



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Erean & another (Criminal Case E011 of 2023)  
[2025] KEHC 11957 (KLR) (15 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11957 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE E011 OF 2023  
RN NYAKUNDI, J  
AUGUST 15, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EWESIT EREAN ..... 1<sup>ST</sup> ACCUSED**

**AMONIKANI NAMUTON NGIKASUKOU ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons were charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 25<sup>th</sup> day of April, 2023, at Nawangaloret village in Kaikor location, Kibish Sub-County within Turkana County murdered Nakurupugole Epero.
2. The accused persons appeared were arraigned before this court and a plea of not guilty was entered, thereby placing the burden on the prosecution to prove guilt beyond reasonable doubt as stipulated in Article 50(2)(a) of *the Constitution*. The lead counsel for the prosecution was Mr. Kakoi whereas the defense was being conducted by Mr. Ondabu, Advocate.
3. At the hearing the prosecution called 5 witnesses who gave evidence to establish the ingredients of the offence of murder contrary to section 203 as read with section 204 of the Penal code. The ingredients of the offence to be proved beyond reasonable doubt within the guidelines in Miller –v- Ministry of pensions (1947) 2 ALL ER 372 at 373 and Woolmington –v- DPP (1935) AC 462.
4. The first prosecution witness is one No. 335124, Chief Inspector Alfred Mbalani based at the DCI headquarters who testified on behalf of James Onyango, a firearm examiner, the docket in which also PW1 has the set skills to testify on the issues surrounding firearm and ammunition examination. According to PW1, an exhibit memo dated 3<sup>rd</sup> July, 2023 prepared by PC Mubarak Mumbo indicative of exhibits dispatched to the ballistic laboratory for analysis and the appropriate report to answer



the following questions: Whether the exhibits marked “A” is a rifle capable of firing, Exhibit marked “B” being a brown envelope containing one spent cartridge of 7.62 mm was fired by exhibit marked “A”, whether exhibit “C1-C10” are live ammunitions of 6.22 mm and can be used to fire in exhibit marked “A” and finally exhibit marked “D” is a magazine which can be used in exhibit marked “A”. In compliance with section 48 of the *Evidence Act*, PW1 told the court that on examination and investigations of the exhibits in the ARMS LAB, the following conclusion was made by the analyst, one James Onyango to the effect:

“Microscopic examination of exhibit (B) revealed identifiable breech face markings, ejector markings and firing pin indentation markings consistent with those from a firearm discharge.

Comparative microscopic examination of exhibit (B) in conjunction with the test cartridge cases fired in exhibit (A) revealed sufficient matching breech face markings, ejector markings and firing pin indentation markings to enable form the opinion that exhibits (B) was fired in one G3 Rifle S/no. G3 CO F-3481 marked Ex. (A).

Exhibit D is a G3 rifle magazine with a carrying capacity of twenty rounds of ammunition in calibre 7.62x51mm when full charged. It is ammunition storage and feeding device for rifle and in good working order.”

5. PW2 Kangetula Ekwom, a child aged below 18 years having been taken through the voire dire examination by this court was found to possess sufficient knowledge and appreciation of what it takes to be a witness in a court of law including some quotient of intelligence being one of the set criteria for eligibility and suitability of a minor to take the witness stand. In his testimony he told the court that on 24<sup>th</sup> April, 2023 in the night hours robbers made entry to their home and having taken them hostage they stole their sheep. However, it was not without a scuffle or a struggle between the robbers and his late father. He also described the surroundings of the incident as having been lit by the torches which they used to search and trace the stable of the sheep. This necessitated them to raise an alarm to seek help from the neighbours so that they can repulse the robbers from their homestead. In the course of that robbery, his late father was shot at with a firearm which was in possession of the robbers. He unfortunately passed on instantly as the sheep were driven out of the homestead. It was further the testimony of PW2 that he was able to identify the 1<sup>st</sup> accused Ewesit whom he had known before this fateful day. However, he denied positively identifying the second accused.
6. PW3 was Corporal Eweet Lokirien based at Kibish sub-county where he also doubles up as a Kenya Police Reservist. It was his evidence that on 25<sup>th</sup> April, 2023 he received a report about the murder of the deceased, Nakurupugole Epero. That by virtue of his role as one of the security men in that village, he responded by visiting the scene where he confirmed the death of the deceased. According to PW3, the 2<sup>nd</sup> accused went to his home and they discussed about the death of the deceased and he was armed with a G3 rifle. He sought assistance and disarmed the accused of his G3 rifle which later became an exhibit in this case. He was able to positively identify the rifle which was dispossessed from the 2<sup>nd</sup> accused before this court.
7. PW4 was Lokoinyuk Ngoripus also a Kenya Police Reservist within the same village where this incident of homicide took place. It was his evidence that on the material day of 25<sup>th</sup> April, 2023 when in the night he heard sounds of gunshots. However, he could not locate exactly the scene and the reasons for the alleged firing of ammunitions and he therefore waited until morning so that he can trace the source. According to PW4 he woke up in the morning and made a few telephone calls and that is when it was confirmed that the homestead of PW2 had been attacked by robbers who also drove away some



sheep and in the course of committing the offence, they shot dead the deceased. The investigations was commenced in earnest culminating into the arrest of accused persons before court.

8. PW5 was Engor Chomer Apachal who told the court that he is a resident who hails from Kaikol location and works with the county government as an enforcement officer. His evidence was in respect of the 27<sup>th</sup> April, 2023 when he received a telephone call regarding a murder suspect who had committed an offence on the 25<sup>th</sup> April, 2023. According to PW5, the telephone call from one Eweet was followed with further inquiries from other Kenya Police Reservist to assist in facilitating the arrest of the suspects involved in the murder of the deceased. That inquiry according to PW5 led him to the home of PW3 where the second accused had been summoned and he did respond to see PW3 at his home while armed with a G3 riffle. This is the home in which PW5 also joined PW3 in disarming the second accused of the G3 riffle and simultaneously a report was made to the police who assisted in effecting the arrest and thereafter investigations were carried out to establish the culpability of the accused persons before court.
9. This was the evidence in which the court considered and in terms of section 306 of the Criminal Procedure Code, placed each accused on his defence as hereunder stated.
10. The 1<sup>st</sup> accused in his defence elected to give unsworn statement in which he denied every element of the offence as alleged by the prosecution witnesses. This was also the trajectory elected by the second accused that in his unsworn statement he denied every fact which attempted to place him at the scene of the murder.
11. I had directed each counsel to file their closing written submissions but at the time of preparing this judgment, none had complied and out of necessity, I proceeded to analyse the evidence tailored towards the decision making of this trial.

#### **Analysis and determination.**

12. As a matter of reiteration, section 203 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder. The elements of the offence are well settled being:
  - a. the death of the deceased occurred
  - b. the death was caused by unlawful acts;
  - c. that the accused committed the unlawful act which caused the death of the deceased; and
  - d. that the accused had malice aforethought. (see Anthony Ndegwa Ngari v Republic [2014] eKLR)
13. This is a criminal charge and the duty rests squarely on the prosecution to prove every essential element constituting the offence beyond reasonable doubt. There is no duty whatsoever on the part of the accused to prove his/her innocence or even to prove anything on his/her part. As Art. 50(2)(a) provides, every person suspected of an offence has a right to be presumed innocent until the contrary is proved including to remain silent at the trial and not to testify at all. Simply this means even if the court establishes a prima facie case against an accused person, he is not liable to give any rebuttal evidence during the pendency of those proceedings. In so far as the burden and standard of proof is concerned, the law is trite as stated in the following authorities:



14. The Supreme Court of Nigeria in *Bakare vs State* (1985) 2 NWLR stated as follows:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says, not admit of plausible possibilities and fanciful possibilities but it does admit a high degree of cogency consistent with an equally high degree of probability.”
15. Similarly, in *Miller Vs Ministry of Pensions* [1947] 2 All ER 372 he stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the 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’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
16. This standard and burden of proof is also illustrative of the provisions seen in section 107(1), 108 and 109 of the *Evidence Act*. This is the threshold which must be satisfied by the prosecution at all material times unless and until there is a necessity for invocation of section 111 of the *Evidence Act* as to matters which may have arisen with specifics of being within the knowledge of the accused person. It is now my singular duty to answer the question whether the prosecution has proved each of the elements of the offence of murder as defined under section 203 of the Penal Code.
17. On the first element there is clear evidence that Nakurupugole died at his home on the 25<sup>th</sup> day of April, 2023. This was the actual scene of the murder and PW2 was an eye witness when their home was infiltrated by robbers who were armed with firearms with an intention to steal their sheep and it was in the course of the struggle that his father was shot dead. The pathologist report dated 27<sup>th</sup> May, 2023 shows the deceased died on 25<sup>th</sup> April, 2023 having been shot dead by the raiders who had gone into his homestead to drive away his livestock. In short there is ample evidence establishing the death of the deceased on the material day.
18. I must consider next whether the accused person before court caused the death of the deceased by an unlawful act. There is no doubt in my mind that the death of the deceased was caused by gunshot wounds as stated before this court by PW2 who happened to be the son of the deceased and was part of the victims of this offence of robbery also culminating in the death of his father. On the other hand, there is evidence of PW1 a ballistic examiner based at DCI headquarters produced the ballistic report dated 24<sup>th</sup> July, 2023 pursuant to section 77 of the *Evidence Act* on behalf of his colleague James Onyango in equal measure also a firearm examiner. According to PW1, the firearm which was marked as exhibit “A” for purposes of examination had been recovered during the investigations of the murder incident in question necessitating PC Mubarak Mumbo to forward it to the ARMS LAB for analysis. This analysis revealed that the G3 rifle with a capacity of twenty rounds of ammunition in caliber 7.62x51mm is a firearm under the *firearms Act* and in good working condition capable of discharging the applicable ammunitions. In addition, PW1 confirmed to the court that the one spent cartridge of 7.62mm apparently recovered at the scene of the murder was discharged from the G3 rifle serial number G3COF-3481. The second accused was the one arrested being in possession of this exhibit as



stated in evidence by PW3 in his evidence before this court. This same firearm and ammunitions were escorted to the ARMS LAB to establish whether it was the murder weapon during the robbery on 25<sup>th</sup> April, 2023 in which the deceased lost his right to life. Presumably, PW2 gave a chronology of events at the scene of the crime and how his late father was shot at by the same robbers who had come to drive away with their sheep. The evidence of gunshots is very clear from the post mortem report. In the findings of the pathologist, the cause of death was cardiorespiratory arrest secondary to gunshot wounds. It is settled law that every homicide is considered unlawful unless justified under sections 17, 207 and 208 of the Penal Code. This is where the court considered the defence of self or property and or the elements of provocation. What really amounts to an unlawful act causing death for purposes of a murder charge under section 203 of the Penal Code? In my view, I consider to be unlawful acts of omission carried out by a human being against another while armed with dangerous weapons or devices, including manipulating one's limbs targeting various vulnerable parts of the body to commit infliction of serious harm which is traceable to the cause of death of the deceased. These unlawful acts are committed without lawful justification or excuse. In the direct and circumstantial evidence of PW1, PW2 and the post mortem report admitted as an exhibit shows very clearly that the deceased's death was unlawful through an act gunshot wounds which is apparent that the G3 riffle recovered from the 2<sup>nd</sup> accused was used to trigger the fatal injuries. That therefore satisfies the criteria of the death being unlawful and there is no defence of self or provocation on the part of the accused person.

19. The third element to be established is whether it was the accused persons before this court who committed the unlawful act that caused the death of the deceased. The question of identification is crucial in criminal proceedings, and the court must be satisfied beyond reasonable doubt that the perpetrators of the crime are indeed the persons standing trial. In this regard, the evidence of PW2, Kangetula Ekwom, is particularly significant. As the son of the deceased and an eyewitness to the incident, PW2 testified that he was able to positively identify the 1<sup>st</sup> accused, Ewesit Erean, whom he had known before this fateful day. His testimony revealed that during the robbery incident on the night of 24<sup>th</sup> April, 2023, when robbers invaded their homestead to steal sheep, he witnessed his father being shot by the intruders. The lighting conditions at the scene, as described by PW2, were adequate as the robbers used torches to search for and trace the sheep, which facilitated his ability to identify the 1<sup>st</sup> accused. In the Supreme Court of Uganda in Abdulla Nabulere and another –vs- Uganda Cr. Appeal No. 9 of 1978, the court held as follows:

“.....apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for.” .....

“All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution.”

20. However, the evidence regarding the identification of the 2<sup>nd</sup> accused, Amonikani Namuton Ngikasukou, presents a different scenario. PW2 candidly admitted that while he could positively identify the 1<sup>st</sup> accused, he could not make a positive identification of the 2<sup>nd</sup> accused. This honest testimony by PW2 demonstrates his credibility as a witness, as he did not attempt to implicate someone he could not clearly identify. Nevertheless, the evidence linking the 2<sup>nd</sup> accused to the crime comes from other sources, particularly the recovery of the murder weapon from his possession.



21. The evidence of PW3, Corporal Eweet Lokirien, is crucial in establishing the connection between the 2<sup>nd</sup> accused and the commission of the offence. PW3 testified that on 25<sup>th</sup> April, 2023, he received a report about the murder of the deceased and responded by visiting the scene where he confirmed the death. Most significantly, PW3 stated that the 2<sup>nd</sup> accused came to his home while armed with a G3 rifle, and they discussed the death of the deceased. PW3, being a Kenya Police Reservist and one of the security personnel in the village, sought assistance and successfully disarmed the 2<sup>nd</sup> accused of the G3 rifle, which subsequently became an exhibit in this case. This evidence establishes a clear link between the 2<sup>nd</sup> accused and the murder weapon immediately after the commission of the offence.
22. The ballistic evidence presented by PW1, Chief Inspector Alfred Mbalani, provides the forensic link between the recovered weapon and the murder. The ballistic examination conducted at the ARMS LAB revealed that the spent cartridge recovered at the scene of the murder was fired from the G3 rifle serial number G3COF-3481, which was the same weapon recovered from the 2<sup>nd</sup> accused. This scientific evidence creates an irrefutable connection between the murder weapon and the 2<sup>nd</sup> accused's possession of it shortly after the commission of the offence.
23. Regarding the 1<sup>st</sup> accused, the direct identification evidence of PW2, coupled with his presence at the scene of the crime during the robbery that resulted in the murder, establishes his participation in the unlawful act that caused the death of the deceased.
24. In this respect, the accused persons are charged jointly with the offence of killing the deceased. This brings into play the provisions of Section 20 as read together with Section 21 of the Penal Code. Section 21 of the Code provides the features of criminal responsibility as follows:

“When two or more persons, form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”
25. The other overriding elements of a common intention concerns characteristics of it being formed at the very onset or during the commission of the offence. It may also arise spontaneously on the spur of the moment. According to Section 10 of the *Evidence Act*, anything said, done or written by any of the persons deemed to have a common intention, in reference to their common intention is relevant evidence of such intention. What is required of the prosecution is evidence tending to show that the individual accused persons were in fact part of the conspirators in a gang of two or more, sharing a common intention, purposed to commit a particular offence.
26. The Court in *Ismael Kiseregwa & Another v Uganda CA CRIM Appeal No. 6 of 1978* held as follows:

“In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter.”
27. The evidence shows that both accused persons were acting in concert during the commission of the robbery, which culminated in the murder of the deceased. Under the doctrine of common intention,



where two or more persons participate in the commission of a crime with a common purpose, each is liable for the acts of the others in furtherance of that common purpose.

28. The final element to be established is malice aforethought. Section 206 of the Penal Code defines malice aforethought as being established by evidence proving any one or more of the following circumstances: an intention to cause the death of or to do grievous harm to any person; knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; and an intent to commit a felony.
29. In this case, the evidence clearly establishes malice aforethought under multiple limbs of section 206. Firstly, under section 206(a), the deliberate use of a firearm to shoot the deceased during the robbery demonstrates an intention to cause death or grievous harm. The choice of weapon, a G3 rifle and the manner of its use against an unarmed civilian during a robbery incident shows a deliberate intention to cause serious harm or death. The fact that the deceased was shot and killed instantly, as testified by PW2, further supports this inference.
30. Secondly, under section 206(c), the malice aforethought can be established through the intent to commit a felony, which in this case was robbery. The evidence shows that the accused persons invaded the homestead of the deceased with the intention of stealing livestock. In the course of committing this felony of robbery, they used a firearm and shot the deceased dead. The law is clear that where a person commits a felony and in the course of that felony causes the death of another person, malice aforethought is deemed to be established.
31. The circumstances of this case reveal a planned attack on the homestead of the deceased. The accused persons came armed with a dangerous weapon, invaded the premises at night, and when faced with resistance from the deceased who was protecting his property, they did not hesitate to use lethal force. This conduct demonstrates not only an intention to commit robbery but also a reckless disregard for human life in the execution of their criminal enterprise.
32. Although the motive of the murder is not clear, both direct and circumstantial evidence manifest existence of malice aforethought on the part of the accused persons consistent with the guidelines in the case of in which the court observed as follows: *Robert Onchiri Ogeto v. Republic* (2004) KLR 19

“The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possesses the motive. See *Karukenya & 4 Others v Republic* [1987] KLR 458. By section 206 (a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonably inferred that when the appellant stabbed the deceased with a knife on the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder.”

33. In this case, the mens rea and the unlawful acts by the accused persons are deducible from the testimony of PW2 who told the court that on the material day, the deceased was at his homestead when robbers invaded to steal their sheep. According to PW2, he witnessed his father being shot by the robbers who were armed with firearms, and he was able to identify the 1<sup>st</sup> accused as one of the perpetrators. The evidence on the shooting by the accused persons while armed with a firearm was never controverted. Thereafter, the post mortem which was carried out showed that the cause of death was cardiorespiratory arrest secondary to gunshot wounds. As a consequence thereof, the nature of the evidence is such that it is sufficient to prove the elements of the offence of murder beyond reasonable doubt to enter a verdict of guilty and conviction against the accused persons. By dint of the accused



persons not offering any defence, the case of the prosecution carried the day in so far as the indictment of the offence against the accused persons is concerned.

34. Having carefully considered all the evidence presented, this court is satisfied that the prosecution has proved beyond reasonable doubt all the essential elements of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The death of Nakurupugole Epero has been established; the death was caused by an unlawful act; the accused persons committed the unlawful act that caused the death; and the act was committed with malice aforethought.
35. In the circumstances, this court finds both accused persons guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convicts them accordingly.

### Sentencing

36. The accused persons were convicted for 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 25<sup>th</sup> day of April, 2023, at Nawangaloret village in Kaikor location, Kibish Sub-County within Turkana County, the accused persons murdered Nakurupugole Epero.
37. As for the mitigation, learned counsel Mr. Ondabu made oral submissions and stated that the accused persons are first offenders and that the court should consider their age, their family and the fact that they are breadwinners in the families further that they are persons who are capable of reform and as such the court ought to consider a non-custodial sentence.
38. The prosecution on the other hand submitted that the court should consider the aggravating factors of the offence and impose an appropriate sentence.
39. A good starting point is the transformative decision in *Francis Muruatetu & Another v Republic* [2017] eKLR, wherein Kenya's highest court upheld the death penalty but found its mandatory character to be unconstitutional. The Supreme Court's observations on this sentencing matter were as follows:

“ 45. To our minds what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in *the constitution* does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of *the Constitution* are not exhaustive.”

40. The court further stated that:

“ 58. We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining



that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of *the Constitution*.”

41. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines to be the following:

“Retribution: to punish the offender for his criminal conduct in a just manner.

Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

Rehabilitation: to enable the offender reform from his criminal disposition and become a law abiding person.

Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

Community protection: to protect the community by incapacitating the offender.

Denunciation: to communicate the community's condemnation of the criminal conduct.”

42. In considering the appropriate sentence, this court must weigh both the aggravating and mitigating factors present in this case. The aggravating factors are significant and include the premeditated nature of the crime, involving an armed invasion of the deceased's homestead during night-time hours. The use of a firearm demonstrates the calculated and dangerous nature of the offence. Most gravely, the murder was committed in the course of robbery, showing a complete disregard for human life in pursuit of material gain.

43. The Constitutional Court of South Africa in *State v. 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 negate 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.”

44. In *R v Engert* (1995) 84 A Crim R 67 at 68, Gleeson CJ observed:

“Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by statute or established by the common law. The



principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment .....

In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance .....

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.”

45. Finally, in *In Rep v Tobett Makuhuni*, Mwaungulu J stated that the sentencing court must regard the nature and circumstances of the offence, the offender and the victim and the public interest. That sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and the mental component of the crime. Consequently, circumstances exacerbating or diminishing the extent, intensity or complexion of the actus reus or mens rea of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the actus reus or mens rea of the offence.
46. Having said that, the deceased, Nakurupugole Epero, was killed in his own home while attempting to protect his family and property from armed intruders. This represents not only a violation of the sanctity of life but also an attack on the fundamental security that every person should enjoy in their own dwelling. The trauma inflicted upon the deceased's minor son, who witnessed his father's killing, constitutes an additional aggravating factor that this court cannot ignore.
47. Turning to the mitigating factors advanced by the defense, this court acknowledges that both accused persons are first offenders with no previous criminal convictions. Their youth and status as breadwinners for their families are noted. However, the court observes that both accused persons elected to give unsworn statements denying all culpability rather than demonstrating genuine remorse for their actions.
48. The principle of proportionality requires that the punishment corresponds to the seriousness of the criminal conduct. This case involves the deliberate taking of an innocent life during an armed robbery, conduct that strikes at the very foundation of a peaceful society. The sentence must serve the objectives outlined in the Judiciary Sentencing Policy Guidelines: retribution, deterrence, rehabilitation, community protection, and denunciation.
49. While the court has considered the accused persons' personal circumstances, the gravity of deliberately taking a life during an armed robbery, the use of a dangerous weapon, and the devastating impact on the victim's family and community significantly outweigh the mitigating factors presented.
50. Accordingly, this court sentences each accused person, Ewesit Erean And Amonikani Namuton Ngikasukou, to 40 years' imprisonment for the offence of murder contrary to section 203 as read with



section 204 of the Penal Code. The sentence shall run from the date of their arrest pursuant to section 333(2) of the Criminal Procedure Code. The commencement date being 29<sup>th</sup> May, 2023.

51. 14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 15<sup>TH</sup> AUGUST 2025**

.....

**R. NYAKUNDI**

**JUDGE**

In the presence of:

Mr. Otieno for ODPP

The Accused

