



**Republic v Edan (Criminal Case E001 of 2023)
[2025] KEHC 15124 (KLR) (24 October 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E001 OF 2023
RN NYAKUNDI, J
OCTOBER 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

EWOI EDAN ACCUSED

JUDGMENT

1. Before this Court is an Accused Person 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 the Accused on the night of 16th day of December 2022 at Lokitela village in Narewa within Lodwar in Turkana County murdered Christine Lotuko Ekatorot.
2. The Accused pleaded not guilty to the offence necessitating the prosecutions to discharge the burden of proof of beyond reasonable doubt on each of the following elements;
 - “(a) The death of the deceased.
 - (b) That her death was through unlawful acts or omission of the accused.
 - (c) That the accused had malice aforethought.
 - (d) As such, the quality of the evidence placed the accused person at the scene of the murder.”
3. The lead Prosecution Counsel happens to be Mr. Kakoi whereas the defense was led by Mr. Lotir Advocate. Thus, it is incumbent upon the prosecution to prove all the essential ingredients of the offence of murder contrary to Section 203 of the Penal Code beyond all reasonable doubt. To prove its case, the prosecution led evidence from seven witnesses herein after referred to PW1 to PW4.



The Prosecution Case Summary

4. PW1 Gladys Ekwacho testified to the effect that the deceased happen to be her cousin. That on 16/12/2022 they were at home with the accused who is also a boyfriend to the deceased. In the course of the conversation the accused told the deceased to stand up so that they can leave PW1's homestead. According to PW1 the deceased was reluctant to leave immediately as asked by the accused and this was not taken lightly as thereafter the accused forced her to leave including engaging in pull and push motion. As of necessity the accused and the deceased left the PW1 house. The following day PW1 received the information that the deceased is dead. She visited the scene and confirmed that the deceased was no more. It now became a police case including her being invited to record a statement including identifying the body of the deceased at the mortuary.
5. PW 2 Esther Ekatokol testified as a witness for the state and the mother to the deceased. She acknowledged that they had not interacted with the accused much prior to the incident although she was informed that they had a love relationship with the deceased. In the testimony of PW2 on 17/12/2022 she received information that the body of her daughter has been found dumped at an ongoing construction site.
6. PW3 Stanley Muchungo identified himself as a mason in Lodwar and to the best of his recollection on 16/12/2022 in between 5:00 and 6:00 pm he was leaving work for his house at Lodwar. Further in the testimony of PW3 he had spent some time in mama county taking some alcoholic drink. He witnessed a fight between the accused and his girlfriend Christine. Simultaneously he witnessed the owner of the rented house asking them to leave. This fight between the accused and deceased continued for some time forcing the deceased to leave the homestead. The witness could hear the motive or cause of the fight being the use of HIV medication as between the accused and the deceased. It was PW3 further evidence he continued enjoying his alcoholic drinks up to around 12:00 am when he retired to his house but in the morning, he saw the body of a human being lying within his compound. he positively identified the deceased as Christine who is also related to Gladys and the boyfriend to the accused. In addition, PW2 confirmed to the court that the deceased and the accused they live in the same compound.
7. PW4 happen to be police detective PC Clarice Asiago based at the DCIO Turkana central. PW4 told the court that she took over investigations from her colleague who had conducted the investigation partially and recommended the accused be charged with the offence of murder. According to PW4, the evidence collected including documentary linked the accused person to the homicide offence against his girlfriend. She placed reliance on the post mortem report and the OB entries of 16/12/2022.
8. I take note that the prosecution also provided a post mortem report by Dr. Kidalio who formed the following opinion upon the examination of the deceased body: external appearance of the body-cut around on the skull, depressed skull fracture bilaterally, open skull fracture extending across the skull, blood (clotted) on mouth, nostrils & ears, cloths soaked with clotted blood & body covered with clotted blood. Head: scalp hemorrhage & depressed skull fracture at the left & right temporal regions open compound skull fracture with hemorrhage. As a result of the examination, the pathologist formed the opinion that the cause of death was severe head injury with skull fracture & hemorrhage. That was the case for the prosecution.
9. In answering the question on whether a prima facie case has been established for the accused person to be placed on his defense based on the four witnesses, it was ruled in their favor under Section 306 of the Criminal Procedure Code.



10. The court having explained the accused his right under *the constitution* on the right to keep silent and not to give incriminating evidence in regard to the offence, he voluntarily elected to give a sworn statement of defense.

Defence Case Summary

11. The Accused perspective on the defense included the following highlight that on 16/12/2022 he woke up and proceeded to a building site where he worked up to 5:00pm. Thereafter he passed through the club to have some drink and he did not stop there in that one club. He also passed through another drinking joint. He also told the court that he was involved in a fight at a wine shop where he suffered physical injuries forcing him to go to hospital. That is where he was arrested by the police and placed in custody for the offence he does not know or committed it.

Analysis and Determination

12. Having considered and examined the 4 prosecution witnesses and further the rebuttal testimony by the defense, the inquiry by this Court is to subject every piece of evidence to establish whether the following elements of murder have been proved beyond reasonable doubt;
 - a. The fact of death
 - b. The fact that the deceased's death was caused by an unlawful act or omission.
 - c. That the accused committed the unlawful act which caused the death of the deceased; and
 - d. That the accused had malice aforethought.
13. The master piece legislation which is the *Evidence Act* gives crystal guidelines under section 107(1), 108 & 109 on the standard and burden of proof vested with the prosecution to establish the existence of facts in issue, to prove or disprove that the offence of murder indeed was committed and the culpability of it is squarely within the knowledge of the Accused persons. The Black's Law Dictionary puts it more succinctly on the degree of higher level required in criminal cases conceptualized as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. that is evidence as a whole show that the facts sort to be proved is more probable than not. This is in contrast with the balance of probabilities in civil cases. The Learned Author Granville Williams in his book Criminal Law 2nd Edition explained this concept of reasonable doubt as follows: that it is the business of prosecution to bring home the guilt of the accused to the satisfaction of the minds of the Jury or Judge, but the doubt to the benefit of which the accused is entitled to must be such as rational thinking, sensible man fairly and reasonably entertain, not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle skepticism. There must doubt which a man may honestly and consciously entertain.
14. Certainly, it is a primary principle in law within our jurisdiction that the accused must be and not merely maybe guilty before a court can convict him or her of any offence initiated and prosecuted by the prosecution under Article 157(6 &7) of *the Constitution*. The facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say there is no any other explanation which is traceable to the defense to destroy or dislodge that hypothesis of beyond reasonable doubt. It is also settled law in Kenya that the suspicion against the accused person however strong it maybe cannot take the place of proof of beyond reasonable doubt.



15. In the locus classicus case of Denning J, as he then was in *Miller Vs Ministry of Pensions* [1947] 2 All ER 372

“that degree is well settled. It need not reach certainly, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible but not in the least probable’ then the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

16. The factual matrix of this case will be subjected to the standard and burden of proof beyond reasonable doubt as set out in the above dicta set out in detail by this Court.

17. The right to presumption of innocence in Article 2A of *the Constitution* necessitates the prosecution to discharge the burden of proof of beyond reasonable doubt. In the event there is a doubt or suspicion to the truthfulness, convincingness, credibility, legality of the evidence the guilty of an accused person has not been established. In *R vs Stoddart* (1909) 2 Cr. App. Rep. 217 at p. 242 the court stated;

“..... in criminal cases the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof.

Where, on the evidence adduced before Court, there exists only a remote possibility of the innocence of an Accused person, it would mean the Prosecution has proved its case beyond reasonable doubt; hence, the Prosecution would have conclusively discharged the burden that lay on it to prove the guilt of the Accused. In *Obar s/o Nyarongo v. Reginam* (1955) 22 E.A.C.A. 422, at p. 424 the Court held that:

“We think it apt here to cite a passage from the recent Privy Council case of *Chan Kau v. The Queen* (1952) W.L.R. 192. ... At p. 194 Lord Tucker said this:

‘Since the decision of the House of Lords in *Woolmington v. Director of Public Prosecutions* (1935) A.C. 462; and *Mancini v. Director of Public Prosecutions* 28 C.A.R. 65; it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defense.’”

In *Okethi Okale v. R.* [1965] E.A. 555, the trial judge had misdirected himself on the onus of proof; and made remark on the defense evidence, stating that:

“I have given consideration to this unsworn evidence but I do not think it sufficient to displace the case built up by the prosecution or to produce a ‘reasonable doubt’.”

On appeal, the Court responded at p. 559 as follows:

“We think with respect that the learned judge’s approach to the onus of proof was clearly wrong, and in *Ndege Maragwa v. Republic* 6(1965) E.A.C.A. Criminal Appeal No. 156 of 1964 (unreported), where the trial judge had used similar expressions this court said:

“... we find it impossible to avoid the conclusion that the learned Judge has, in effect, provisionally accepted the prosecution case and then cast on the defense an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout



on the prosecution. Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defense.

In our view, it is the duty of the trial judge ... to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defense rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, of course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different.)”

18. We now come to the evidence for the prosecution to establish whether the four elements have been established beyond reasonable doubt. In the first instance there is no dispute that the deceased Christine Lotuko is dead as supported by the post-mortem report admitted in evidence as Exhibit 3.
19. The second element is whether the deceased was unlawfully caused. The chain of events on causation flow within the scope of Section 213 of the Penal Code. In murder cases the prosecution must not only establish the death of the deceased but also its cause. The following characteristics of the element intertwines the following characteristics in discharging the burden of proof of beyond reasonable doubt; Establishing death: The fact of death and its cause can be established through eye witnesses, even without a post-mortem report, according to precedents like Republic v. Cheya. Causation: The accused does not need to be the sole or immediate cause of death. They can be held responsible for death resulting from their act, even if it led to a surgery or treatment that went wrong, or if the victim failed to take proper precautions after an injury was inflicted. Intent: The prosecution must prove the necessary intent to kill (*dolus eventualis*). This occurs when the accused subjectively foresaw the possibility of their actions causing death and was reckless as to whether death would result. Unlawfulness: The act must be committed without the victim’s consent and without any legal justification. Intention: The perpetrator must have intended to apply force, either directly or indirectly, to the victim. Categories: Assault can be common assault (minor harm) or assault with intent to cause grievous harm (GBH) (intent to cause harm), with the prosecution needing to prove the intent of the latter.
20. In this case there is evidence that the death was unlawfully caused for there is no evidence to support justification, self defense under Section 17 and provocation in Section 207 and 208 of the Penal Code. It is trite law that any homicide is presumed to have been caused unlawfully unless it was accidental or it was authorized by law as was held in the case of R vs Gusambuzi s/o Wesonga (1948) EACA 65. In my considered view the death of the death was unlawfully caused. The history of this incident as captured in the post-mortem report on the circumstances in which the deceased met her death connotes the following;

The body of the deceased was found lying on the ground with visible head injuries and some bruises on the body. Blood had splashed all over the head and spilled on the ground and beside it was a building block stone believed to have been used to smash the victim’s head. Kindly examine and determine the cause of death. This element has been proved beyond reasonable doubt, has manifested in the testimony of PW1, PW2, PW3 and PW4. Cumulatively the defense never dislodged any of the features and characteristics of the material evidence adduced by the witnesses for the prosecution. What this means the threshold of beyond reasonable doubt has been discharged in so far as the death of the deceased person is concerned.

21. The other cardinal element for the offence of murder is that of malice aforethought under Section 206 of the Penal Code. The dimension of malice aforethought constitutes the following;



- (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
 - (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.
 - (c) An intent to commit a felony.
 - (d) An intention to facilitate the escape from custody of a person who has committed a felony.
22. For the offence of murder and proof of malice aforethought in *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, the Court held that:
- “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
23. In *Hyam v DPP* {1974} A.C. the Court held inter alia that:
- “Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”
24. The Court in *Ernest Asami Bwire Abanga alias Onyango v R.* (CACRA No. 32 of 1990) stated that;
- “the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”
25. The term "malice" refers to a person's intent to injure or kill another person. Malice can either be "expressed" or "implied." Malice is expressed when someone deliberately intends to take someone else's life. Malice is implied when a person is killed, yet no proof exists that the killer was provoked. Implied malice may also exist when a crime is committed by someone who is said to have a "depraved" or "malignant" heart. "Intent to kill" is another way of saying malice aforethought, or mens rea. Mens rea is a Latin term that refers to a defendant's intention to commit a crime, as opposed to the actual crime itself. Mens rea is concerned only with the defendant's mind set, not with his ultimate actions. An intent to kill does not need to be specifically expressed by the killer. It can be inferred based on the killer's actions. For example, malice aforethought can exist if someone shoots another person with a gun. However, just because someone shoots another person, that does not intent to kill. Perhaps he was just trying to defend himself, or to stop the person he shot from harming someone else, and he accidentally killed that person in the process.
26. In the instant case the evidence is very clear from PW1, PW2 PW3 that whoever killed the deceased had malice aforethought.
27. Malice aforethought in our jurisprudence under Section 206 of the Penal Code clarifies that this element could be found as having been established if the accused intended to kill or cause grievous harm or if he or she foresaw that he or her actions would cause death or grievous bodily harm with virtual certainty. In the instant case there is sufficient evidence that the accused in causing death had formed the necessary intention as reflected in the findings made by the Pathologist clearly captured in the post mortem report dated 15th December 2022. According to the Pathologist the deceased was found to



have suffered the following injuries: Cut wound on the skull. Depressed skull fracture bilaterally. Open skull fracture extending across the skull. Blood (clotted) on mouth, nostrils and ears. Clothes soaked with clotted blood and body covered with clotted blood. Scalp hemorrhage and depressed skull fracture of the left and right temporal regions. Open compound skull fracture with hemorrhage.

28. As a result of the examination the Pathologist formed the opinion that the cause of death of the deceased was severe head injury with skull fracture and hemorrhage.
29. Speaking from the point of view of analyzing both the Prosecution and defence case on what would have been available defence in a homicide case like the one facing the accused person in line with Section 17 of the Penal Code on self defence and provocation under Section 207 and 208 of the Penal Code in relation to this killing none of either the above elements are applicable in favour of the accused to reduce the offence to manslaughter. In so far as provocation is concerned the Court in *R. V Duffy* [1949] 1 All E.R. 932 at Pg 933 remarked as follows:

“Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. Let me distinguish for you some of the things which provocation in law is not. Circumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient constitute provocation in law. Indeed, the further removed an incident is from the crime, the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here – the blame attaching to the dead man. You are not standing in judgement on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant. What matters is whether this girl had the time to say: ‘Whatever I have suffered, whatever I have endured, I know that thou shalt not kill.’ That is what matters. Similarly, as counsel for the prosecution has told you, circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negate a sudden temporary loss of self-control which is of the essence of provocation ... Provocation being, therefore, as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, where there has been no time for reflection. Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation – that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation.”

30. In our very own Statute Section 207 and 208 of the Penal Code goes further to state that the term ‘provocation’ used with reference to an offence of which an assault is an element, 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, or 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, 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. Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact. (Emphasis is mine).

31. I have been able to evaluate the evidence by the Prosecution of PW1 to PW3 and the rebuttal defence by the Accused person. I find no iota of the characteristics and features of the penal definition of provocation as known in law that any act, word or conduct was carried out or spoken by the deceased to entitle the accused of the defence on provocation. In absence of material evidence to support provocation the element of malice aforethought as defined under Section 206 of the Penal Code remains manifested in the unlawful act of causing grievous harm and subsequently occasioning the death of the deceased carries the day beyond reasonable doubt.
32. This case also does not fall under the scope of self defense. The defence applies only when a person only needs to act to protect themselves from an immediate and unlawful danger. It is also trite that a person cannot claim self defense if their own actions were the sole cause of the unlawful aggression in the first place. In this case no iota of evidence is available in favor of the accused person to justify the defence of self to negate malice aforethought.
33. Finally in this respect the discussion will be incomplete without placing the accused person at the scene of the crime. That is the question of identification. Time and time and again the issue of identification is of significance as stated in the case of *Turnbull and others* (1976) 3 ALL ER 549 and English case, *Loard Widgency C.J* had this to say: “ First wherever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? “At what distance” In what light was the observation impended in any way, as for example by passing traffic or a press of people. Had the witness ever seen the accused before” How often if only occasionally, to the police” Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance”
34. It follows therefore, that from the evidence of PW1, PW2 & PW3 there is sufficient evidence of visual identification of the accused person and I find no possibilities of mistaken identity to warrant entertaining suspicion or error on the part of the witnesses that another person besides the accused is the one who committed the offence. It is for these reasons I am of the view that the prosecution as discharged the burden of proof of beyond reasonable doubt in so far as the charge of murder contrary to Section 203 of the Penal Code. As a consequence, thereof I find the accused guilty of the offence followed with a verdict of conviction which satisfies the criteria of Malice Aforethought under Section 206 of the Penal Code.



SENTENCE

35. The Accused herein has been convicted of the offence of murder contrary to section 203 as punishable with section 204 of the Penal Code upon. The particulars of the offence are that the Accused on the night of 16th day of December 2022 at Lokitela village in Narewa within Lodwar in Turkana County murdered Christine Lotuko Ekatorot. Upon a full trial, and having carefully evaluated the testimony of PW1 to PW4, the post mortem report by Dr. Kidalio, this Court found that the prosecution proved its case beyond reasonable doubt. The Accused was accordingly convicted of the offence of murder on 27th July 2025.
36. The court now faces the solemn task of determining an appropriate sentence that balances the imperatives of justice, punitive sanctions, and societal protection while acknowledging the human dignity of the offenders.
37. I am guided by the Supreme Court’s decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR, which declared the mandatory death sentence unconstitutional to the extent that it deprives the trial court of judicial discretion in sentencing, and directed that in all capital offences, the court must take into account mitigating and aggravating factors before pronouncing sentence.
38. In the present case, the prosecution has proved beyond reasonable doubt that the Accused unlawfully caused the death of the deceased, Christine Lotuko Ekatorot, with malice aforethought. The evidence from PW1, PW2, PW3, and PW4 placed the Accused at the scene of the fatal assault and the post-mortem findings corroborated the occurrence of a violent homicide. In mitigation, the Accused is a first offender and has been in custody throughout the trial period.
39. In considering the appropriate sentence, I am guided by the Supreme Court decision in Francis Karioko Muruatetu and Another v Republic and Others [2017] eKLR, which established that despite section 204 of the Penal Code providing for a mandatory death sentence upon conviction for murder, the court retains discretion in sentencing. That discretion must however be exercised judiciously and not capriciously. In African Continents Bank V Nuamani [1991] NWLI 486, the Court stated that:
- “The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”
40. In the Francis Muruatetu case, the Supreme Court guided as follows, both in the Original Petition and in the Directions given on 6/7/2021 while providing clarity on the judgment that had applied the principle that mandatory sentences were unconstitutional in as far as they deprived the trial courts of the discretion to mete out appropriate sentences having regard to the circumstances of each case and also denied the accused persons the opportunity to mitigate.
- “vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;
- (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) The manner in which the offence was committed on the victim;
- (g) The physical and psychological effect of the offence on the victim's family;
- (h) Remorsefulness of the offender;
 - (i) The possibility of reform and social re-adaptation of the offender;
- (j) Any other factor that the Court considers relevant.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in *Muruatetu*.”

41. In arriving at a just sentence, I am also reminded to consider the 2023 Judiciary of Kenya Sentencing Policy Guidelines which expressly provide 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/her criminal disposition and become a law-abiding person.
- d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- e. Community protection: to protect the community by incapacitating the offender.
- f. Denunciation: to communicate the community's condemnation of the criminal conduct.
- g. Reconciliation: To mend the relationship between the offender, the victim and the community.
- h. Reintegration: To facilitate the re-entry of the offender into the society.

42. I take note that where a court is convinced, after considering all the factors, an injustice would follow if the minimum sentence is imposed, then it can characterize such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.

43. *Henriques J* referred to *S v Vilakazi 2009 (1) SACR 552 (SCA)*, where the court (in *Vilakazi*) explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. In deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. In addition, when sentencing, a court considers the personal circumstances of an accused. However, only some of the factors carry more weight than others. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence.



44. The foundation dicta in sentencing of homicide cases under section 203 of the Penal Code flows from the guidelines given by the Supreme Court in the case of Francis Muruatetu case (2017) eKLR. In the event of substantial and compelling circumstances existing, a sentencing court is then entitled consider departing from imposing the prescribed minimum or maximum sentences, if it is of the view that having regard to the nature of the offence, the personal circumstances of the accused, and the interests of society, it would be proportionate and just to do so. This is often referred to as the proportionality test. In my view however, the proportionality test must be viewed against all the circumstances of the case, particularly the interests of society in violent and serious crimes.
45. The point of departure in sentencing is to have regard to the three interconnected factors relevant to an appropriate punishment. It is the Court's task to have regard not only to the offender, but also the offence itself and the interest which society has in the imposition of a suitable sentence (*S v Zinn* 1969 (2) SA 537 (A)).
46. During sentencing the court must also be directed at addressing the traditional purposes of punishment. These are deterrence, prevention, retribution and rehabilitation of the offender. At the end of it all, it is the unenviable task of the Judge to achieve a proper balance amongst these competing factors and ultimately arrive at a sentence that is just. For that is what *the Constitution* Court of South Africa in *State Vs Makwanyane* (1995) CCT/3/94 remarked as follows on mitigation and aggravating factors in sentencing:
- “mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.”
47. While the Court acknowledges the Accused's status as a first offender and his expression of remorse, it must also weigh the aggravating factors:
- a. The heinous nature of the offence, involving a deep cut that severed the jugular vein and carotid artery, causing instant death.
 - b. The violent manner in which the offence was committed.
48. The Sentencing Policy Guidelines (2016) state that imprisonment is warranted for serious offences that endanger public safety, although rehabilitation continues to be an important objective even for those convicted of severe crimes. Turning into mitigation, the Accused is a first offender and has been in custody throughout the trial period. However, the Court cannot ignore the aggravating factors: the deceased was a young woman known personally to the Accused, the killing was preceded by a violent confrontation, and there is evidence suggesting a pattern of physical aggression. The offence has caused irreparable loss to the family of the deceased and shaken community peace.
49. Balancing these considerations and applying the sentencing discretion as clarified in Muruatetu case, I find that a custodial sentence is warranted, both as a deterrent and to reflect the gravity of the offence.



Accordingly, the convict is hereby sentenced to twenty-six (26) years' imprisonment, the term to run from the date of his first arraignment in court being 6th January 2023. 14 days right of appeal explained to the convict. It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH OCTOBER 2025

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R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Kakoi for the DPP

Mr. Lotir Advocate for the Accused

The Accused person

<i>criminal case no e001 of 2023</i>	0
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