IN THE COURT OF APPEAL
AT NYERI

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CRIMINAL APPEAL NO. 15 OF 2019

BETWEEN

GABABO HUKA DIKE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Meru (Wendoh, J.) dated 27th October 2015

in

HCCR. No. 48 of 2012)

****

JUDGMENT OF THE COURT

1. **Gababo Huka Dike,** the appellant herein, is before this Court by way of a first appeal, judgment having been delivered by the High Court (Wendoh, J.) on 27th October 2015.

2. The appellant was charged before the Meru High Court with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were that on the night of 13th June 2012, at Kenya Wildlife Services, Maili Saba Station in Isiolo District within Isiolo County, the appellant murdered **Noordin Farah.**

3. The appellant pleaded not guilty to the charge, and the matter proceeded to trial, where the prosecution called 10 witnesses. At the end of the prosecution's case, the appellant was found to have a case to answer and was placed on his defence. Upon considering the evidence, the learned Judge convicted the appellant of the offence of murder and sentenced him to death.

4. Aggrieved by the High Court's decision, the appellant preferred this appeal. Our mandate as the first appellate court is to retry the case, so to speak. We are required to consider the entire evidence on record, analyse and evaluate it, except that we shall not interact with the witnesses firsthand; thereafter, we shall reach our own independent opinion. This has been reiterated over time. Some of the instances include: ***Okeno vs. Republic* [1972] EA 32,** where it was stated:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the***

trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

Similarly, in ***Ngala & 2 Others vs. Republic (Criminal Appeal E117 of 2023) [2025] KECA 660 (KLR (11 April 2025) (Judgment),*** the Court stated; -

> ***"The principal role of this Court on first appeal is to step into the shoes of the superior Court and re-assess and re-evaluate the evidence adduced at the trial, and determine whether any alleged contradictions, discrepancies or inconsistencies exist and, if they do, whether they are prejudicial to the Appellant(s)."***

5. Before addressing the grounds of appeal, we will summarise the evidence presented in the trial court.

PW1 Olive testified that on the material day, she reported to work at 6:00 p.m. alongside the appellant. Together, they switched on the lights in the compound, after which she left the appellant at the gate while she checked the compound to ensure the doors were closed and to turn on additional lights. While at one of the offices, she heard a gunshot and stood in a corner for 10 minutes. She then left for the next office, which was lit and

50 meters away, when she noticed someone lying beside a vehicle. She called out to the person, asking for identification, but received no response. She did not go near the person; she left for the canteen about 20 meters away, to seek for information. She got no answers, and together with other officers, they went to check and Cpl. Garma identified the dead person as Noordin.

6. She learnt from Cpl. Garma that the appellant had killed the deceased. She checked for the appellant but could not locate

him, then quickly locked the gate. The witness called Cpl. Mzonge, who was near the canteen, informed him that the appellant had killed Noordin. Cpl. Mzonge went to where the deceased was lying, found he had a pistol and took it away. Wardens were mobilised from the camp to search for the appellant, but they were unable to find him. Around 5:30 a.m., the Head of Operations informed them that the appellant had surrendered to the police. PW1 was then asked to record a statement the following morning at around 8:00 a.m. She further testified that she did not notice any animosity between the appellant and the deceased.

7. **PW2 Abdi Guyo Galma** testified that on the date in question, he arrived at work with the deceased and a driver from Isiolo Town, and upon arriving at the camp, they parked the vehicle. He left the deceased and the driver behind and went to the canteen before it closed. The distance from the parking area to the canteen was about 30-50 meters. While at the canteen, he heard gunshots and hid for about 20 minutes, and when he finally lifted his head, he saw the driver heading towards the store. He ran to the driver to find out what had happened. He asked about the deceased's whereabouts, and the driver told him he did not know. He went to where they had parked the vehicle and found Noordin dead. There was blood at the scene. He did not touch the deceased but went near him to observe. He then reported the incident to Sgt. Ngugi, who had also heard the gunshots, went to the scene with them, and thereafter they reported the incident to the District Warden, Mr. Mureithi,

who

advised them not to move about, as they were unsure of what had occurred. Mr. Mureithi called another camp (Archers) and requested assistance in searching for the person who had committed the murder. They had two vehicles with armed officers set out to look for the person who had murdered. Two people, PW1 and the appellant, were on duty. PW1 was present, the appellant had gone missing, and the rest began to suspect him. He could not be found at his house either. A search was mounted. PW2 and three others set out separately to find the appellant. PW2 stayed at the stage while the others went to Archers. At 6:00 a.m., he received a call from an investigating officer named Clamyot, who informed him that the appellant had surrendered himself and the gun to the police. PW2 returned to the camp and later wrote a statement at the CID.

8. PW2 further testified that he knew both the appellant and the deceased and that their relationship was strained. He recounted an incident in May 2012 at around 10:00 p.m., and spoke to him, Cpl. Tahicha, and Cpl. Kelima and told them that he had a problem with the deceased, claiming that the deceased was having an affair with his wife. They promised the appellant they would meet to discuss the matter. Together with Cpl. Tahicha, they met again with the appellant and advised him that they had not heard anything about the allegation and that he needed evidence. When they enquired about the source of the suspicion, the appellant got annoyed and claimed that everyone was aware of the situation, and they were pretending not to know. They

advised him to resolve the issue with his wife.

9. **PW3 Adam Bakata** testified that sometime in May 2012, the appellant called him, Cpl. Tahicha, and Cpl. Kelima told them that he wanted to kill someone who was "spoiling his home." The appellant, however, was hesitant to reveal the person's identity, saying that even if he did, the issue would likely remain unresolved. The officers insisted to know the person when the appellant disclosed that the person was Noordin, but he did not reveal the source of that information. PW3 and the other officers requested time to investigate the matter, but found no evidence. They conveyed their findings to the appellant and advised him to seek peace with the other party. Despite this, the appellant insisted that he did not want to see the deceased.

10. PW3 then informed the appellant that they had reported the matter to PW4, the Warden in Charge, who had instructed them to provide feedback to the appellant. PW3 and Cpl. Tahicha returned to PW4 who assured them that he would handle the situation. On 13th June 2012, at around 8:00 p.m., while at Camp Zebra with ranger Caroline, he received a call informing him that Noordin had been shot by the appellant and had died. He went to the scene and waited there until the police arrived to take the body to the Isiolo Mortuary.

11. **PW4 Silas Mureithi** testified that on 19th May 2012, while at home, the appellant visited him and reported that the deceased was interfering with his home by befriending his wife.

    PW4 went to the canteen, where PW3, a corporal, was, and

told him about the report he had received from the appellant. The

following day, he got other corporals, PW3, Cpls, Tacha, and Galmal to his office for a meeting, but Galma had to leave urgently. PW4 shared with them what the appellant had told him, including that the deceased had gone to the canteen in a hurry, where he encountered two corporals who spoke the same language as him and had told them that he was extremely tired because he had slept with the appellant's wife and wanted milk as he was thirsty. PW4 asked the appellant whether the other corporals had heard the deceased, and the appellant said they had not said anything. The appellant then told PW4 not to ask them about it, as they would deny it. When PW4 inquired what action the appellant had taken upon hearing the deceased's statement, he said he had taken no action. The appellant also said that he overheard his wife on the phone with the deceased, and that the call had lasted a long time. However, when PW4 asked whether he had heard the conversation, he said he did not.

12. Additionally, the appellant claimed that he suspected that the deceased had sent a lady to their camp to take money to his wife. However, when asked if he had taken up the issue with his wife, he answered in the negative.

13. PW4 further testified that he had assigned two corporals two days to investigate the allegations, and they reported back that they did not get any evidence in support of the allegations. This led PW4 to believe that the appellant had a problem, and he asked Warden Okoth, who had worked

with the appellant, to

counsel him, which he did; the appellant agreed to move on from the issue.

14. On 13th June 2012, the deceased went to PW4's office and complained about false rumours going round at the camp that he had an affair with the appellant's wife, which he denied, stating she was young, he did not stay at the camp, and he had never met her. PW4 assured the deceased that he would take action if the issue persisted. Later that day, PW4 heard multiple gunshots but did not investigate, as he was 80 meters away and in a training ground area.

    After a short while, Sgt Mburu and PW2 arrived and informed him that Noordin had been shot and killed and that, though they did not know who had shot him, the appellant was the night guard. PW4 called for reinforcements, who searched for the appellant but were unable to find him. At 6:00 a.m., PW4 received a report that the appellant had surrendered to the police in Isiolo, and was in possession of an AK-47 with 56 rounds of ammunition.

15. **PW6 Johnstone Musyoka Mwongela,** of the ballistics section at the CID, testified that through a report dated 3rd July 2012, his colleague examined one AK 47 assault rifle, S/No. M4443 and another number, MU8062, which belonged to the appellant. He also examined 2 magazines (B1–B2), 56 rounds of ammunition, and 4 expended cartridge cases marked C1-CU. He formed the opinion that EX A1 and B1-4 and D1-56 were capable of being fired and were a firearm and ammunition with

firearms. He also examined C1-CU and found they were fired cartridge cases, calibre 7.62 x 39mm. He compared them under a microscope and found that C1-C3 were fired from one gun, while C4 lacked sufficient markings to classify it. He examined EX CI and 3 with the 4 test cartridge cases. (TSI-a) from the appellant and good enough watching of the ejector workings and sufficient matching, giving identification markings. This led to the formation of the opinion that CI-3 was fired from an AK- 47 – EX A1. CU did not have enough markings. He did not rule out that C4 was not fired from the appellant's EX No. 1.

16. **PW7 Michael Ngugi** testified that he was in charge of the armoury on June 9, 2012, and he issued the appellant a firearm for work purposes. He handed over an AK-47, Serial No. M. 8062), to the appellant between 5:00 pm and 6:00 pm, so that he could report for night duty for a week.

    On 13th June 2012, at around 7:30 p.m., while watching the news at his house, he heard gunshots. Thereafter, people ran into his house seeking cover, including PW2 and PW8. Later, PW2 went to the scene first and informed PW7 that Noordin had been shot dead next to a vehicle. They decided to report the incident to PW4, who called for reinforcements from the Isiolo Police. At that time, they did not know who had shot the deceased. They guarded the area until the next morning when they recorded statements.

17. **PW8 Nahashon Nyachumba,** a driver, testified that on 12th June 2012, he left Archers in the company of PW2 and

the

deceased and drove to the camp. Upon arrival at about 7:30 p.m., the appellant opened the gate and exchanged greetings with PW2 before they headed to the parking area. PW2 was the first to exit the vehicle. The deceased received a phone call, got out of the vehicle, and left the door open. While PW8 was locking the vehicle, he heard gunshots and lay down. He then saw a ranger, wearing a green jungle hat and carrying a gun, coming towards the vehicle and heading towards the gate.

In shock, he went to Dorcas Seren's house and sat there. PW1 passed by the house, screaming that Noordin had been killed. PW8 and the others then came out and went to the scene, where they saw the lifeless body of the deceased. PW8 observed that the deceased had been shot on the shoulder and was bleeding slightly. Many people gathered at the scene, and the police arrived shortly after. The body was taken to the mortuary.

18. **PW9 Wilfred Muindi** from the Isiolo Police Station testified that on the night of 13th June 2012, while on duty at around 8:30 p.m., he received information from OCS Batiani that there was a murder at KWS Camp. He took four police officers and a driver with him to the scene. On 14th June 2012, PW9 was called to the report office around 5:00 p.m., while he was preparing for his change call-up. Upon his arrival at the report office, he met a KWS ranger, the appellant, who was in uniform and holding a gun. PW9 asked the appellant what had happened, and the appellant stated

that he had shot his colleague and had come to surrender.

He received the gun with 56 ammunition. He inspected the gun, identified as an AK-47 with the Serial Number MH 8062, and kept it. He then instructed the officers to frisk him and lock him in the cell. The following morning, PW9 reported the incident to the Officer Commanding Police Division (OCPD) and handed over the gun and ammunition to the officer in charge of the armory. He gave the name of the person who surrendered as Cpl. Gababo Huka, KWS No. 5155 (the appellant). He asked the appellant why he shot the deceased, and the appellant replied that it was a longstanding issue but did not provide further details.

19. **PW10 Dr. Stephen Kiluva** performed the postmortem examination on 14th June 2012 and testified that the body of Noordin Farah was identified by PW5 and Abdi Mohammed. General observations of the body were that the deceased was wearing a light blue T-shirt that was blood-stained, a dark blue vest which was also blood-stained, grey striped trousers, blue underwear and brown socks. He was a 31-year-old male African and 169cm tall. There were pale blood stains on the nostrils and the mouth. Both of his arms showed signs of struggle, with fractures evident. A gunshot wound on his left arm measured 5 x 4mm. Internally, there were bullet wounds on the same arm measuring 3 x 7mm, with an additional wound on the inner side of the arm also measuring 3 x 7mm. The lower right arm displayed a rugged wound with exposed tissue approximately 31.5cm in size.

20. When placed on his defence, the appellant elected to give sworn evidence. He testified that on 13th June 2012, he was on duty at the gate alongside PW1. PW1 asked for permission and left the camp. At approximately 7:20 p.m., a vehicle with the registration No. KAV 888E stopped at the gate. The appellant checked and saw three people inside: PW2, the deceased and PW8. He opened the gate, allowing the vehicle to proceed towards the office. The appellant went to an office by the gate where the guards on duty would stay and sat down. While there, he noticed a figure approaching from the direction of the office, but trees obstructed his view, making it difficult to see the person clearly. He asked the individual to identify himself, and the person replied that he was Noordin. The deceased came to where he was sitting and began insulting him, calling him a dog and accusing him of taking their issues to the elders as if they were his parents. The appellant had indeed reported the matter to the elders previously. On 15th May 2012, he had met with PW2, Cpl. Aden Bakate, and the deceased. When they met at the canteen, the deceased spoke to Bakate, and told him that the appellant believed that he was with his wife. He stated that he had taken the appellant's wife while the appellant was asleep and had sexual relations with her outside the appellant's house before returning her. After hearing this, the appellant did nothing at that moment. He reported the incident to the elders, and the matter was resolved. They were instructed to live in peace, and the appellant tried to forget about the incident.

21. Further, he testified that the deceased mocked him, saying the elders were not his parents. He warned the appellant that if he reported him to the elders again, he would still come for his wife, claiming he did not fear the elders. The deceased then removed a gun from his pocket and armed himself. The appellant had a gun resting on his lap, and as the deceased was preparing his weapon, the appellant shot him first before he could act. The appellant claimed that it was never his intention to kill Noordin. After the incident, he walked to Isiolo Police Station, which was about 12 kilometres away, to report what had happened.

22. After considering the evidence before him, the learned Judge found that the prosecution had proved that the appellant harboured malice against the deceased and that is what prompted the attack on the unsuspecting deceased. The appellant was found guilty as charged and was sentenced to death.

23. Aggrieved by the conviction and sentence, the appellant preferred an appeal to this Court. In a supplementary memorandum of appeal dated 3rd January 2025, he raised two grounds, namely that the learned trial Judge failed to give due weight to the appellant's defence of provocation and he erred by finding that malice aforethought was proved to sustain the offence of murder.

24. In support of the grounds of appeal, the appellant's learned counsel has filed submissions and a list of authorities, both

dated 3rd January 2025. On whether the appellant's defence

was considered, counsel submits that it is not in doubt that the deceased Noordin Farah was murdered on 13th June 2012. However, there were no eyewitnesses to confirm that the murder took place. None of the ten prosecution witnesses was present at the time of the incident. Further, the appellant lived under a cloud of suspicion that the deceased was having an affair with his wife. The trial court acknowledged the appellant's concerns about the suspected affair. Further counsel contends that the appellant's suspicion was not idle, as he had reported the issue to the elders.

25. Counsel asserts that the testimonies of witnesses PW1, PW2, PW7, and PW8, which the trial court relied upon, did not support the conclusion that the deceased was following the vehicle in which the deceased was. According to the evidence, the gate, the vehicle's location in the parking area, and the canteen were all within close proximity. The deceased exited his vehicle and, as the appellant recounted, the deceased approached him, hurled insults at him before he shot him. This interaction highlights the tension, as the deceased was the very person the appellant suspected of having an affair with his wife. Yet, the court dismissed the appellant's defense of provocation.

26. Counsel cites ***section 208*** of the Penal Code and further contends that there was cumulative provocation that ultimately led the appellant to shoot the deceased. Counsel further argues that legal precedents have established that,

even if a weapon is used multiple times in an offence, if that offence was committed

in response to provocation, it may not be classified as murder.

In support of this contention, he relies on ***Stephen Kipkeror Cheboi vs. Republic* [2002] eKLR, *R vs. Hussein s/o Mohamed* [1942] EACA** as quoted in *Republic vs. Kipkemei (Criminal Case E040 of 2021) [2024] KEHC 2388 (KLR),* where the courts considered the defense of provocation where an accused would be provoked to the extent of losing self-control.

27. On whether malice aforethought was proved, learned counsel submits that the prosecution's case was based on circumstantial evidence, and even then, they needed to prove malice aforethought for a charge of murder to be sustained. Counsel cited ***Roba Galma Wario vs. Republic [2015] eKLR,*** where the court affirmed that for a charge of murder to succeed, malice aforethought is required.

28. In opposition to the appeal, Learned State Counsel appearing for the respondent has filed two sets of submissions dated 15th May 2024 and 25th February 2025. Counsel submits that there is sufficient circumstantial evidence that links the appellant to the murder of the deceased, a fact which the appellant himself admitted in his defence. In support of the circumstantial evidence relied upon, counsel relies on the often-cited case of ***Abanga alias Onyango vs. Republic Cr. App No. 32 of 1990(UR),*** where the court set principles necessary for circumstantial evidence to be relied upon.

29. Regarding the appellant’s defence, counsel argues that the

appellant did not deny that he was the one who shot the deceased, but claimed that it was in self-defence. Counsel

asserts that the evidence on record does not support this assertion, as the appellant was not injured in any way if, indeed, he was attacked by the deceased. Furthermore, the appellant was not provoked in any way and therefore the defence of self-defence does not stand in this case.

30. On sentencing, counsel submits that the appellant was sentenced to the death penalty which is appropriate in the circumstances. He contends that if the appellant indeed had a dispute with the deceased, he could have found a more amicable way to resolve it rather than resorting to murder in cold blood. Additionally, the appellant used government-issued property to commit the heinous crime. He asserts that the trial court considered the seriousness of the offence, the weapon used, the impact of the incident on the deceased's family, and the brutal manner in which the deceased was killed.

31. We have considered the record, the submissions by counsel, and we find that two issues emerge for our consideration since the appellant, in his defence, admitted to having shot the deceased, namely; whether the defence of provocation is available to the appellant and secondly, whether the sentence meted out was appropriate.

32. There is no doubt from the evidence of the prosecution witnesses, and indeed the appellant, that the deceased met his untimely death by the gun. He was shot at dusk by a fellow officer just as he had alighted from a vehicle at the

parking lot of the KWS Camp in Isiolo. He had arrived at the camp in the

company of his two colleagues, PW2 and PW8. The appellant had opened the camp's gate for them. The gate, the parking lot, and the canteen were in close proximity. PW2 alighted from the vehicle ahead of the other two and went to the canteen. PW8 testified that the deceased picked up a call and alighted from the vehicle. PW8 also alighted from the vehicle, and as he went to close the door left open by the deceased, he heard gunshots and ran to hide. He did not see the assailant nor the target. Indeed, no one saw the assailant. Later officers who heard the shot found the deceased with gun wounds lying in a pool of blood. The postmortem report was produced by PW10. The injuries and cause of death were classified as follows; -

> ***Both right and left arms were defamed in the grass on the body. Both arms had fractured.***
>
> ***A gun shot wound on the left and arm and a wound created there 5x4 mm. Internally on same left arm there was bullet wound which measure 3x7 mm.***
> ***On inner side of the arm was another wound 3x7 mm.***
>
> ***<u>Right arm</u>***
> ***On lower 1/3 of the arm was rugged wound and fatty tissue were exposed. It was about 31.5 cm.***
>
> ***On the anxilla (armpit) was a gaping wound and muscles were exposed at 5.5x4 cm. HCCR 33 were very rugged.***
>
> ***<u>Chest</u>***
> ***Left side, a wound which measured 6 mm x l cm. Right side - below right nipple another wound, 5 mm x 6 mm edge were not smooth.***
>
> ***<u>Right chest</u> more laterally were armpit, a***

deep wound, 3x5 cm 5.5 from the anxille.

Back side of chest (posterior) on lower side are Capsule 4.5x3 cm muscles were exposed.

Mid thorax area a wound 1.5 cm.
Left lower capsule red wound 1.5 cm -
5mm left chest wound 5mm x 1.5mm.

<u>Internally</u>
respiratory by then - 3rd lib was fractured and both up and light lungs were demanded to blood in chest cavities.

Ce deo vascular system
Heart was proforded 3 cm wound other systems were normal.

<u>Opinion</u>
cause of death was severe hemorrhage from the penetration of the bullets into the chest"

33. Doubt if any that the appellant was the likely assailant rested with the defence as the appellant admitted to the shooting. His defence was that the deceased had walked to where he was in a small office at the gate where guards stayed, hurled insults at him and mocked him. The deceased removed his pistol and cocked it; upon which the appellant took his gun and shot the deceased.

34. The prosecution witnesses, PW2, PW3, and PW4, supported the appellant's assertion that there was bad blood between the appellant and the deceased. The appellant had reported to the elders that the deceased had an affair with his wife and that the deceased had openly boasted in his presence about it. From their colleagues a casual investigation was done, where the deceased denied the allegations which did not satisfy the appellant. In his testimony PW2 stated:

"...The relationship between Noordin and Gababo was not good. There was a time Gababo called me and CPL Aden Bekata, CPL Tahicha and CPL Kelima in May 2012. It was about 10:00 am. He said he had a problem because somebody had a relationship with the wife. He did not mention who it was. He said it was Noordin. We told him we would meet. The, CPL Tahacha and-: Baketa met and asked if anybody had information on the alledged and who of us knew about it, we called Gababo again, we met and told him nobody knew of the said allegation. We told him he should have good reasons for such a serious allegation…"

On his part, PW4 stated:

"About 1:00 pm Accused came. He is Gababo Huka. He told me he had a report to give me. I asked him what it was and he said somebody was interfering with his home he was befriending his wife…

I told them what accused told me. I told them that Noordin had gone to the canteen in hurry, there were two - cpl who speak same language as Gababo,-Borana, Baketa, Taticha and Galma. The accused said he was very tired because he had made love to accused's wife and wanted milk as he was thirsty. I asked accused if other Corporal heard and he argued that the other did not say anything. Accused told me not to ask them because they would not agree. I asked what step he took when he heard Noordin spoke but he did nothing. Accused also said that he heard his wife taking a phone and from what he understood it was Noordin who had called and that they talked for a long time."

In his further testimony, PW4 said:

"I thought Gababo had a problem and I told Warde Okoth who had worked with accused for long and he said he would counsel the accused. I told him to return a feedback. He returned and said they talked and agreed that Gababo had forgotten about the issue…"

35. The dead give no tales, unfortunately. We only have the evidence of the witnesses who spoke to deceased and that he had denied the allegations. What is clear to us though is that the appellant's accusations were not properly investigated or resolved. He seemed to have carried the grudge against the deceased, rightly or wrongly, and the culmination was the gunshot at the deceased. His colleague PW4 says he thought the appellant had a problem and asked another colleague to counsel him. A trail of the trauma that the appellant suffered due to the suspicion is seen in his engagement with his colleagues, and especially the narration that the deceased kept taunting him, which certainly would provoke any man.

36. The prosecution has submitted that malice aforethought has been proved, meaning that the appellant had premeditated on killing the deceased, and his eventual action of shooting the deceased proved the intent to kill as defined in ***section 206*** of the Penal Code, which states:

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

(a) an intention to cause the death of or to do grievous harm to any person,

whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony.

37. On the other hand, the defence pleads cumulative provocation. From the evidence of both the prosecution and the defence, the bad blood between the deceased and the appellant had subsisted for a while, and the appellant had sought intervention from his colleagues on the issue of the deceased having an affair with his wife, but nothing much had come out of it. He may not have necessarily been provoked on the material evening, but can the court ignore his concerns?

38. ***Section 208*** of the Penal Code defines provocation thus:

(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.

39. In ***R vs. Hussein s/o Mohamed*** ***[1942] EACA,*** the predecessor to this Court, stated:

> ***"When once legal provocation as defined in our Court has been established and death is caused in the heat of the passion whilst the accused is deprived of self-control by that provocation, the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation..."***

In ***Stephen Kipkeror Cheboi vs. Republic*** ***[2002] eKLR,*** the Court had this to say on provocation:

> ***"The history of disagreements between the appellant and the deceased, as narrated by the appellant amounts to what could be termed as "cumulative provocation".***
>
> ***It is stated in*** *Archbold 1999 at para 19-58 (page 1574)* ***as follows: "A general approach can, however, be discerned from the authorities, namely that Evidence of previous provocative acts or past conduct, particu larly in cases of domestic violence, is admissible in order to place in its appropriate context the reaction of the accused to the alleged provocation on the occasion of the killing." It is clear to us that the superior court did not properly consider the question of cumulative provocation when arriving at the conclusion that the appellant had sufficient cooling time as not to lose the control of his temper. For instance in the case of R.V. Humphreys [1995] 4 All E.R. 1008 it was held, by the Court of Appeal in England, that in a case where the provocative circumstances comprised a***

complex history with several distinct and cumulative strands of potentially provocative conduct which had built up over time until the

final encounter, the Judge ought to give guidance to the jury in the form of careful analysis of those strands so as to enable them to understand their potential significance." (Emphasis added)

40. Similarly, this Court in ***Joseph Mwongera Rukaria vs. R Criminal Appeal No. 311 of 2011,*** while considering the defence of cumulative provocation, stated; -

"On the material day, the evidence shows that the deceased and the appellant were quarrelling, and the deceased had intimated that today was the last day for the appellant, and he was carrying a stick. The question is whether the quarrel on the material date became the proverbial last straw which broke the camel's back and led his temper to snap, causing him to carry out the ghastly crime? Could it be murder? Can it be said that if the trial court had given sufficient consideration to the appellant's subjective state of mind when the deceased told him to get out of his fence, he would have come to the conclusion that the appellant was provoked enough to render the crime to be manslaughter rather than murder? <u>We pose this question as it appears the trial judge did not consider the appellant's subjective state of mind at that crucial moment.</u> Had he done so, it is probable that he would have found sufficient provocation. <u>We must look at the whole scenario from the point of view of an ordinary person and not necessarily a reasonable person.</u> We adopt the dicta in R – V- Humphreys, (1954) 4 All ER 1008, where it was held that in a case where the provocative circumstances comprised a complex history with several distinct and cumulative strands of potentially

provocative conduct which had built up over time until the final encounter, the judge ought to give consideration for this and

appreciate its potential significance. It is our considered view that the trial court did not consider the cumulative effect of the problems between the appellant and the deceased".

41. The circumstances of this case and the above trail of information, we agree with the appellant's counsel that the trial court fell into error by ignoring the defence of provocation. We are constrained in the absence of proper investigations or proper handling of the issue the appellant raised against the deceased over time, which issue was long outstanding, emotive, and sensitive and which would provoke an ordinary man to the limit, find that the defence of cumulative provocation would be applicable in favour of the appellant. This defence, in turn, completely deflates the prosecution's argument that malice aforethought was established.

42. As stated earlier the appellant admitted to shooting the deceased. ***Section 202*** of the Penal Code states that:

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

43. In the end we find that the offence that commends itself and which is supported by the evidence on record is that offence of manslaughter, and we accordingly find the appellant guilty of the offence.

44. As regards the sentence, having found the appellant guilty of the offence of manslaughter, we inevitably must set aside the death sentence.

45. In the end, based on our findings above, we quash the conviction of the offence of murder and set aside the death sentence meted out. In its place, we convict the appellant of the offence of manslaughter. He is to serve 15 years' imprisonment from the time his plea was taken.

Dated and Delivered at Nyeri this 25th day of March, 2026.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF

APPEAL ALI-

ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR