



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCR NO. 211 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**BENJAMIN MUSYOKA THOMAS.....ACCUSED**

**JUDGMENT**

1. By information dated 17/12/2009 the accused was charged with offence of murder contrary to Section 203 as read with Section 204 Penal Code.
2. Particulars being that on 07/12/2009 at slaughter Estate, Wote Township, Makueni District of Eastern Province murdered Cecilia Mueni Musumbi.
3. The Accused pleaded not guilty and the matter went into trial. The prosecution called seven (7) witnesses.
4. Upon close of the prosecution case, the court found the accused to have a case to answer. Upon being put on his defence, he gave sworn statement and called no witnesses.

**PROSECUTION CASE**

5. PW1 Wilson Ikua who worked with Kenya Women Finance trust said that on 07/12/2009 on Monday in the morning at around 7.50 a.m., while preparing for work suddenly heard screams within the plot.
6. He came out and saw a lady standing outside his door bleeding from the nose and ear and looked dazed. He tried to talk to her but she was not responding. PW1 called a taxi so that she could be taken to hospital. By the time the taxi arrived the deceased had collapsed and passed on.
7. PW1 went back to his house and called the DCIO Makueni and informed him of the incident. The DCIO came with police officers and he explained to him what he had seen. The body was subsequently removed to the mortuary. The deceased was bleeding from all the orifices. She was soaked in blood. PW1 said he didn't know the accused.
8. Upon cross examination PW1 said that the deceased had been his neighbour for about 2½ months. The deceased found PW1 staying on the plot. The plot had several units. However PW1 had never been involved with the deceased socially.
9. PW1 could not tell whether the deceased was married or single. PW1 never saw any man coming to stay in the deceased house overnight. He never knew how the deceased met her death or the injuries.
10. PW2 Daniel Mwendwa Muluki who was the manager CDF, Kaiti Constituency, testified that on 07/12/2009 at 6.00 a.m. he had breakfast with the deceased and later at 7.45 a.m. left the house for Mukuyuni. At about 8.20 a.m., he saw a corporal of police looking for him and said that he was required in the office by the OCS.
11. On his way PW2 received a call from his treasurer who informed him that his wife had been killed. He saw a huge crowd of people in his residence. The OCS took him to the plot where at the gate PW2 saw the body of the deceased bleeding from the mouth, chest and back.
12. PW2 stated that in the house he found a bag which did not belong to them. There was a knife (MFI 2) on the table. It had bloodstains. DCIO opened the bag (MFI 1) where they found a pay slips (MFI 3) of TSC belonging to the accused. There was also a receipt of fees from Kampala International University (MFI 4) which were in the name of the accused. There were also clothes in the bag that belonged to the accused.

13. PW2 stated that he had seen the accused in his office in Makueni. He was the District Children Officer. PW2 was able to identify the shirt (MFI 5) since it was the very shirt he had seen him with in his office. There were shoes as well (MFI 6). PW2 told the OCS he knew the owner of the bag and the contents of the bag belonged to accused.
14. PW2 stated that he had known the accused for a long time and he later learnt that the accused and the deceased had a child outside wedlock.
15. At some point, the accused had reported the deceased to the District Children Officer because he wanted to be given the child.
16. In cross examination, PW2 stated that PW1 was occupying unit 6 since the plots had 9 units. That he got involved with the deceased in July, 2009 and the deceased was killed in December 2009. He had by then separated from his 1<sup>st</sup> wife, Mukundi who he had married in 1981 under Kamba customary law.
17. PW2 stated that he had not formalized the marriage by paying *Theo* nor paid dowry. They were blessed with 2 children (daughters) until 2005 when the marriage hit the rocks. Makundi (1<sup>st</sup> wife) walked out of the marriage and went with the children. 1<sup>st</sup> born was 18 years and the 2<sup>nd</sup> born was 13 years.
18. PW2 said that PW1 was not his close neighbour. That the deceased occupied the unit in July 2009 and she was his wife in accordance with Kamba customary law. He was not aware that the accused was her (deceased) husband.
19. PW2 was aware of the letter inviting the accused and deceased to go and attend the District Children's officer at Wote. PW2 was given the letter by the deceased.
20. PW2 was the one paying the monthly rent and he had a house in his rural area.
21. He did not know whether the accused was the natural father of the child and never threatened the accused with death. He denies that he was the one who killed the deceased and doesn't know who killed his wife.
22. PW3 Alex Ndeti who was in hospitality industry knew the accused and had been his friend since 2004. By then PW3 was working at Kathonzweni whereas the accused was a teacher at Vitale Boarding Primary School. When PW3 relocated to Wote, the accused kept on visiting PW3 and sleeping in his house.
23. On 06/12/2009 at about 5.00 p.m., the accused called and informed PW3 that he was around and wanted PW3 to accommodate him for the night. PW3 sent him keys for the house and later came home. At about 5.30 a.m. the accused left PW3's house.
24. PW3 further stated that some minutes after 6.00 a.m, he too left the house enroute to his place of work. At about 8.00 a.m., he heard that a woman had been killed. At 3.00 – 4.00 p.m. on the same date, CID officer approached PW3 and told him that the accused had killed the deceased and wanted him to record a statement.
25. In cross examination, PW3 stated that he knew that the deceased was a wife of the accused since 2008 and at the time of her death, he could not say whether they were still husband and wife.
26. PW4 Cpl Bramwell Saina No. 62619 who was that time attached to CID Kilindini performing general investigations testified that on 07/12/2009 at about 8.00 a.m. while in the office, he received instructions from DCIO to accompany him to a scene where someone had been killed.
27. They proceeded there in the company of OCPD, DCIO and Deputy OCPD, Makueni. On arrival they met a crowd of people and on entering a plot at slaughter house, they found a body of a woman lying in a pool of blood. She was lying 16 meters away from the house she used to occupy.
28. On making enquiries, they entered the room where the deceased was living and found fresh blood stains leading to the house that she had been housed. They also found a black travelling bag and a knife stained with fresh blood.
29. On opening the bag, they found personal documents indicating the names of one, Benjamin Musyoki. They were personal pay slips, travelling receipts from Nairobi to Kampala, ignition keys of a motor bike, hospital appointment card and advocates receipts – MFI 10.
30. They also found the kitchen knife (MFI 2), receipts for Kampala University (MFI 4), receipt for motor cycle (MFI 11), hospital appointment card from Shalom Hospital (MFI 8) and a bank slip from Equity bank (MFI 9). They also recovered personal clothes – 3 shirts and 1 t-shirt in the travel bag – MFI 5.
31. PW4 stated that while still at the scene, they received information that a person had availed himself to the station claiming to have killed somebody. They went to the station and found the accused and upon searching him, PW4 found an ATM card and ID card indicating his names.
32. Upon interrogating accused further, the accused took them to a thick bush where he had crossed. He led them to an acacia tree where they recovered a vest. He had intended to commit suicide using the vest (MFI 1).
33. The accused also led them to homestead of an old lady which the accused claimed had gone to in search of poison with which to commit

suicide.

34. In the home they came across a man who confirmed that he had persuaded the accused from his mission. He availed a motor cycle to him which ferried him to the police station. PW4 recorded a statement from a lady who was at the scene during the commission of the crime.

35. She had described the T-shirt that the accused was wearing. PW4 recovered the said t-shirt from the accused which is dark with white stripes – MFI 12.

36. Through interrogation, PW4 established where the accused had spent the night previously and the person he had shared the night with described the way he was dressed when he left in the morning. He described the t-shirt, the travelling bag and black safari boots.

37. Keys were recovered at the scene. The accused led them to his normal residence in Makindu Kiongwani. The key was able to open the padlock of his house. He also led them to parental house where a motor bike was packed. A key on the bunch they recovered at the scene of crime was able to ignite it.

38. PW4 stated that after a post mortem was carried out, the accused was later charged. Exhibits 1-16 were produced in court. At the scene PW4 summoned scenes of crime personnel who took photographs – MFI 17.

39. In cross examination, PW4 stated that he took the inventory of the items he recovered as aforesaid which were in total 22 items. When they visited the scene of crime, the accused was not among the crowd. The 6 units were all rented and established the owner. PW4 did not record the statement of the landlord.

40. PW4 found out that the deceased was a housewife but selling mitumba at Wote market and she was married to Mr. Maluki. According to his investigations, it was the accused who came with the travelling bag that was recovered from the sitting room of the deceased.

41. The accused was not present when it was recovered.

42. The owner of the house who was staying with the deceased disowned ownership of the knife.

43. According to PW4, Pauline Mukonyo and Wison Ikuia Ngima were two people who volunteered the information as having witnessed the incident. The lady witnessed the screams and saw the accused while Ikuia witnessed the screams and the deceased running towards him before she fell down. They never saw the accused enter the room where the deceased was staying.

44. PW4 testified that Pauline heard screams, saw the deceased run and fall and thereafter saw the accused running away and looking back 3 times. She was at close range. She was lighting a jiko nearby. Prior to that she had not heard of any commotion.

45. However PW4 did not take the knife to Government Chemist because he was soon thereafter moved to another station. He handed over the file to PC. James Ngure. Also the recovered blood stained clothes of the deceased were not forwarded to the government chemist.

46. PW4 did not establish when the marriage between the deceased and accused broke down. According to PW4, the deceased was accused longtime girlfriend. He was not aware that they were still seeing each other. PW4 never spoke to any of the parents of the deceased and accused.

47. PW4 stated that they did not bother to charge accused with the crime of attempted suicide since they were interested in the murder charge. The accused cooperated with them during investigation.

48. PW5 Catherine Ndila Kilonzo was a medical doctor who was a senior medical officer between 2007- 2010 at Makueni District hospital where she was doing general clinical duties and surgical duties, perform post mortem and administrative duties.

49. That on 18/12/2009 she conducted a post mortem on Cecilia Mueni (deceased) aged 26 years old. PW5 stated that she noted externally the body had mild pallor (whitish) blood loss. Fresh blood oozed from the nose and mouth. There was a bruise on the right cheek and face. Blood was seen on palms of the hands. There was a chest wound of 2 cm. The stab wound was linear with sharp edged and deep.

50. On the respiratory system, the chest had a fracture of the 2<sup>nd</sup> rib, on the back massive harmo-thorax on the right chest cavity and the blood was fresh and mixed with clots. These were around the posterior chest wall and extended to the article right lung.

51. On the cardiovascular system, there was a laceration of the 1 cm on the apex of the pericardio and also blood clots. The rest of the head was intact. The ascending aorta was injured and it exited from the heart. Digestive system showed nothing abnormal.

52. The cause of death was cardiopulmonary collapse secondary to massive haemothorax and pericardia which resulted from a stab wound. PW5 signed the report on 18/12/2009 and duly stamped and produced it as evidence. Post mortem report – Exhibit 17.

53. Upon cross examination, PW5 stated that she opened the body of the deceased with the assistance of the mortuary attendant. There was only one (1) stab wound on the body.

54. PW5 was not given a history of the lady having been treated elsewhere. The body was naked when it was presented to her. It had no clothes. The body was identified by 2 gentlemen who were in company of 2 police officers. She could not know who removed her clothes.

55. PW6 Raphael Muasya was a casual worker at constructions sites. That on 07/12/2009 at 9.00 a.m., he was at shamba. He saw an old lady who was his neighbour coming from her house to his shamba calling him. She told him that there was someone who had entered her house.

56. When they went to the house they found the house locked from inside. PW6 called out and asked him what he was doing in the house and he replied that he had hidden in the house because he had killed someone.

57. He said he wanted to commit suicide by taking poison. PW6 assured to help him and told him to call the police. According to PW6, the accused called the police in his presence and was willing to look for a police station nearby and go to report there. PW6 directed accused to the nearest police station i.e. Wote police station.

58. PW6 hired a motor bike at Wote town, came back on it and asked the motor bike rider to take the person to the police station where indeed he was taken.

59. At around 2.00 p.m., when he came back to his shamba and went back to the lady's house, she told him that he was requested by the police to record a statement at the Wote police station. The police had come back with the accused to the lady's house. PW6 was able to identify accused at the dock.

60. PW7 No. 75602 PC Joseph Mutie of CID headquarters scene of crime recalls that on 06/12/2009 he was based at scenes of crime in Makueni. He received a sealed packet which was signed by Cpl. Bramwel Saina.

61. It contained an express photographic film. It was accompanied by an exhibit memo form dated 30/11/2009. The said exhibit memo and packet were each signed and dated by him.

62. On 09/01/2010 PW7 processed and got the fully 17 colour photographs which were exact reproduction of the express film submitted to him and were in no way retouched or otherwise interfered with during the process of production.

63. The films are the photocopies photographs 1-3, general close-up view showing the scene with the deceased lying on the ground beside a water container. Photographs 4-5, full view showing pool of blood beside the deceased and house. Photographs 6-8, are full and closer view of deceased lying in a pool of blood.

64. Photographs 9-12, are blood spots on the doorway, on the floor and on the outer of the deceased's house. Photographs 13-14, closer view showing the suspect bag, murder weapon on the floor in the deceased's house.

65. Photographs 15-17 are the front and rear view of motor cycle registration No. KMC 494. The last letter is not visible. The motor cycle blue in colour. PW7 produced a copy of gazette notice dated 15/12/2006. He also produced photographs; each of them signed, stamped and dated by PW7 on 19/01/2010.

66. Upon cross examination, PW7 stated that he was not the one who took the photographs and that there was no laboratory at Makueni.

67. He was only appointed by order of the Attorney General for purpose of processing photograph prints from express films submitted to him. The report indicated that the prints were processed at CID Headquarters.

68. Upon re-examination PW7 said that he received the file from Cpl. Bramwel Saina, a police officer. The procedure was wholly course was to develop photographs films from an officer with exhibit memo.

69. PW7 stated that the film had a summary memo and confirmed it was intact. He said that they present their evidence in court by way of a report. The report has a certificate that the original file is not interfered with.

70. After closure of the prosecution case, the court found the accused had a case to answer and he was put on his defence. The accused opted to tender sworn statement.

#### **DEFENCE TESTIMONY**

71. Accused Benjamin Musyoki Thomas the accused herein stated that on 06/12/2009, he came to work where his wife and child were living. He went to her house but did not find both the wife and his child. He did not have spare keys. He called but did not get her.

72. He later went to his friend's place at Wote. He stayed with his friend at a bar called Maisha Kamili. They took alcohol up to 11.00 p.m.

73. He was trying to call his wife as they were drinking. They went to her place and found she was not present. He later went and spent in his friend's place.

74. Further accused stated that on 07/12/2009 on Monday, his friend left him as he went at work. Later accused went to his wife's place at 7.30 a.m., and upon arrival he found her house's door was open. He was with his travelling bag. He entered and placed his bag at a couch.

75. The house had bed room and kitchen and sitting room. Bedroom was not fully closed. He found his wife with another man in bed. He further stated that the man was PW2 Daniel Mwendwa Maluki. His wife was sleeping on bed and the man was sited by the bedside.

76. Accused retreated to coffee table. He got a kitchen knife at the coffee table. The man came held accused and threw him down. He tried to run. While accused struggling with him, his wife came wearing a lessa and he stabled her. The man ran away. Accused saw her bleeding on front side and tried to help her.

77. According to accused he later went to where taxi was to get one to transport his wife and after 20 minutes he returned and saw crowd had gathered at her place and police car. He ran to report at police station. PW2 had employed sister to deceased. He tried to explain to the OCS.

78. Accused said that the OCS arrested PW2 and brought him later to the scene of crime. He saw former MP Ndambuki with the PW2. Accused was being told to confess by the OCS. Accused further told court that his advocate Mr. Makundi told him not to confess.

79. Accused was later charged. He was enraged when he found a man in his house. Accused admitted the attack was un-intentional. He regrets the act.

80. He further stated that he had a child with the deceased. That time the child had gone to maternal grandmother. He was providing for them since he was working in Kibwezi District. Accused stated that he had no idea of the relationship between PW2 and his wife. He had no problem with his wife.

81. Upon cross examination, accused testified that he stabbed the deceased unintentionally. He further stated that they were married by cohabitation as from 2004 and the deceased used to come to Wote while he was working in Kibwezi. That the deceased would come to the accused and stay for about 2 weeks. She had business in Wote. The accused used to visit most weeks and leave in time because he was a teacher.

82. Accused testified that he had amicable live save for few quarrels i.e. the normal marital issues. The material day was the first time to fail to find his wife in the house. The man he found with her was Daniel Muluki whom he knew via sister to deceased.

83. He further stated that he was with Alex Ndeti PW3 when they went previous night to her house. They found house locked at about 11.00 p.m. In the morning he went alone. The door was not locked; it was opened towards sitting room.

84. He went via sitting room then he proceeded to bedroom. He pushed bedroom door open. He found the man dressed but the lady had a "shuka". He retreated to sitting room and when the man (PW2) saw him, he got surprised and stretched and had to lock bedroom.

85. Accused testified that he was extremely enraged and took kitchen knife and returned to bedroom but the man was pushing the door to lock while accused pushing to open. PW2 pushed the door violently and knocked him down. It took 2 to 3 minutes. Accused held knife by his right hand and pushed door by left hand. The door opened from inside.

86. PW2 came out followed by the deceased. She got stabled in the commotion. There was no shouting but commotion. Accused admitted he wanted to fight using a knife. He was to use it as a defence weapon. He left her on the ground when he went to get a taxi.

87. When he came back, he saw a crowd milling and gathered at her place. There were more than 20 people. Accused admitted reporting to the police. He wanted to plead to a lesser charge of manslaughter.

88. He had no disagreement with PW2. Accused did not know deceased had extra marital affairs then.

89. Upon re-examination accused stated that he realised that the deceased was injured and went to look for a taxi. When he came back he found crowd and decided to go to the police to report the incident.

90. Accused denied that he was going for a fight in the house. He was enraged to find both in bedroom and that he was emotionally mad upon finding the deceased and PW2 in bedroom. Accused said that he had no previous problem with the deceased and that he had assisted the police to investigate the case.

91. On close of defence case, the defence filed submissions but the prosecution opted to rely on the evidence on record.

## **DEFENCE SUBMISSIONS**

92. The accused person concedes that he killed the deceased though accidentally and also in a situation he was extremely provoked. For murder to be proved, both the *men's rea* and *actus reus* must be present. The accused found his wife in bed with another man after she had spent the night from the home and she was unreachable on her phone.

93. Provocation under Section 208 of the Penal code includes any wrongful act or insult of such nature as to be likely, when done to an ordinary person or in the presence of an ordinary man to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or paternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

94. The accused and deceased were husband and wife and were blessed with one child. The accused loved and provided for his family, was faithful and never quarreled with the wife. No evidence was adduced to show that their relationship was strained but only that he was a passionate, caring, faithful and loving husband and father.

95. Section 207 of the penal code provides where a person who unlawfully kills another under circumstances which, but not for the provisions of the section, would constitute murder, does an act which causes death in the heat of the passion caused by the sudden provocation as hereinafter defined, and before there is time for the passion to cool, he is guilty of manslaughter only.

96. It's the accused testimony that he reacted immediately after what he witnessed and that he did not have time to cool. The actions that led to the stabbing were continuous, there was no time to cool and think things through and it's unfortunate that it led to loss of life.

97. The court while quoting the decision of **Mancini –vs- Director of public prosecutions (1942) AC** stated;

***“...it is important to consider whether a sufficient interval has lapsed since the provocation to allow a reasonable person time to cool, and account must.....”***

98. The accused stabbed the deceased only once as per the post mortem report, malice cannot be derived from the accused actions in this particular matter. If the stab wounds inflicted on the deceased were multiple, then malice could have been read from the actions of the accused person.

99. The accused was deprived of self-control when he found his wife in bed with another man and death occurred at the heat of the moment. This is especially after the wife spent the night outside their home and never answered nor returned any of the accused husband's call.

100. According to **Yovan –vs- Republic (1970) EA 405 (duffus P, spry Vp and law JA)**, heat of passion refers to both a state of anger and any emotional state caused by the provocation.

101. The Evidence Act, Cap 80 of the Laws of Kenya provides that;

***“Section 107.***

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

102. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused person is only to be considered on a balance of probabilities.

103. The standard of proof placed on the prosecution to prove the guilt of an accused person is proof beyond reasonable doubt. It is now cast in stone as established in the Locus classicus; **Woolmington –vs- DPP (1935) AC 462**, that; Lord Sankey in the celebrated “Golden thread” speech;

***“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.”***

104. In **Republic –vs- Derrick Waswa Kuloba (2005) eKLR** the court said;

***“.....the burden of the prosecution is to establish its case beyond reasonable doubt....”***

105. In **Hau –vs- Aregiam (1954) 21 EACA 276**, the court in reducing a conviction of murder to manslaughter, found that the accused had acted both in self defence and under stress of provocation.

106. The accused had quarreled with the deceased, and immediately a fight ensued between them. It was the accused who struck the first blow. There was no time for passion to cool.

107. The prosecution has not proven its case beyond reasonable doubt. The essential ingredients of murder are (a) death of a person (b) that the accused caused that death through unlawful act and (c) that the accused had malice aforethought.

108. The death of the deceased was accidental and un-intentional. The deceased was stabbed as she was trying to leave the room after the accused had an altercation and pushing back and forth of the door with PW2. Section 9(1) of the penal code a person is not criminally responsible for an event which occurs by accident.

109. In **Rex –vs- Jehoshaphat Rugambi Mwaniki (1942) 9 EACA 40 (Sir Joseph Sheridan CJ, sir Norman Whitely CJ and Sir Henry Webb J)** it was held that where the defence of accident is put forward by the accused person and is rejected by court, the court still has the duty to consider the possibility of manslaughter, even though the accused does not put forward the defence, and if there is some evidence to support it.

110. The prosecution has not proved that the death that occurred was caused intentionally by the accused person.

111. The stab occurred after a confrontation with the PW2, a thing that stirred up, enraged the accused which actions deprived him of the

control of his senses nor did he have time to cool down and think things through. It was at a moment notice and the accused tried his best to save the deceased life after she was accidentally stubbed.

### **ISSUES, ANALYSIS AND DETERMINATION**

112. After going through the evidence on record and tendered submissions, find the issues are;

- *whether the prosecution as proved its case beyond reasonable doubt?*

113. The offence of murder is defined as follows by section 203 of the Penal Code:

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

114. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

-**The fact of the death of the deceased.**

-**The cause of such death.**

-**Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and;**

- **Lastly Proof that said unlawful act or omission was committed with malice aforethought.**

115. **THE ACTUS REUS;** Having sufficiently proved the fact as well as the cause of the death of the deceased the prosecution is under a duty to prove that the accused person before the court is criminally culpable for the act leading to the death of the deceased. This is what in law is referred to as the ‘actus reus’ of the offence. **Websters New World Law Dictionary** defines ‘actus reus’ as **“The voluntary and wrongful act or omission that constitutes the physical components of a crime.**

**The term ‘MENS REA’; is defined by the Wex Legal Dictionary as follows:**

**“The state of mind indicating culpability which is required by statute as an element of a crime.”**

116. The mens rea for murder is described as ‘malice aforethought’. **Section 206 of the Penal code** defines ‘malice aforethought’ as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

**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;**

**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.**

### **INTENT TO COMMIT A FELONY.**

117. An “intention.....” from the above definition specifically **section 206(b) and section 206(c)** malice aforethought comprises not only intentional acts, but also comprises reckless acts likely to cause death and/or grievous bodily harm with indifference of the consequences of such acts.

118. In the case of **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] eKLR** where the elements of the offence of murder were listed as follows:-

**a) The death of the deceased occurred;**

**b) That the accused committed the unlawful act which caused the death of the deceased; and**

**c) That the accused had malice aforethought.**

119. In the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where the Court of Appeal cited the case of **MOHAMMED OMAR & 5 OTHERS [2014] eKLR** and the case of **DPP V MORGAN [1975]2 ALL ER 347** where it was held that:-

**The essential element of self defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds. The ground of self defence also fails as evidence on record**

does not bring out that the appellant faced any kind of danger that made him fear for his life.

120. Provocation was discussed in the case of **TEI S/O KABAYA VS REPUBLIC [1961] EA** where the court held:-

**In consideration whether the defence of provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.**

121. In the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where the court held that;

**For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.**

122. Malice aforethought was defined in the following cases;

(a) **NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- **Intention to cause death.**

- **Intention to cause grievous bodily harm.**

- **Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.**

123. (b) In the case of **DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, BOSIRE, O'KUBASU and ONYANGO OTIENO JJA.**, while considering what constitutes malice aforethought observed as follows:

**When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.**

124. The issue of self defence was discussed in the case of **AHMED MOHAMMED OMAR & 5 OTHERS VS REPUBLIC [2014] eKLR** where the court held as follows;

**What are the common law principles relating to self defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNIS, 55 Lord Morris, delivering the judgment of the Board, said:**

**“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 may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some 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 immediate defensive action may be necessary. If the moment is one 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. There may be no longer any link with a necessity of defence. .... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one 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.”**

125. The Court of Appeal further held that;

**“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP V MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds.”**

126. In the Court of Appeal case of **NJERU VS REPUBLIC [2006] 2 KLR 46**, the court in dealing with self defence held:-

**“A killing of a person can only be justified and excusable where the action of the accused which caused the death was in the**

course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.

In this case, it was not in dispute that the appellant, being a police officer on duty, had shot the deceased and killed him. It was therefore upon the appellant to show that at the time of the shooting he was in the course of averting a felonious attack and that no greater force than necessary was applied. The appellant was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.

127. By virtue of **Section 17 of the Penal Code**, the principles of the English common law were applicable in determining criminal responsibility for the use of force in defence of the person or property.

128. Under those principles, a person who attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances.

129. Section 207

**When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.**

#### **Section 208**

**1. The term “provocation” means and includes, except as hereinafter stated, 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 immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.**

**2. 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, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.**

**3. A lawful act is not provocation to any person for an assault.**

130. The accused in his sworn statement testified that he went to his wife’s place at 7.30 a.m., and upon arrival he found her house’s door was open. He was with his travelling bag. He entered and placed his bag at a couch.

131. The house had bed room and kitchen and sitting room. The bedroom door was not fully closed. He found his wife with another man in bed. He further stated that the man was PW2 Daniel Mwendwa Maluki. His wife was sleeping on bed and the man was sitted by the bedside.

132. Court notes that PW2 testified that he left deceased house at 7.45 a.m. and PW1 testified that he heard screams from the deceased house and saw her ran towards his house at 7.50 a.m. The accused arrived in the house of the deceased at 7.30 a.m.

133. Accused retreated to coffee table. He got a kitchen knife at the coffee table. The man came, held accused and threw him down. He tried to run. While accused was struggling with him, his wife came wearing a lessa and he stabled her. She got stabled in the commotion. There was no shouting but commotion. Accused admitted he wanted to fight using a knife. He was to use it as a defence weapon.

134. In the case of In the case of **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] eKLR** the elements of the offence of murder were listed as follows:-

**a) The death of the deceased occurred;**

**b) That the accused committed the unlawful act which caused the death of the deceased; and**

**c) That the accused had malice aforethought.**

135. The accused defence corroborates PW5 (doctor) that the deceased death occurred and as per the content of the postmortem she produced. This is because the accused admits stabbing the deceased. It was a single shot stab which occasioned the death as cardiopulmonary collapse secondary to massive haemothorax and pericardial tamponade resulted from a stab wound.

136. The accused admits that he caused the fatal stab thus he caused the unlawful act which caused the death of the deceased.

137. As to whether he had malice aforethought, he says he got the knife as he wanted to fight using a knife. He was to use it as a defence weapon. What emerges from his testimony is that he procured the knife to fight PW2 or both PW2 and the deceased. He ended up killing one of them i.e. the deceased.

138. He appears to erect justification of self defence in the circumstances. When he glanced at the bedroom occupied by deceased and PW2, he opted to run for a knife to fight with it as a defence weapon. Why did he behave like that? Was he provoked? He claims the deceased was his wife and finding her in bed room with another man justified circumstances to fight even with a knife which could cause grievous harm or kill.

139. On cross-examination, Accused stated that, when he found the deceased house door open, He went via sitting room then he proceeded to the bedroom. He pushed bedroom door open. He found the man dressed but the lady had a "shuka". He retreated to sitting room and when the man (PW2) saw him, he got surprised and had to lock the bedroom.

140. Accused testified that he was extremely enraged and took kitchen knife and returned to bedroom but the man was pushing the door to lock while accused was pushing it to open. PW2 pushed the door violently and knocked him down. It took 2 to 3 minutes. Accused held knife by his right hand and pushed door by left hand. The door opened from inside.

141. PW2 came out followed by the deceased. She got stabled in the commotion. There was no shouting but commotion. He left her on the ground when he went to get a taxi. When he came back, he saw a crowd milling and gathered at her place. There were more than 20 people.

142. Accused admitted reporting to the police. He wanted to plead to a lesser charge of manslaughter.

143. In the case of **Rex –vs- Jehoshaphat Rugambi Mwaniki (1942) 9 EACA 40 (Sir Joseph Sheridan CJ, sir Norman Whitely CJ and Sir Henry Webb J)** it was held that where the defence of accident is put forward by the accused person and is rejected by court, the court still has the duty to consider the possibility of manslaughter, even though the accused does not put forward the defence, and if there is some evidence to support it.

144. The accused testified that him and the deceased were husband and wife and were blessed with one child. The accused loved and provided for his family, was faithful and never quarreled with the wife. No evidence was adduced to show that their relationship was strained but only that he was a passionate, caring, faithful and loving husband and father.

145. **Section 207 of the penal code** provides where a person who unlawfully kills another under circumstances which, but not for the provisions of the section, would constitute murder, does an act which causes death in the heat of the passion caused by the sudden provocation as hereinafter defined, and before there is time for the passion to cool, he is guilty of manslaughter only.

146. It's the accused testimony that he reacted immediately after what he witnessed and that he did not have time to cool. The actions that led to the stabbing were continuous, there was no time to cool off and think things through and it's unfortunate that it led to loss of life.

147. In 2014 treatise **PROVOCATION IN SLOW AND ESCALATING LOSS OF SELF-CONTROL BY GEORGE KAMAU KINUTHIA** opined that;

**"Whether there is sufficient provocation rests with the court upon consideration of all the facts of the case, in line with the code, the defence will only be available to the accused when the stipulated ingredients are proved to exist.**

**-Firstly, it must be shown that the killing was done in the heat of passion and without time for it to cool.** Thus, it has been held that provocation would not be available as a defence where the accused kills another arising from the conduct of the deceased several days prior.

**-Secondly, the provocation must be sudden. Hence, where the accused knew of his wife's infidelity and later killed her after she threatened to leave him, it was held that the wife's conduct did not amount to sudden provocation.**

**-Thirdly, the provocative conduct must comprise an unlawful act in order to give rise to a legal provocation. Unlawful acts which have been held to amount to provocation include killing of the accused's relative, an attack on the accused's wife or relative, trespass to property, a verbal insult of gross nature, flagrante delicto, and. S 202(2) provides that unlawful is conduct 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. Instances of unlawful killing amounting to manslaughter include provocation, excessive use of force in defence of person or property, omission to perform a duty recognized by the law of homicide, criminal negligence and pursuance of a suicide pact to kill witchcraft.**

**-Fourthly, the provocation must be such as to deprive an ordinary person of the class to which the accused belongs of his power of self-control.** The court is able to draw an inference based on the facts of the case.

**-Finally, the provocative act must be done in the presence of the accused, either towards the accused or towards a person who has a specific relationship with the accused"**

148. The court while quoting the decision of **MANCINI –VS- DIRECTOR OF PUBLIC PROSECUTIONS (1942) AC** stated;

**"...it is important to consider whether a sufficient interval has lapsed since the provocation to allow a reasonable person time to cool, ....."**

149. The accused stabbed the deceased only once as per the postmortem report, thus the defence submits that, malice cannot be derived from

the accused actions in this particular matter. If the stab wounds inflicted on the deceased were multiple, then malice could have been read from the actions of the accused person.

150. The accused was deprived of self-control when he found his wife in bed with another man and death occurred at the heat of the moment. **The Evidence Act, Cap 80 of the Laws of Kenya** provides that; “**Section 107.**

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

**An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused person is only to be considered on a balance of probabilities.”**

151. The standard of proof placed on the prosecution to prove the guilt of an accused person is proof beyond reasonable doubt.

152. It is now cast in stone as established in the Locus classicus; **Woolmington –vs- DPP (1935) AC 462**, that; Lord Sankey in the celebrated “Golden thread” speech;

**“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 .....**”

153. In **Republic –vs- Derrick Waswa Kuloba (2005) eKLR** the court said;

**“.....the burden of the prosecution is to establish its case beyond reasonable doubt....”**

154. The prosecution did not displace the defence tendered by the accused which negatives malice afore thought thus in the circumstances of the case, I find that murder was not proved beyond reasonable doubt.

155. This is because the PW1 testimony that the screams from deceased house were heard at 7.50 a.m., accused arrived in the same house at 7.30 a.m. and PW2 stated that he left same house at 7.45 a.m., which indicates that the incident happened on balance of probabilities in presence of both accused and PW2. PW2 version that he was not in the house during the attack is not credible.

156. There are also elements of accused attempted suicide and shown willingness to confess on offence of manslaughter immediately after the incident.

157. He surrendered himself to the police and reported that he had killed somebody. This is the same story he narrated to the PW6.

158. However the accused took knife to fight on what he alleges to be in extreme provocation situation. He employed extreme and un-proportionate force thus he inflicted fatal stab to the deceased thus he committed an offence of manslaughter in the circumstances which the court hereby convicts him of.

159. Thus the court makes the following orders;

**i. The accused is found guilty of manslaughter and convicted accordingly.**

**ii. The accused will be sentenced accordingly after mitigations.**

**SIGNED AND DATED THIS 2<sup>ND</sup> DAY OF JULY 2018, IN OPEN COURT.**

.....

**C KARIUKI**

**JUDGE**