



REPUBLIC OF KENYA



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**Republic v Okumu (Criminal Case E005 of 2023)
[2025] KEHC 11959 (KLR) (15 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E005 OF 2023
RN NYAKUNDI, J
AUGUST 15, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

BENTER ACHIENG OKUMU ACCUSED

JUDGMENT

1. The Accused person was 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 Accused Benter Achieng Okumu on the night of 4th -5th July 2022, at Lokhore area, Kakuma Township in Turkana County murdered Benjamin Were Nyandega alias Benja.
2. During the plea taking, the Accused person pleaded not guilty of the offence vesting the burden of proof upon the prosecution under Article 50 (2)(a) of the *Constitution* as read with Section 107(1), 108 & 109 of the *Evidence Act* on the presumption of innocence to adduce evidence to establish every element of the offence of murder. The lead Counsel for the defence was Mrs. Kariuki, Advocate for the Accused. The lead Prosecution Counsel happened to be Mr. Kakoi.
3. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. This is founded on the maxim that he who alleges must prove. The principal burden is on the accuser and in criminal cases the accuser is the prosecution usually the state. Since the burden of proof lies throughout on the state, the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters. In *Republic v Subordinate Court of the First Class Magistrate at City Hall, Nairobi and another ex-parte Yougindar Pall Sennik and another Retread Limited* (2006) 1 EA 330 (Nyamu J), it was stated that the burden can be shifted where the law, pursuant to Section 109 of the *Evidence Act* provides for it. This can be done by Parliament by a law shifting the burden of proving certain facts and the same is not a constitutional issue where any such other law provides for it.



Prosecution Case Summary

4. This case concerned the death of Benjamin Were Nyandega alias Benja out of an incident which occurred on the night of 4th and 5th July 2022 at Lokhore area, Kakuma Township in Turkana County.
5. The prosecution laid the foundation of their case to prove the following elements before reasonable doubt as stipulated in Section 203 of the Penal Code. Thus,
 - a. The death of the deceased.
 - b. That the death was unlawfully caused
 - c. That the death was actuated with malice aforethought.
 - d. That the Accused before court was positively identified as the one who committed the homicide.
6. This case was built by the prosecution based on the following witnesses;

The first witness summoned by the state was PW1- Richard Langat who testified as the government analyst based in Kisumu branch with regard to the exhibits sampled by PC Harrison Sesi. According to PW1, the following exhibits were received from the CID Headquarters at Turkana West, INQ, 1/2022.

- a. Clear plastic container marked “A” containing cooked meat and rice.
- b. A one-liter plastic bottle “B” containing clear liquid.
- c. A colourless plastic container marked “C” containing stomach content.

Examination Required: Toxicological screening

Methodology: UV-vis spectrophotometry, thin layer chromatography.

Findings and Conclusions: The above exhibits were analyzed and an organophosphate based pesticide was detected in the stomach content sample marked “C” and in in the cooked meat and rice sample marked “A”. No other chemically poisonous substance was detected in all the other samples.

N/B: Organophosphate based pesticides are fatal when ingested.

7. Further, the prosecution relied on the evidence of PW2- Laban Indieme, an Engineer by profession working in a project located at Kakuma. He had admitted to having met the deceased Benjamin who was also one of the Assistant Engineers at the site which was being managed by the Kenya National Highways Authority. According to PW2, on the 4th of July 2022 on or about one o'clock, one of the Staffs informed him that the deceased Benjamin was not responding when they checked him at his residence. This information led PW2 to inform the police who secured the scene and the investigations were commenced which were followed with the arrest of the arrested person. He also informed the court that accused person was apparently cohabiting with the deceased although he did not know the nature of their relationship.
8. In this same discourse, the prosecution targeting to discharge the burden of proof summoned the evidence of Paul Mboya Otieno, a resident of Meru and an Engineer based at Kakuma. He acknowledged knowing Benjamin the deceased as his colleague, an Assistant Engineer on the project at Kakuma. The witness recalled very well the events on the night of 4th and 5th July 2022. He was actually sleeping in his house when the two drivers attached to the project came knocking and informed him that the deceased life seemed non-responsive when they visited the house on the invitation by the



accused. That is when PW3 made the decision to visit the deceased's house and on arrival, the accused was on the floor crying. That is also the first time when he learnt that the accused and the deceased cohabited together and boyfriend, girlfriend relationship. What followed was a report made to the police to initiate investigations on how the deceased met his death.

9. Finally, the prosecution also placed reliance on the testimony of PW4, Dr. Ekiru, a Medical Officer working with the County Government of Turkana who apparently carried out a post mortem on the body of the deceased and established the following injuries; scratch on the left axillary region, collapsed right lungs attached to the ribs, left lung with massive pulmonary oedema and blood in the heart chambers. As a result of his examination, PW4 formed the opinion that the cause of death was cardio pulmonary arrest due to pulmonary oedema and chronic obstructive airway disease and heart attack.
10. From the prosecution perspective with the evidence on record, a prima facie case had been established to warrant the accused person to be placed on her defence under Section 306 and 307 of the Criminal Procedure Code. Therefore, the court having concurred with the submissions by the prosecution ruled in their favour and the accused was placed on her defence. Prior to these half-time submissions on the State case, the Accused was explained on her rights under the Constitution which included the rights to keep silent and not to give incriminating evidence in her defence.

Defence Case Summary

11. As a result of these directions on a prima facie case, the accused elected to give a sworn evidence whose highlights were as follows on oath. That she was a resident of Kakuma who used to work for a Chinese company. That she knew the deceased whom they cohabited together as a spouse. That on the fateful day, they were together when they were visited by some friends. The deceased wanted to have sex with her but he was not able to do it even with several attempts. In that same night, the accused told the court that he asked the deceased to go and see the doctor to treat the condition of erectile dysfunction. In the meantime, she cooked some pilau and served it for them to enjoy the family meal. Besides this, the accused explained to the court that the deceased opened the fridge and served himself a red bull. As the events of the day went along, they all departed for their work stations and in the evening on reporting back, the deceased went to their bedroom. There was again some debate between the accused and the deceased on what to be served on the evening menu. Again, according to the Accused, she was invited to join the deceased so that they can watch Netflix. That is when he started complaining of high heart beat and a conversation ensued for him to go to the hospital. However, that was never to be for each one of them retired for the night. The accused told this court that in the night she was surprised to notice that the lights of the room were on and the deceased was complaining of some chest issues. She decided to seek help from the neighbours but in a little while the deceased passed on and that's how she was arrested and charged with the present offence of murder.

Analysis and Determination

12. In light of the foregoing background, and upon considering the evidence presented and the submissions made, my primary duty is to determine whether the prosecution has proved beyond reasonable doubt that the accused person is responsible for killing the deceased Benjamin Were Nyandega.
13. The prosecution evidence is appraised as against the provisions of Section 107(1), 108 and 109 of the Evidence Act, which provides as follows:

107:



- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- 108: The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.
- 109: The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
14. I put reliance in the decision of the case of *Mbugwa Kariuki v The Republic* [1976-80] 1 KLR 1085 where the emphasized: “That the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.
15. The State bears the initial burden of proof for all the essential elements of an offence beyond reasonable doubt for the accused to be convicted. This burden may only appear to shift to the accused in two situations: first, in the exceptional circumstances outlined under Section 111 of the *Evidence Act*; and second where the defence raised falls under recognized legal grounds such as insanity, justification, excuse, self-defence, provocation or other legal presumptions. In defences such as self-defence or provocation, the accused does not dispute the facts alleged by the prosecution but instead admits the act or omission and seeks to justify or excuse it to avoid criminal liability. Other defences such as insanity aim to exempt the accused from liability due to mental incapacity as is alleged in the present case.
16. Article 50(2)(a) of the *Constitution* of Kenya 2010 guarantees that an accused person is presumed innocent until proven guilty, whether through direct or circumstantial evidence. Direct evidence establishes a fact outright, while circumstantial evidence supports the inference of a fact indirectly. In *People v Bretagna* (298 NY 323, 325-326 [1949]) the court addressed itself in the following language:
- “Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. * * * Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred” see *People v Hardy*, 26 NY3d 245, 251 [2015] By contrast . . . direct evidence ...requires no inference to establish (a particular fact)”; *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]”
17. An examination of the facts of this case shows that it is based entirely on circumstantial evidence. According to *Black’s Law Dictionary*, circumstantial evidence is indirect proof that, on its own, does not establish a fact in issue but leads to a logical inference of its existence. Put simply, it is evidence that supports the existence of a fact by proving other events or circumstances from which the fact can reasonably be inferred. It is a well-established principle in law that any offence must consist of both mens rea (the mental element) and actus reus (the physical act). The trial court has a duty to ensure



that, before entering a conviction, both elements have been established beyond reasonable doubt. In the case of *Joseph Kimani v R* [2014] eKLR, the following ingredients of the offence of murder must be proved beyond reasonable doubt without any conjecture or suspicion.

- a. The fact of death of the deceased
 - b. The death was unlawfully caused
 - c. The death was caused with malice aforethought
 - d. The accused persons participated in or caused the death of the deceased.
18. Section 203 defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
19. The first ingredient is the proof of death. From the case at bar, there is no dispute about the deceased's death. The post-mortem report by PW4 confirms the cause of death of the deceased as cardiopulmonary arrest due to pulmonary oedema, chronic obstructive airway disease, and heart attack. PW1's toxicology report found a fatal pesticide in the stomach contents and food consumed. The cause of death therefore appears linked to ingestion of a poisonous substance.
20. The next ingredient to be determined by this court is whether the death of the deceased, Benjamin Were Nyandega was unlawful act or omission. It must be presented in evidence that the victim of the murder suffered either physical or bodily harm as a result of the unlawful act of omission or commission. Moreover, that the evidence demonstrates beyond reasonable doubt that the injuries inflicted leading to the loss of survival of a human being as known in law were unlawfully executed. It is therefore necessary to appreciate the scale of evidence on this ingredient as submitted before this court by the prosecution. In the present case, directly, the flow of evidence by the prosecution witnesses point out to the Accused person as the perpetrator.
21. In murder cases causation is a central issue. The prosecution must adduce evidence connecting the acts or omissions which contributed or caused the death of the deceased. The Prosecution establishing the cause of death is non-negotiable in so far as section 203 of the *Penal Code* is concerned. The allegedly causative acts or omissions need not to be the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death (The maxim here is that of acts or omission which occasion the acceleration of death). The provisions of S
22. ection 213 of the *Penal Code* which defines causing death to include acts which are not the immediate or sole causes of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances;
- a. He inflicts bodily injury on another person and as a consequence of the injury the injured person undergoes a surgery or treatment which causes his death;
 - b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or/and proper precautions as to his mode of living;
 - c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused;



- d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
 - e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.
23. In the case of *R v Gusambisi s/o Wesonga* (1948)15 EACA 65, every homicide is unlawful unless rebutted by evidence that it was either justifiable or excusable. These principles bring into play the provisions under section 17 on self-defence and section 207 as read with 208 of the [Penal Code](#) on provocation. In this respect any potential defences to the unlawful acts which causes death have been excluded in respect of all of that range of acts which caused the fatal injuries leading to the victim succumbing to death. That those acts or omissions done by the offender were in the prosecution of an unlawful purpose to endanger human life. As a matter of emphasis, the element of unlawfulness to cause death in exceptional circumstances is excusable by law in the event of an accident, natural causes, insanity self-defence and also provocation.
24. Article 26 (1) of the [Constitution](#) guarantees every person the right to life. Therefore, no person is permitted to kill or cause the death of another person unless otherwise as provided for in our constitution or any other enabling statute. The law in Kenya presumes every homicide to be unlawful unless it is accidental or excusable or authorised by law. On this ground the court has to take into account the guidelines in *Juma Lubanga v R* (1972) HCD in which the court made the following observations: “Grievous harm as defined in the [Penal Code](#) involves a consideration whether the harm is such as seriously to interfere with the health or comfort, and the answer to the question may depend on the nature of the injury and the circumstances of the case.”
25. PW1’s toxicology report found a fatal pesticide in the stomach contents and food consumed by the deceased and thus, the presence of a fatal pesticide in the deceased’s food strongly suggests an unlawful act. There is no evidence to suggest accidental ingestion from the environment. This was not opposed by the defence. In the circumstances, I am persuaded beyond reasonable doubt that the deceased, Benjamin Were Nyandega died of an unlawful act.
26. The other question is whether it was the Accused who unlawfully caused the deceased’s death. None of the prosecution witnesses actually saw the subject kill the deceased. In essence, the prosecution case was based on circumstantial evidence. In [Abamad Abolfathi Mohammed and Another v Republic](#) [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: - “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



27. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows: “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

28. PW3, Paul Mboya Otieno, a resident of Meru and an Engineer based at Kakuma testified that he recalled very well the events on the night of 4th and 5th July 2022. He was actually sleeping in his house when the two drivers attached to the project came knocking and informed him that the deceased life seemed non-responsive when they visited the house on the invitation by the accused. That is when PW3 made the decision to visit the deceased’s house and on arrival, the accused was on the floor crying. That is also the first time when he learnt that the accused and the deceased cohabited together and boyfriend, girlfriend relationship.

29. On her defence, the Accused stated that on the fateful day, they were visited by friends. Later that night, the deceased unsuccessfully attempted to have sexual intercourse with her, leading her to suggest he visit a doctor. She prepared pilau for them to share, and the deceased also drank a Red Bull from the fridge. Later in the evening, the deceased complained of a high heartbeat, but they both went to bed. In the middle of the night, he complained of chest problems. She sought help from neighbours, but he passed away before medical assistance arrived. She denied poisoning him.

30. From the evidence adduced by the prosecution, it is clear that the Accused person was the last person to see the deceased prior to his death. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene of the incident as the person who was last seen with the deceased before he died, the Accused person herein has a duty to give an explanation of how the deceased met his death. In the Nigerian case of *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 I LAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

31. Moreover, I take note that the deceased ate the food prepared by the Accused on the night in question, the toxicology confirmed the same food contained the pesticide and that no evidence of other persons having prepared or tampered with the food. The Accused person in this case is thus required to offer an



explanation on how the deceased met his death. Sections 111(1) and 119 of the [Evidence Act](#) provides as follows:

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

32. In the circumstances of this case, it is my view that the Accused person defence failed to offer any explanation as to how the deceased might have met her death. Her defense, in my mind, amounted to a mere denial. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the Accused who unlawfully caused the deceased’s death.

33. Finally, on the question of whether there was malice aforethought on the part of the Accused, section 206 of the [Penal Code](#) defines Malice aforethought as follows:

“ 206. 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;
- (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.”



34. The manifestation of malice aforethought was articulated in *R v Tubere S/O Ochen* [1945] 1 E.A.C.A. 63, where Justice Sir Sheridan established that the court must consider:

“The weapon used i.e. whether it was a lethal weapon or not; The part of the body that was targeted i.e. whether it is a vulnerable part or not; The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and The conduct of the accused before, during and after the incident.”

35. On the other hand, where there is no expression of intention to kill from the guidelines in Tubere Case Supra the Court can exercise discretion to infer such intention based on evidence from the accused’s conduct and circumstances surrounding the commission of the offence and conclude that such an intent existed in accused’s mind.

36. A finding on murder with actual intention is sustainable in the circumstances of this case. The prosecution managed to demonstrate that at all material times the accused person cohabited with the deceased and on this very day she happened the only person to be in the company of the deceased. There was no intervening factor or person who could have committed this offence except the accused person. She even gave a chronology of the chain of events on what transpired on the 4th going to the night between 4th – 5th July 2022. The food which the deceased may have consumed was prepared and served upon the deceased by non-other than the accused. The very classified information on what transpired on the fateful day can only be answered by the accused under Section 111 of the *Evidence Act*. I do not think in my evaluation of this evidence in its entirety that burden under Section 111 of the *Evidence Act* was discharged against the prima facie case presented by the prosecution. I have no doubt in my mind that the prosecution has managed the offence of murder with legal intent. The graphic details of the injuries arising out of the poison in the food which was consumed by the deceased caused his death as stipulated in the Penal Code for the offence of murder to be sustained.

37. In the context of the above discussion on mens rea and actus reus, poisoning would fall squarely within a pre-conceived plan to cause death or grievous harm, thereby satisfying the element of malice aforethought as defined under section 206 of the *Penal Code*. The use of poison is inherently a deliberate and calculated act, it is not something that ordinarily occurs accidentally in circumstances leading to death. Section 206(a) expressly provides that malice aforethought shall be deemed established by proof of an intention to cause the death of or grievous harm to any person. Administering poison by its very nature demonstrates premeditation: the perpetrator must have procured the substance, decided on the means of administration, and chosen the time and manner of delivery. These steps indicate a settled plan rather than a spontaneous act.

38. Further, poisoning often involves concealment whether in food, drink, or medication thereby denying the victim the opportunity to detect or avoid harm. This element of deceit reinforces the conclusion that the act was planned in advance, with the conscious objective of ending life or inflicting serious injury. I take note that PW1’s toxicology report found a fatal pesticide in the stomach contents and food consumed. The cause of death therefore appears linked to ingestion of a poisonous substance. In particular, according to PW1, the following exhibits were received from the CID Headquarters at Turkana West, INQ, 1/2022.

- a. Clear plastic container marked “A” containing cooked meat and rice.
- b. A one-liter plastic bottle “B” containing clear liquid.
- c. A colourless plastic container marked “C” containing stomach content.

Examination Required: Toxicological screening



Methodology: UV-vis spectrophotometry, thin layer chromatography.

Findings and Conclusions: The above exhibits were analyzed and an organophosphate based pesticide was detected in the stomach content sample marked “C” and in in the cooked meat and rice sample marked “A”. No other chemically poisonous substance was detected in all the other samples.

N/B: Organophosphate based pesticides are fatal when ingested.

39. Further to the above, PW4 – Dr. Ekiru, Medical Officer conducted the post-mortem and in his report, he noted a scratch on the left axillary region, collapsed right lung, massive pulmonary oedema in the left lung, and blood in the heart chambers. He concluded that the cause of death was cardiopulmonary arrest due to pulmonary oedema and chronic obstructive airway disease and heart attack.
40. In sum, it is my considered view that the prosecution has proved beyond reasonable doubt that the accused administered poison to the deceased, the act which strongly supports a finding of malice aforethought on the basis of pre-conceived intention to kill.
41. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the offence of murder against the Accused person beyond reasonable doubt. I record and enter a finding of guilty and conviction against the Accused person as charged.

Sentence

42. It is now the duty of this court to determine the appropriate sentence to be imposed for this offence against the accused person. Before the advent of the dicta in *Francis Muruatetu & Anor v The Republic* [2017] eKLR the only sentence available for an accused person who commits the offence of murder contrary to Section 203 of the *Penal Code* and subsequently found guilty and convicted he or she will suffer death as a mandatory sentence. The Supreme Court rendered the mandatoriness of the death penalty unconstitutional drawing from the foundation of our Constitution specifically the Bill of Rights. The apex court in settling this issue provided various guidelines for the trial courts trying the offences of murder under Section 203 of the *Penal Code* in so far as sentence is concerned.
43. One of the key discussion point by the Supreme Court was that of mitigation and this is what was observed by the Bench:

“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”

“We now lay to rest the quagmire that has plagues the court with regard to the mandatory nature of Section 204 of the Penal Code. We do thus 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 Articles 25(c), 28, 48 and 50(1) and (2) (g) of the *Constitution*.”
44. In answering this question of sentencing the sentencer is to be guided by the *Sentencing Policy Guidelines [2023]* which sets out the objectives and principles of sentencing. The Committee set up by the Chief Justice provided the following criteria as to what constitutes the principles underpinning the sentencing process;Proportionality: The sentence meted out must be proportionate to the



offending behaviour meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable, and intended impact of the offence as well as the responsibility of the offender. Equality/Uniformity/Parity/Consistency/Impartiality: The same sentences should be imposed for same offences committed by offenders in similar circumstances. Accountability and Transparency: The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing principles laid out in these guidelines. Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process. Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behaviour as a whole. More guidance is given on this in paragraphs 2.3.21 to 2.3.30. Respect for Human Rights and Fundamental Freedoms: The sentences imposed must promote, and not undermine, human rights and fundamental freedoms. Whilst upholding the dignity of both the offender (and where relevant, the victim), the sentencing regime should contribute to the broader enjoyment of human rights and fundamental freedoms in Kenya. Sentencing impacts on crime control and has a direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.

45. In the context of sentencing besides the statutory provisions, the constitutional binder is to be found in Article 10, 25 and 50 of the Constitution. Therefore as the trial court mirrors on the principles of sentencing, the verdict finally arrived at must reflect one, or two or a mixed grill of the following objectives:

- i. Retribution: To punish the offender for their criminal conduct in a just manner.
- ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offence.
- iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person
- iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.
- v. Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
- vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
- vii. Reconciliation: To amend the relationship between the offender, the victim and the community.
- viii. Reintegration: To facilitate the re-entry of the offender into the society.

46. In the instant case learned Counsel M/S Maryanne offered mitigation on behalf of the accused person with the following highlights:

The accused is a first-time offender with no prior criminal history and has lived a law-abiding life up to that point. Prior to his death, she lived peacefully with him and sought help when his health began to decline. Therefore, she had no intention of harming him. The accused was financially dependent on the deceased and has never shown any ill will towards him. She was seven months pregnant at the time of his demise and has since given birth while in



prison. The child requires her care as the sole parent. She also has two other minors who solely depend on her, and she is an orphan. The accused had no malice aforethought to cause the death of the deceased. The accused has been in prison since 2023.

47. This offence besides mitigation constitutes aggravating factors with a draw down of the accused having breached the trust accorded to her by the deceased and their relationship blossomed into a love affair although there was no solemnization of a valid marriage in the name and style under the *Marriage Act* 2014. The right to life is protected and guaranteed in Article 26 of the *Constitution*. It is the duty of every Kenyan to guarantee and protect this right in their homes, offices, communities so as to appreciate one of these greatest human rights ever endowed to every human being. The seriousness of this offence has one or two dimensions, first the manner in which the deceased was poisoned by his own girlfriend whom they were cohabiting with in the same house. Secondly was the harm and culpability of the accused, and for this court factors of intent, motive and circumstances surrounding the death all point to malice aforethought though the defence does not seem to agree with the court.
48. For those reasons I find no other compelling and exceptional circumstances to persuade this court to rule in favour of the accused to impose a non-custodial sentence. As for this offence I sentence the accused to 25 years imprisonment and the sentence shall incorporate pre-detention period under Section 333 (2) of the *Criminal Procedure Code*, for the period and commencement of it to run from third of February 2023. 14 days right of appeal explained.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 15TH AUGUST 2025

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Otieno for ODPP

Mr. Karanja Adv. h/b for MaryAnne

The Accused

