IN THE HIGH COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 102 OF 2018

BETWEEN

RUTH WANJIKU KAMANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit, J.) dated 31st May, 2018

in

HCCRA No. 93 of 2015

****

JUDGMENT OF THE COURT

1. The appellant **RUTH WANJIKU KAMANDE** appeals to this Court against the conviction and sentence of death imposed on her by the High Court at Nairobi (Lesiit, J.) for the murder on 20th September, 2015 of **Farid Mohamed Halim** hereinafter referred to as **"the deceased"**.

2. The prosecution called a total of 15 witnesses. The appellant gave an unsworn statement of defence and denied having committed the offence as charged. The trial court convicted the appellant and sentenced her to death as by law prescribed. Being dissatisfied with the said conviction and sentence, the appellant proffered an appeal to this Court. At the hearing of the appeal, the appellant was represented by Prof. Githu Muigai SC, while the respondent was represented by Mr. Hassan, Assistant Director of Public Prosecutions.

3. Being the first appellate court, this Court is enjoined to re-evaluate, re-assess and re-examine the evidence that was tendered before the trial court and arrive at its own conclusion. ***(See Okeno vs. Republic [1972] EA 320)***. The Court must however keep in mind that, unlike the trial court, it did not have the benefit of hearing and observing the demeanour of the witnesses as they testified or the deportment of the appellant so as to assess their credibility. That being so, we would accord the trial court's findings and conclusions a great deal of respect while free to depart therefrom if the same were founded on no evidence, on a misapprehension of the evidence or are plainly wrong or perverse. We shall now proceed to provide a summary of the evidence that was tendered before the trial court, the grounds of appeal, submissions by counsel and thereafter determine the appeal. In doing so we shall subject the totality of the evidence that was placed before the learned Judge to a fresh and exhaustive analysis from which we shall make our own independent inferences of fact and draw appropriate conclusions as required by **Rule 29 (1)** of the **Court of Appeal Rules**.

4. The prosecution's case was that the appellant was having a relationship with the deceased and at the time of the incident were cohabiting. On the morning of 20th September, 2015 screams and calls for help were heard in the house of the deceased which he had rented from PW7 and PW8, a man and wife respectively. As PW8, the first to attend the scene, walked towards the appellant's house she heard the deceased say *"nisaidie, nisaidie, amenidunga" ("Help* me, help me, she has stabbed me"). Upon knocking on the door and asking what was going on in the house, PW8 heard the deceased say; "It is this one who has stabbed me", followed immediately by the words, "I have been stabbed again".

5. At that point PW7, husband of PW8, arrived at the scene. He testified that he looked inside the deceased's house and saw the deceased standing facing a woman whose back was turned to PW7 but whom he later came to know as the appellant in this case. PW7 stated that the deceased was holding

his abdomen and appeared to be in significant pain. He stated that the deceased asked him to break the window and access the keys so as to open the door for him. PW7 did so but was unable to find the keys and went to look for help to break into the house. On returning, he stated that the appellant was holding a knife in her left hand actively blocking the deceased from accessing the kitchen. PW7 left again to find help amidst continuing screams; on returning he heard the deceased cry out that he had been stabbed again and that this time the screams were coming from the inside the bedroom. He testified that he looked into the bedroom window and saw appellant holding a knife and the deceased on his knees beside the bed leaning onto the bed.

6. PW2, another neighbour, joined PW7 at that point. Looking into the toilet window, PW2 noted blood in the sitting room and the toilet Looking through the bedroom window he saw the deceased quiet and on his knees. He stated that he saw the appellant in the bedroom and asked her to open the door. The Police arrived soon after PW2 did; PW5 and PW10, police officers attached to Buruburu Police Station arrived to find the public gathered outside the house. Peering inside the house, which was locked, they saw the appellant who, upon being ordered by PW10 to do so, opened the door. Upon entering the house, they found blood everywhere and the deceased on his knees, leaning on the bed with stab wounds to various parts of his body.

7. PW9, the initial investigating officer in this case, testified that he entered the house of the deceased the same day of the incident and recovered evidence including taking mouth swabs from the appellant. PW9 further testified that the alleged murder weapon, a knife, had been handed over to him by PW6, one of the officers who first arrived at the scene. PW7 identified that knife as the weapon used by the appellant to stab the deceased. PW14, the subsequent investigating officer retrieved evidence from the deceased's home including mobile phones and 'love letter' correspondence to the appellant. PW15 a police officer attached to the DCI Cybercrime Forensic Unit extracted chat messages from one of the mobile phones retrieved, compiled and submitted a report on the same.

8. PW12, a pathologist working with the Ministry of Health, Medical Legal Division carried out the post-mortem on the body of the deceased at City Mortuary on 20th September, 2015. Finding a total of 25 stab wounds to the deceased's chest, hands, legs, head, abdomen, back and shoulders. The doctor formed the opinion that the deceased had died of multiple injuries and blood loss due to penetrating force trauma.

9. The prosecution also produced PW11 and PW13, doctors who had examined the appellant. PW11 examined the appellant during her admission to Kenyatta National Hospital on 20th September, 2015 to 22nd September, 2015. He stated that the appellant had complained of assault with a sharp object and as well as of sexual assault. Upon examination, he found that she had suffered multiple soft tissue injuries on her chest and abdomen; pelvic examination found her genitalia in normal condition and a chest x-ray revealed no fractures, and lungs in normal condition. PW13 examined the appellant on 25th September, 2015 to assess the degree of her injuries and her mental status. He found cuts to her chest, abdomen, hand and leg inflicted by a sharp object. He also found the appellant fit to stand trial.

10. Having considered the evidence proffered by the prosecution and found that a *prima facie* case had been established against the appellant, the trial court placed the appellant on her defence. The appellant gave an unsworn statement in her defence. The appellant explained that the day before the incident, she had quarreled with the deceased about some love letters from previous friends of the deceased that she had found in a drawer in his bedroom. She had asked the deceased why he still kept the love letters after all these years.

11. Alleging that she had acted in self-defence having been attacked by the deceased, the appellant explained that the reason for the attack was that, on the morning of the incident, she had discovered in their bed a card with the deceased's name on it and the words "Aids Control Program". After demanding an explanation from the deceased and threatening to expose the deceased to their families and his close friends, she states that the deceased attacked her stating that he would rather kill her and himself than expose his status. After sustaining stab wounds to her hands, chest, stomach and legs, the appellant stated that she managed to disarm the deceased and proceeded to stab him several times. She then dropped the knife and rushed to the kitchen to fetch water with which to save his life.

12. The appellant's counsel, Mrs. Okonji, submitted that the prosecution had failed to prove malice aforethought with the injuries to the deceased insufficient to prove that. Learned Counsel submitted that the actual damage caused to the internal organs of the deceased by these stab wounds could not be ascertained because the deceased had not been opened up during post-mortem on grounds of his religion. Counsel pointed to the multiple injuries suffered by the appellant and her admission at Kenyatta National Hospital following the incident to illustrate that both the appellant and the deceased suffered severe injuries.

13. Counsel for the appellant summed up the prosecution's case as to the intent of the accused as framed by three issues: that the door was locked; that the appellant hid the keys, and that the appellant had stabbed the deceased repeatedly. On the door being locked she explained that as the incident took place on Sunday morning between 9.00 a.m. and 10.00 a.m., it could be expected that the door would still be locked. On whether the appellant hid the house keys, counsel for the appellant highlighted the contradictory evidence on where the keys were and how the door came to be opened as provided by PW1, PW7, PW8 and PW10. Stating that it was well within normal possibility that one who locks a house would place keys out of the reach of an outsider, counsel submitted that there was no evidence from any witness that the same had indeed been hidden by the appellant. On the repeated stabbing, counsel submitted that there had been a struggle as evinced by the injuries suffered by the appellant and that the appellant had acted in self-defence. Counsel for the appellant further discredited the evidence from PW1, maternal cousin to the deceased and PW4, sister to the deceased, inferring motive as unreliable and contradictory.

14. On the other hand, Mr. Hassan for the prosecution asserted that the prosecution had proven its case beyond reasonable doubt. He submitted that the multiple injuries inflicted upon the deceased by the appellant had been intended to and indeed caused his death and that a comparison of the injuries between the deceased and the appellant debunked the appellant's defence that they had been inflicted in self-defence. He highlighted the evidence of PW7 and PW8 that the appellant had refused to stop inflicting stab wounds upon the deceased even when urged to stop and that she had refused to open the door when they requested her to do so. Prosecution counsel submitted that the attacks were premeditated, malicious and illustrative of revenge and pure aggression.

15. Mr. Hassan submitted that the appellant was obsessed with the deceased, prone to extreme jealousy and possessive of the deceased as testified by PW1. Prosecution counsel submitted that when the appellant discovered love letters from previous friends of the deceased, she was outraged and this was the motive for the deadly attack on the deceased.

16. Upon the learned trial Judge assessing, evaluating and anlaysing the totality of the evidence tendered before her and applying the law to the said facts, she arrived at the conclusion that the prosecution's evidence had met the threshold of proof beyond reasonable doubt of the commission of the offence of murder. On that account the Court found the appellant herein guilty of the offence as charged, convicted her accordingly and sentenced her to death.

17. The appellant was aggrieved by that conviction and sentence. The appellant is before us with a Memoranda of Appeal raising twenty (20) grounds of appeal and seeking orders that, *inter alia*, the judgment and sentence in this matter delivered by Hon. Lady Justice Lesiit be set aside in its entirety and in the alternative, that the judgment of the High Court be substituted with a finding of manslaughter and a sentence of time served be entered against the appellant.

18. Leading counsel Prof. Muigai SC, based on the grounds contained in the Memorandum of Appeal, distilled three issues for determination by this court.

(i) Whether the prosecution had proved the charge of murder;

(ii) Whether the appellant's defence was inconsistent with a finding of guilty beyond reasonable doubt; and

(iii) Whether the appellant's sentencing was unduly harsh and failed to take into account her mitigation.

19. Urging the appeal before us, Prof. Muigai SC cited the High Court in ***R. vs. Motongori Marwa Gosiani*** ***[2019] eKLR*** where the criteria to be satisfied in order to substantiate a conviction for murder were stipulated as:

"(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence".

20. Counsel submitted that whilst it is not contested that the death of the deceased occurred at the hands of the appellant, the appellant lacked the requisite *mens rea* to satisfy a conviction for murder. Citing section 206 of the Penal Code and the interpretation of this section by this Court in ***Nzuki vs. Repubic*** ***(1993) KLR 171***, learned counsel submitted that the prosecution evidence failed to establish malice aforethought on the part of the appellant. He stated that the deceased and the appellant were alone in the house at the time of the incident and thus when the altercation arose there were no witnesses to confirm how it started and how it progressed to completion. He submitted that the appellant in her unsworn statement of defence had confirmed the basis of the altercation, that she had been threatened and attacked and that she had defended herself from imminent death.

21. Prof. Muigai SC submitted that the trial court had relied heavily on the testimony of PW7 and PW8, the husband and wife landlords, whose evidence was contradictory and inconsistent. He stated that they had arrived at the scene after the altercation had commenced hence they could not confirm how or where in the house the altercation began. He further stated that PW7 and PW8 stated that the deceased had repeatedly shouted out that he had been stabbed but it was not possible to ascertain whether he was actually being repeatedly stabbed or whether he was merely repeating himself out of pain. He added that at no point did PW7 or PW8 state that they saw the appellant stabbing the deceased. Learned counsel submitted that the appellant did not have malice aforethought as she did not take the weapon from the kitchen, she did not commence the attack and she had not shown any aggression towards the deceased prior to being threatened.

22. Learned counsel for the appellant states that the evidence of PW7 was illogical and contradictory. He explains that PW7's testimony implies that throughout his peering into the window, breaking the window, running to and from the front of the house to get help and speaking to the deceased, the appellant was 'merely standing there frozen in time for several minutes' with her back towards PW7. Learned Counsel stated that it is pure speculation on the part of PW7 that the appellant was preventing the deceased from getting to the door and that, with the appellant's back to PW7 as the latter alleges, it was impossible to ascertain the appellant's intentions. He states that there was no communication between the appellant and PW7 to the effect that the deceased was being prevented from reaching the door nor was there any evidence that the appellant had moved or actively tried to prevent the deceased from reaching the door.

23. Prof. Muigai SC further submitted that had the events unfolded in the manner assumed by the trial court and the appellant was truly of bad intent, the appellant would have continued to stab the deceased especially as her back was towards PW7 and PW7 would have witnessed the actual stabbing,. Alternatively he submits, PW7 would have somehow reacted to the presence of PW7 such as preventing him from searching for the keys to gain entry, turning to see who was breaking the windows and/or speaking, changing stance, dropping the knife, but none of this was said to have been done. Further citing contradicting testimony from PW7, PW8 and PW2, he stated that the events alleged to have taken place during the incident were obscure enough to create reasonable doubt. Further, stating that the statements of PW7 and PW8 were taken two (2) weeks after the incident, in the presence of each other thus allowing them to align their testimonies and that they had retained full access to the deceased's home after the incident, counsel for the appellant submitted that their testimony was, at the very minimum, questionable.

24. Asserting that the appellant's unsworn statement of defence remained uncontroverted, it was possible that the appellant had stabbed the

deceased from a lying position with the deceased seated on top of her and in a state of fear and panic, possible to have stabbed the deceased severally in self-defence. He submits that the stab wounds were random and not around one location in a calculated attempt to kill the deceased. Further, the fact that the appellant did not recall how many times she stabbed the deceased lends credence to her state of mind at the time of the incident. Counsel submitted that the witnesses stated that they saw blood all over the house only once they gained access to the house. Hence, it is very possible that once the appellant got the deceased off her, she panicked, ran out of the bedroom, into other parts of the house spreading blood all over the house. Further, in the public being able to access the crime scene, they may have also assisted in spreading blood around the deceased's home.

25. Citing the decisions in ***Sawe vs. Republic [2003] KLR 364, Abanga alias Onyango vs. Republic CR. A No. 32 of 1990 (UR)*** and ***Martin Kimeu vs. Republic [2002] eKLR*** and the guiding principles therein on the use of circumstantial evidence for the inference of guilt, Prof. Muigai SC submitted that the prosecution had failed to offset the burden of proving the facts drawing an inference of guilt as there were clearly other co-existing circumstances that weakened and cast grave aspersions on the prosecutions inferences thus allowing for more than one conclusion to be drawn.

26. Reiterating the circumstances of the altercation as contained in the unsworn statement of defence, counsel for the appellant, citing ***Palmer vs. Regina (1971) All ER 1077*** and ***R. vs. Lobell [1957] All ER 734*** submitted that a defence of self-defence can only fail where the prosecution proves beyond a reasonable doubt that the actions of the appellant were in no way self-defence. He explained that a number of prosecution witnesses had confirmed seeing the appellant's injuries with both PW11 and PW13 confirming that the appellant had sustained injuries inflicted by a sharp object, wounds that he asserted were consistent with the kitchen knife used and similar to those of the deceased. He stated that the appellant had been admitted into Kenyatta National Hospital for 2 days and had also received post-HIV exposure treatment and that PW11 confirmed that it was not necessary for there to be injuries when a person is sexually assaulted. Prof. Muigai SC submitted that the prosecution had failed to counter or disprove the appellant's defence which therefore stood uncontroverted and thus should have automatically precluded a conviction of murder.

27. Counsel for the appellant submitted that the trial court had exhibited bias against the appellant. Prof. Muigai submitted that certain statements made by the trial court prior to analyzing the evidence established clear bias against the appellant. He stated that the trial court had concluded that the appellant was jealous based on the evidence of PW1 who had only ever met the appellant for one hour, in disregard to the testimony of PW3 that the appellant had been pleasant in all other encounters and the evidence of PW4 who had welcomed the appellant into her home where they lived together for several months.

28. Counsel for the appellant bemoaned the High Court's contention that the appellant held a grudge due to discovering old love letters in his possession, as failing to take into account evidence that they had resolved the disagreement the day it occurred with the appellant cooking for the deceased and watching a movie together before retiring to sleep and the deceased communicating the resolution to PW1 in chat messages obtained from his phone. On the contention that there was no 'AIDS control programme' card, counsel for the appellant submitted that the trial court disregarded the fact that PW9 had failed to collect other significant evidence from the scene, most of what he collected was handed to him on the scene by PW10, PW14 only visited the scene two weeks after the incident to collect evidence overlooked by PW9 and that the evidence in the house had been tampered with as the public had been able to access the house and the landlords PW7 and PW8 had retained full access to the deceased's home during and after the investigations.

29. Guided by **section 17** of the **Penal Code** and this Court's decision in ***Ahmed Mohammed Omar & 5 Others vs. Republic [2004] eKLR***, learned counsel submitted that the test applied to the defence of self-defence is a subjective test based on the facts and circumstances of the case. He asserted that the appellant had proved that, on a balance of probability, she faced imminent danger as the deceased had numerously provoked the appellant and they had a history of assault. He stated that in a state of shock, panic and survival the appellant had instinctively hit out and at that moment had been unable to weigh the exact measure of her defensive actions.

30. Prof. Muigai SC further submitted that it was common ground that an exact cause of death cannot be established without a post-mortem hence the external examination undertaken by PW12 merely assumed the deceased's cause of death, but did not ascertain it and thus it cannot be stated with precision that the appellant's actions were the exact and only cause of the deceased's death.

31. Learned counsel submitted without prejudice to the foregoing that the sentencing of the appellant failed to appreciate the contemporary jurisprudence on sentencing as established by the Supreme Court in ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR.*** Using the guidelines in that matter counsel submitted that the sentence imposed was unduly harsh and failed to appreciate that the appellant was twenty-two years old, a first time offender, had been willing to plead guilty to a charge of manslaughter before the plea bargaining process had been aborted by the prosecution, that the character and record of the appellant was that of a committed Muslim who had been studious and of upstanding conduct during remand, that the appellant had acted in the context of domestic and gender-based violence, that the appellant had made statements of remorse, that the appellant's conduct in remand had shown a measure of reform and willingness to adapt back into society and that the appellant was the sole breadwinner for her ailing grandparents and had pleaded for the court's leniency. Prof. Muigai SC urged us to find that in totality of these circumstances, even if the conviction on the charge of murder was to stand, sentencing ought to have been adjusted to reflect the mitigating circumstances.

32. Mr. Hassan, the learned prosecuting counsel opposed the appeal. He stated that it was not disputed that the deceased succumbed due to injuries caused by the appellant.

33. The key issue he submitted was whether there was malice aforethought that resulted in the deceased's death. He stated that the prosecution had proved this to the required standard. The elements that constitute malice that had been proved were: (a) the nature of the weapon; (b) the nature of the injuries; (c) the conduct before, during and after the incident and d) the manner of use of the weapon. He asserted that the 23 stab wounds inflicted upon the deceased's person were a clear indication of intent and malice. He urged us to dismiss the appeal.

34. We have considered the record, submissions by counsel and the law. Section 203 of the Penal Code provides the elements that must be proved beyond reasonable doubt to secure a conviction for the offence of murder. These are;

(a) the death of the deceased and the cause of the death;

b) that the appellant committed the unlawful act which caused the death of the deceased;

(c) and that the appellant had harboured malice aforethought ***(see Nyambura & Others vs. Republic [2001] KLR 355*** and

Milton Kabulit & 4 Others vs. Republic [2015] eKLR).

From the post-mortem report dated 20th September, 2018 and the testimony of PW12, the cause of death was multiple injuries and blood loss due to penetrating force trauma. According to the appellant's unsworn statement of defence she stated:

"…I then grabbed the knife with my left hand. He was sitting on me. I used the knife to stab him severally."

Further, according to PW2, PW5, PW7, PW9 and PW10 the deceased and the appellant were the only persons in the house. There is thus no doubt that the deceased's death was caused by the actions of the appellant. The trial court thereafter correctly stated that:

"The prosecution must prove that at the time the accused stabbed the deceased, she was motivated by malice and that she was not acting in self defence as she pleaded in her defence."

35. On the elements of malice aforethought, the learned trial Judge rightly took note that these are well set out in **section 206** of the

Penal Code:

"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 cause or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

36. Citing ***Bonaya Tutu Ipu & Another vs. Republic [2015] eKLR*** this Court in ***Milton Kabulit & 4 Others vs. Republic [2015] eKLR*** stated that:

"…"malice aforethought'' is the *mens rea* ***for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on peculiar facts of each case. (See*** *Moris Aluoch vs. Republic Cr. Appeal No. 47 of 1996*) ***where the court went further and drew inspiration from a persuasive authority in the case of*** *Chesakit vs. Uganda Cr. Appeal No. 95 of 2004* ***wherein the Court of Appeal of Uganda held thus:***

"In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

37. This Court in ***John Mutuma Gatobu vs. Republic [2015]*** **eKLR** further stated that there is nothing in the definition of malice aforethought:

"…that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, it is to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."

38. The trial court correctly considered the evidence of the prosecution witnesses especially the first on the scene towards determining whether the appellant had developed an intention to kill the deceased. Learned counsel for the appellant argued that there were contradictions and inconsistencies in the testimonies relied upon by the trial court and that the prosecution had failed to offset the burden of proving the facts drawing an inference of guilt as there were clearly other co-existing circumstances that weakened and cast grave aspersions on the prosecution's inferences thus allowing for more than one conclusion to be drawn. With all due respect to learned Senior Counsel, we believe that the trial court correctly considered the evidence that built a cogent and irrefutable picture of a person who meant by their action to kill. As clearly pointed out by the prosecution, the elements that constitute malice aforethought are that, the nature of the weapon used, nature of injuries suffered by the deceased, the conduct, before, during and after the incident and lastly the manner of use of the weapon. Clearly, there

is no doubt that the appellant inflicted the injuries that caused the death of the deceased. The issue is whether the appellant intended to cause death of the deceased in the manner she inflicted the injuries upon the deceased. No doubt, the appellant inflicted 25 stab wounds upon the deceased to the chest, hands, legs, head, abdomen, back and shoulders. According to the prosecution evidence, the said injuries were multiple and severe, done repeatedly, intending to cause grievous harm or death of the deceased. In our view the nature of injuries suffered by the deceased and admittedly caused by the appellant is a clear testimony that the appellant intended to kill, hence the offence of murder was proved beyond any reasonable doubt in regards to malice aforethought.

39. Counsel for the appellant stated that throughout the sustenance of the inquiry, the authorities blatantly mismanaged the investigations and allowed for tampering of evidence. Further, that the testimonies of the witnesses were riddled with inconsistencies as to the events that had taken place. He submits that the trial court overlooked these errors and discrepancies and substantiated its decision on circumstantial evidence. The role of a court when confronted with allegations of existence of contradictions, discrepancies and inconsistencies in the prosecution's case is well settled. In ***Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993***, the court ruled that:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the***
>
> ***Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."***

40. In ***Njuki & 4 Others vs. Republic [2002] 1 KLR 771*** the court went further to state that:

> ***"Where discrepancies in the evidence do not affect an otherwise proved case against an accused a court is entitled to ignore those discrepancies."***

In ***Vincent Kasyula Kingo vs. Republic Nairobi Criminal Appeal No. 98 of 2014*** this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. In ***Josiah Afuna Angulu vs Republic CRA No. 277 of 2006 (UR)*** this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants commission of the offence charged and proceeded to substitute conviction for the disclosed offence. Also in ***Charles Kiplang'at Ng'eno vs. Republic CRA. No. 77 of 2009 (UR)*** this Court also sitting as a first appellate court reconciled contradictions, discrepancies and inconsistencies in the prosecution's case and found that these went to discredit the prosecution's evidence as they created doubts as to the appellant's commission of the alleged offence and allowed the appellant's appeal in its entirety.

41. Applying the above to the appellant's arguments on this issue, learned counsel for the appellant alleged that members of the public were allowed into the deceased's home immediately after the incident hence tampering with the scene before the police collected evidence. Prof. Muigai SC stated that by the time the investigating officer, PW9 arrived on the scene on the afternoon of the day of the incident, PW10 had moved crucial evidence (the knife, Nokia mobile phone, bed sheets). He further pointed out that the landlords PW7 and PW8 retained access to the deceased's home after the incident with PW14 accessing the scene two weeks after the incident to retrieve additional evidence not previously collected by PW9. Additionally, the learned counsel for the appellant stated that whilst two mobile phones were collected from the scene, only one of them was sent to PW15 for examination. We find that the appellant has neither substantiated what evidence was tampered with nor how such tampering compromised the evidence that was gathered by the police.

42. Learned counsel for the appellant argued that the photographs of the scene taken by the police were damaged while in police custody and were therefore incapable of production in court as evidence. The trial court satisfactorily dealt with this matter stating:

> ***"It is unfortunate the photographs of the scene were [inadvertently] destroyed. None the less the evidence of these witnesses establishes that the whole house had blood everywhere, evidence which discounts the accused defence that the incident occurred only in the bedroom. There was also the eye witness account of PW7 and 8 who clearly saw the deceased in the small verandah between the kitchen and the sitting room."***

43. Learned counsel for the appellant states that testimonies of PW7 and PW8 were taken in the presence of each other. Once again it is unclear what the import of this allegation is on the veracity of those witness statements. We find no reason as to why the two witness would corroborate each other's testimonies and to what end. We also find that this allegation was neither substantiated nor proved by the appellant.

44. On the apparent glaring disparities in the events leading up to the appellant opening the door to the deceased's home, the trial court duly addressed the issue and stated:

> ***"PW2 saw the accused climb the kitchen sink and reach out for keys. There was inconsistency in the evidence of the prosecution on this point. According to PW2 the accused handed over the house keys to PW7. PW7 and PW5 on the other hand said that it was PW10 who ordered the accused to open the door to the house which she did. That matter is however not in dispute as the accused in her defence sated that she was ordered to open the house by a gun trotting Officer, which she did."***

45. The learned counsel for the appellant pointed to the discrepancy in that PW2 and PW7 both testified to entering the deceased's home together with neighbours and police while PW10 denied these facts.

With no submissions to substantiate the import of this discrepancy, we find that it did not affect the case against the appellant and hence the trial court was entitled to ignore it. Another discrepancy pointed out by the appellant was PW2's testimony that he had not seen the appellant with any injuries whereas in his statement he had stated that he had seen the appellant with injuries to her legs. The trial court adequately

considered the issue of injuries sustained by the appellant and found that:

> ***"The injuries on accused were superficial cuts classified as harm by PW13. The admission of the accused in Kenyatta was for investigation of her complaint that she had been assaulted and sexually assaulted…She had no fractures and no internal injuries. There was no stab injury on the accused at all. The accused had no injury that could be comparable to the ones suffered by the deceased…the patient had superficial injuries, was in no danger at all, and definitely apart from ruling out any serious injuries on her, keeping her in hospital was superfluous."***

The issue as to the injuries sustained by the appellant was exhaustively determined by the examinations of the appellant by both PW11 and PW13 after the incident. The appellant has failed to substantiate how this discrepancy in the testimony of PW2 had any effect whatsoever on the case against the appellant. We find that the trial court was entitled to disregard it.

46. Learned counsel for the appellant points out that PW14 testified that he visited the scene two weeks after the incident and found the doors and windows of the home in good condition. He alleges that this contradicts evidence of PW2 and PW7 that they broke the windows in the kitchen and bedroom in an attempt to access the home and assist the deceased. Again, learned counsel for the appellant has failed to substantiate how this discrepancy had any effect whatsoever on the case against the appellant. Nevertheless, we are inclined to believe that PW2 and PW7 were being truthful when they stated that they broke the windows in an attempt to access the property and assist the deceased. Indeed, in her unsworn statement of defence, the appellant states that she saw a broken window.

47. Learned counsel for the appellant referred to the testimony of PW15 stating that the witness confirmed that the Samsung mobile phone he received for examination and from which he extracted the WhatsApp chat messages had a different IMEI number from the Samsung mobile phone produced as PExb17. We find that the reason for the examination of the mobile phone was the extraction of the excerpts from the WhatsApp chat between the deceased and PW1. At no point has the appellant challenged the authenticity of the chat messages between the deceased and PW1 as produced in the report by PW15 from the Samsung mobile phone. We find that the discrepancy in IMEI numbers is a triviality and does not affect the case against the appellant as it does not quash the veracity of the extracted conversation that the trial court subsequently relied on in evidence.

48. Therefore, on the above findings on the alleged unreconciled contradictions, discrepancies and inconsistencies in the prosecution evidence, we find that these were either well explained in other testimony, inconsequential or adequately addressed by the learned trial Judge.

49. Having carefully examined the evidence on record, we find the conclusion that the appellant violently, intentionally and unlawfully killed the deceased inescapable. On our own analysis, we find no fault and agree entirely with the learned Judge's finding that:

> ***"…the evidence of the eye witness account discredits accused defence that the attack was confined to the bedroom. The evidence is clear that the deceased was on his feet in the kitchen and corridor when the accused attacked him. In addition the evidence of PW2 that the accused climbed the sink to reach for the key to the house after the deceased had already succumbed to the injuries; taken together with the evidence of PW7 and 8 that the accused blocked the deceased from reaching the kitchen to get the keys where he normally kept them in order to escape from her and the fact the accused not only stabbed the deceased 25 times all over the body, but did it intermittedly, all taken together establishes beyond any doubt that the accused had formed the intention to cause grievous harm or death to the deceased. The accused inflicted each stab, not in a frenzy as she alleged in her defence, but deliberately and intermittedly. Her action was calculated to inflict pain and cause death slowly but assuredly. That is clear proof of malice, of spite, callousness and hatred. There is no doubt in my mind that the accused action was caused by malice."***

50. Upon close scrutiny of the evidence adduced, we cannot but conclude, as did the learned Judge, that the appellant's alleged defence of self-defence was unbelievable given the cogent and compelling evidence of the prosecution witnesses. Our position is further fortified by the case of ***Victor Nthiga Kiruthu & Another vs. R [2017] eKLR*** where this Court stated:

> ***"The principles that have emerged from these and other authorities are as follows:***
>
> ***(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.***
>
> ***(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.***
>
> ***(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.***
>
> ***(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.***
>
> ***(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case."***

51. The trial court properly considered the law and evidence and rightly rejected the appellant's plea of self-defence. Accordingly, we find that the appellant's conviction for the offence of murder was within the confines of the law.

52. In regard to the sentence meted out on the appellant, the trial court addressed its mind to the mitigating factors in line with the Supreme Court's decision in ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR.*** We see no reason to interfere with the same.

53. The upshot of the foregoing is that we find that the appeal before us lacks merit and it is accordingly dismissed.

Dated and Delivered and Nairobi this 6th day of November, 2020.

H. M. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR