who he regarded as his second wife.

In the face of these facts, I am bound to agree with the learned magistrate's conclusion that there was sufficient circumstantial evidence, neatly corroborated and pointing to the appellant as the person who killed the deceased.

As was stated in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715** the evidence in support of the inculpatory facts was completely incompatible with the innocence of the appellant and could not possibly be explained upon any other reasonable hypothesis than that of his guilt. I am satisfied that the state discharged the burden of proving facts which justified the drawing the inference of guilt on the part of the appellant.

I am also satisfied that there were no other co-existing circumstances that would have weakened or destroyed that inference of guilt. (See **Teper versus Republic (1952) AC 480).**

The appellant's conviction in the first count was safe and proper. If anything, based on the evidence presented before the trial court a charge of murder under section 203 of the Penal Code would have been sustainable. I say so because when the appellant shot in the deceased's single roomed house knowing very well that the deceased with her two children were there, he must have intended to cause death to them or any of them or he intended to do grievous harm. Shooting in the house as he did, he must have known that his acts would probably cause the death of or grievous harm to the deceased or any other person in that house. In short, looking at the evidence in its entirety, there was a clear case of premeditated murder.

Going by the appellant's own testimony, the relationship between him and the deceased was not all that rosy; earlier, there was a disagreement between him and the deceased and therefore when he set out to go to the deceased's house while armed with a gun which he ought to have surrendered earlier, it was clear that the appellant was on a mission to commit a felony; as it turned out the ultimate result was the death of the deceased.

A defence of provocation, which the appellant seemed to suggest would not have passed the test. Apart from what he alleged the deceased to have told him, there was no evidence, as he testified, that there was a man in the deceased's house who threatened him. It was his own evidence that the deceased's door was locked from inside the house and it remained so locked until police officers arrived; they had to break in to collect the body. If there was a man in the house the question would be where did he escape from if the appellant was shooting from the deceased's window which, apparently, was the only other opening he could have escaped through?

In R **versus Jarmain (supra)** the appellant was out on a robbery mission; he pointed a loaded gun at his victim and eventually pulled the trigger and shot her dead. He collected the money the deceased had been counting and ran away. He was indicted for murder and convicted accordingly. His defence was that he triggered the gun inadvertently and therefore he ought to have been charged or convicted of manslaughter rather than murder. He took up the same argument to the Court of Criminal Appeal. In dismissing his appeal, the court stated that:

> ***"We think … that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those violent measures result, even inadvertently, in the death of the victim. For this purpose, the use of a loaded firearm in order to frighten the person victimised into submission is a violent measure. The recent case of R v Hulton and Jones decided in this court, but not reported, is clear authority for the proposition.***

The court followed the House of Lords decision in **Director of Public Prosecutions versus Beard [1920] AC 479** where it was established that death caused in the course of the commission of a felony involving personal violence is murder and that once a series of acts involving violence is commenced the performer must accept the consequences and cannot plead that at some stage they become involuntary.

The law being what it is, the appellant must count himself lucky to have escaped with a less grave offence of manslaughter.

As far as the second count was concerned, the appellant was charged, as earlier noted, under sections 226 and 36 of the Penal Code; the former section defines the offence of attempting to commit suicide and reads as follows:

> ***226. Attempting suicide***
>
> ***Any person who attempts to kill himself is guilty of a misdemeanour.***

And section 36 simply defines the penalty for a misdemeanour; it reads as follows:

> ***36. General punishment for misdemeanours***
>
> ***When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both***.

Turning back to the appellant's case, there is sufficient evidence that after he shot the deceased, he attempted to take his own life.

The evidence in this regard was led by Gichuhi (PW1) who testified that as he pursued the appellant after he had shot the deceased, he heard the appellant call their mother and say that since she had stopped the appellant from marrying the deceased, he had killed her and he was now going to kill himself. On the fateful night Sergeant Peter Injendi (PW6) saw the appellant bleeding; it was his evidence that the appellant had

shot himself in the lower jaw. Again the investigation officer Inspector Makau (PW9) testified that the appellant shot himself in the chest and in the mouth. The appellant himself confessed in his defence that he made an attempt on his own life. To quote him, he stated as follows:

"On the issue of suicide was the same day (sic). At that point my mind was not Ok. I had already gone back to work so I tried to shoot myself."

Thus there was uncontroverted evidence that the appellant attempted to take his own life and therefore he was properly convicted on the second count.

As earlier noted, although he convicted the appellant on this count, the learned magistrate turned round and "acquitted" him under section 35 (1) of the Penal Code because, in his respectful opinion, the appellant was of "unstable mind." With due respect to the learned magistrate, the only power exercisable by a trial court under that provision of the law is the power to discharge, and not acquit. That section reads as follows:

> ***35. Absolute and conditional discharge***
>
> ***(1) Where a court by or before which a person is convicted of an offence is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act (Cap. 64) is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein.***

The logic is simple; one cannot be convicted and acquitted on the same offence at the same time. He is either convicted or acquitted. However, where a person is convicted but the court is of the opinion that it would be inappropriate to subject him to any sort of punishment then he may be discharged under section 35(1) of the Penal Code having regard, of course, to the circumstances of the case.

Assuming the learned magistrate had made the proper order under this section, it would be futile because he ended up sentencing the appellant to life imprisonment and thus defeating the very purpose for which section 35(1) was meant.

In any event, there was no basis for such order because there was no evidence presented before court that the appellant was of "unstable state of mind". Such factual conclusion could only be supported by expert opinion and without it there was absolutely no basis upon which the learned magistrate could reach the conclusion he reached. In short, he misdirected himself on the fact and, inevitably misapplied the law.

I note, however, that no cross-appeal was filed against the learned magistrate's decision in this regard and therefore I would do well if I say nothing more on this question.

Turning to the third count, section 220 which defines the offence of attempted murder reads as follows:

> ***220. Attempt to murder***
>
> ***Any person who—***
>
> ***(a) attempts unlawfully to cause the death of another; or***
>
> ***(b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.***

The appellant was charged under section 220. (a) of the Penal Code and the basis for this charge was that he shot at Anthony Muthama (PW3) with a rifle. His evidence was that he was shot in the company of his colleagues Felix Nyaga and Isaac Nyaga as they investigated the source of a gun blast that they had heard moments before. As they shone their torches in the direction from where the someone appeared to in distress, that person, whom they later came to learn was the appellant, shot in their direction. Unfortunately for him, he was hit on the right thigh.

Although Muthama testified that he was treated and discharged at Mathari hospital, there was no evidence of his visit to the hospital or medical evidence of any sort of treatment. As much as the complainant identified a P3 form which apparently was filled in respect of his injuries, the form was never produced and admitted in evidence.

I note that the investigation officer also made reference to the same form but it was only marked for identification; it was never produced by the doctor who filled it or any other medical personnel for that matter. It follows that there was no evidence that the complainant was shot at and injured by the appellant; in the absence of this evidence, there was no evidence in support of the charge of attempted murder. Accordingly, his appeal against conviction on the third count is merited.

Counsel for the appellant urged that at some stage during the trial section 200 of the Criminal Procedure was not complied with in the sense that the appellant was not informed of his rights under that section when one magistrate took over the trial from his predecessor. This ground was obviously not among the grounds set forth in the appellant's petition and that being the case, the learned counsel's submissions were in breach of section 350(2) of the Criminal Procedure Code, cap. 75 which is explicit that it is only those grounds in the petition of appeal that

may be argued at the hearing of the appeal; it reads as follows:

> ***350.(2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal. (Emphasis added).***

There are provisos to this subsection but none of them opens any window for the appellant to argue any ground outside those set forth in his petition. However, under section 350 (2) (iv)(v) an appellant may seek leave, if he so wishes, to amend his petition and perhaps include any other ground of appeal that may not have been captured in the initial petition. In the absence of such amended petition, the appellant is restricted to the grounds in the petition on record. It is for this reason that I would be entitled to disregard the appellant's submission on whether section 200 of the Criminal Procedure Code was complied with.

In the final analysis I come to the conclusion that the appellant's appeal on conviction of the first count is dismissed. However, his appeal against sentence on this count succeeds primarily because it does not appear from the record that the learned trial magistrate took into account the appellant's mitigation when he meted out the maximum life sentence.

It was stated on the appellant's behalf that the accused was remorseful; that he had a wife with five children and that he was still under medication which included surgery as a result of the self-inflicted injuries. For all these reasons the appellant prayed for leniency.

While I am minded that it was well within the discretion of the learned magistrate to sentence the appellant to such sentence that he deemed lawful, as long as it was lawful, I am bound to interfere with that discretion if it is apparent the he overlooked the appellant's mitigation. I will therefore allow the appeal on sentence in respect of the first count and reduce the life imprisonment to twenty (20) years imprisonment. For reasons I have given, the appeal against the third count is allowed; the conviction on the third count is quashed and sentence set aside. It is so ordered.

Signed, dated and delivered this 9 October 2020

Ngaah Jairus

JUDGE