



**Republic v Tanui & another (Criminal Case 75 of 2019)  
[2024] KEHC 1629 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1629 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 75 OF 2019  
RN NYAKUNDI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**REPUBLIC ..... RESPONDENT**

**AND**

**PASCALINE JERUIYOT TANUI ..... 1<sup>ST</sup> ACCUSED**

**JANET JEMURGOR ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons Pascaline Jeruiyot Tanui and Janet Jemurgor jointly faced a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The brief particulars as to the commission of the offence are that on the 19/11/2019 at Kapket village in Moiben Sub County Within Uasin Gishu they jointly murdered Beatrice Kimaiyo. During the time of arraignment each of the accused person pleaded not guilty and it was therefore the duty vested with the prosecution to prove the elements of the offence as provided for in Art.50 (2) (a) of the Constitution beyond reasonable doubt. In this respect the following witnesses were summoned by the senior prosecution counsel Mr. Mark Mugun. On the part of the defence the accused persons were represented by legal counsel’s M/ S Kogo and Mr. Miyienda.
2. The summary of the prosecution case is captured as follows;
  1. PW1-Philip Kipkogei Kemboi testified as the husband of the deceased Beatrice Kimaiyo. In his testimony he also alluded to having known the accused persons as his neighbours within the village. That on 19/11/2019 he left his wife and went to work and on arrival at home he was informed that the deceased had been rushed to hospital. Thereafter, he received information that the accused persons has attacked his wife and from that incident she suffered fatal injuries. The body was taken to Moi Teaching and Referral Hospital for a postmortem examination



which showed she had suffered multiple injuries to the back and head inflicted by a sharp object like a knife.

2. PW2-Fridah Jeptoo testified that she was the deceased's daughter. On 19<sup>th</sup> November 2019 she went looking for casual jobs but was unsuccessful. She returned back home at around 1000Hrs and started helping the deceased with the household chores which included washing the family's clothes. While they were in the river washing their clothes, her mother noticed that the 1<sup>st</sup> accused kept staring at her. They brushed this off and went about their duties. When they got back home to prepare a meal, the 2<sup>nd</sup> accused came to where her mother was dragged her outside the kitchen and pushed her to the ground. She saw that 1<sup>st</sup> accused stab her mother about six times
3. As the 2<sup>nd</sup> accused was holding her down. They then left heading to the home of the 1<sup>st</sup> accused. She screamed attracting the attention of their neighbours who found her mother writhing in pain. They rushed her to the hospital and she was later informed that her mother had passed on. She identified the knife as the murder weapon together with clothes the deceased was wearing on the material day. She also-identified a wooden cooking stick as one of the weapons used by the accused persons.
4. PW3-Nancy Cherop Korir testified that she was the 1<sup>st</sup> accused's neighbour. On 19<sup>th</sup> November 2019 at around 1600Hrs she went to the home of the 1<sup>st</sup> accused to borrow salt. She met the accused persons having a discussion and when she requested for the salt, the 1<sup>st</sup> accused agreed but asked her to fit of all look after a small child as she ran an errand. The 1<sup>st</sup> accused then took a knife from the cupboard and told the 2<sup>nd</sup> accused that she was going to the home of the deceased. After a few minutes she heard someone screaming from the home of the deceased and when she stepped out, she found the accused persons. The knife that the 1<sup>st</sup> accused went away with had blood. The 2<sup>nd</sup> accused was bleeding from her forehead and her clothes also had blood. She testified that she then went immediately to the fence that separates the homestead of the 1<sup>st</sup> accused and the deceased. She found her bleeding and asking for help then collapsed. She left when the deceased was being taken to the hospital. This witness also identified the knife as MFI-I and the deceased's clothes as MFI-4.
5. PW4- Retired Chief Barnab Tarus Rono testified that on 19<sup>th</sup> November 2019 he was informed that the deceased had died after being stabbed by the two accused persons. Knowing that the villagers would most likely retaliate, he cautioned against releasing the information about her death. He then organized for police officers to be brought to apprehend the suspects. The police responded to his request and when they arrested the accused persons, she noticed that the 2<sup>nd</sup> accused was bleeding from her forehead. He escorted the team to the police station where the accused persons were kept in custody.
6. PW5 Corporal David Kibiwott testified that on 19<sup>th</sup> November 2019 he was on duty at Tembelio Police Post. PW4 notified him of the incident at Kapkatet village and expressed his fear that the suspect might be harmed by the villagers unless he acted swiftly. He went to the village in the company of the chief and was able to apprehend the suspects before they Were harmed by members of the public. He was also able to recover a broken wooden cooking stick with blood stains(MFI-2), Assorted clothes (MFI-4), a pair of canvas shoes (MFI-4) and a kitchen knife (MFI-I) which he handed over to the investigation officer.
7. PW6-Retired Sergeant Andrew testified that he was the investigation officer and after he was assigned to investigate the matter, he received a broken wooden cooking stick with blood stains, assorted clothes and pair of canvas shoes (MFI-4) and a kitchen knife with blood stains (MFI-



I) which he produced as exhibits in the matter. He sent blood samples from the deceased together with the recovered exhibits for analysis. The Government Analyst confirmed that the knife, cooking stick and clothes had the deceased's blood thus confirming the knife as the murder weapon. By mutual consent and in fulfilment of the provisions of section 143 of the Evidence Act, he was allowed to produce the Post-Mortem Form and the Government Analyst's report together with the accompanying exhibit memo form as exhibits. He was convinced that the accused persons committed the crime because they were identified by eye witnesses who recognized them in circumstances that favored positive identification.

### Defence Case

3. On the part of the 1<sup>st</sup> accused she denied ever being involved in the commission of the offence of killing the deceased. She narrated on the material day being at home when the 2<sup>nd</sup> accused came alleging that the deceased had referred to her as a prostitute. She then decided to report the matter to the in-laws to resolve the dispute which had been triggered by Beatrice. According to the 1<sup>st</sup> accused testimony in company of the neighbours and the 2<sup>nd</sup> accused, they decided to go to the home of the deceased to make attempts to sought out the conflict. Some kind of squabbles arose during that meeting as between the deceased and the accused's persons that is when the deceased entered into the house picked a cooking stick which she used to attack the 2<sup>nd</sup> accused. Sensing danger to her life the 1<sup>st</sup> accused told the court that she took flight from the scene. In addition, it is the testimony of the 1<sup>st</sup> accused that the deceased did not stop at that initial attack but she armed herself with a knife which she used to stab her by inflicting bodily harm. That second incident of assault occasioned a full blown fight she was only to see the 2<sup>nd</sup> accused on the ground having sustained some injuries. In a short while, the deceased was taken to the hospital at MTRH for treatment at around 6.00 p.m. Thereafter, the police came and effected an arrest in relation to the deceased death. On being cross-examined by the Senior Prosecution counsel Mr. Mugun the 1<sup>st</sup> accused alleged that the deceased had an affair with her husband and as if that was not enough, she also continued to refer to the 2<sup>nd</sup> accused as a prostituted. She however, confirmed that they had no grudge as between them and the deceased.
4. On the part of the 2<sup>nd</sup> accused in her sworn statement, she told the court that prior to the incident she had gone to visit the 1<sup>st</sup> accused. in the ensuing meeting the second accused testified that they had a conversation with regard to the conduct of the deceased of making false allegations impeaching her character. It was therefore, agreed that look for the deceased to sort out the bad blood between them and may be finally solve the conflict. That is how they ended up in the deceased house. In the course of their encounter the deceased armed herself with a cooking stick and a knife which weapons she used to inflict injuries upon the 1<sup>st</sup> accused. In the same vein the 2<sup>nd</sup> accused testified that the deceased used the same devices to hit her on the head inflicting bodily harm. That is the evidence by the defence which must be weighed against the case of the prosecution.

### Submission By The Prosecution Counsel

5. In addition to the evidence presented by the Senior Prosecution Counsel Mr. Mugun on behalf of the state he canvassed the issues to affirm that the duty vested with the prosecution to discharge the burden of proof of beyond reasonable doubt as against the accused persons has been surpassed. He invited the court to disregard the typology of self defence as argued and advanced by the accused persons. It is at that juncture Mr. Mugun invited the court to appreciate the principles in the following authorities; Anthony Ndegwa Ngari v Republic [2014] eKLR, Bonaya Tutu Ipu & another v Republic [2015] eKLR, Chesakit v. Uganda, Cr. App. No. 95 of 2004, Daniel Muthee v Republic [2007] eKLR, Victor Nthiga Kiruthu & Another v Republic [2017].



6. In a nutshell, it was the case for the prosecution that the two accused persons had a common intention which they executed on arrival at the deceased homestead and eventually identified as the perpetrators of the crime as defined under section 203 as read with Section 204 of the Penal Code. He therefore, urged this court to find the two accused person jointly guilty of the offence, proceed to convict and on undertaking sentencing hearing impose an appropriate sentence.

### **Submission By The Defence**

7. On behalf of the accused persons learned counsel Mr. Miyienda reiterated both the prosecution and defence case to demonstrate that the prosecution had failed to proof the elements of the offence of murder beyond reasonable doubt. Learned counsel was specific in his submissions that this is a case which should find it's safety net under section 17of the Penal Code on self defence. That means that in his appreciation of the evidence, the accused person's action and conduct was of necessity to preserve their right to life. Learned counsel further contended that the best to be deduced from the evidence can only fall squarely within the provisions of Section 202 of the Penal Code for the accused persons to be found guilty of a lesser offence of manslaughter. Learned counsel invited the court to find favour with the guideline principles in the following case law:

In criminal Appeal No. 39 of 2017 David Mwangi Monica vs Republic (2020) eKLR, in Palmer vs Republic (1971) AC 814, in Mokuva Vs Republic (1976-8) KLR EA 13.”

8. With that submissions the defence pursued a trajectory with differentia minimum with the prosecution as to the proper charge established by the prosecution.

### **Analysis And Determination**

9. The Onus to adduce evidence under Section 107 (1) of the *Evidence Act* to establish the guilt of the accused remains with the prosecution throughout the trial. Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist. In addition, section 109 of the Act provides, the burden of proof as to any particular fact lies on the person who wished the curt to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person.
10. In re Winship 397 US 358 (1970) the court succinctly summarized the concept of beyond reasonable doubt as follows;

“First in a Judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief the degree to which a fact finder is convinced that a given act actually occurred can, of cause vary. In this regard, a standard of proof represents and attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases “preponderance of the evidence” and “proof beyond a reasonable doubt” are quantitatively imprecise they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusion... the standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial where a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilt persons. but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative



frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In a criminal case... we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty... in the context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”

11. Similarly, in *Mbugua Kariuki v Republic* (1976) the court took this approach that the burden of proof remains on the state throughout, to establish the case against the accused beyond reasonable doubt. Where the defence raised an issue such as provocation, alibi, self-defense, 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. So what is the prosecution required to prove beyond reasonable doubt within the tenets of the law for the offence of murder to actualize a plea of guilty and conviction against an accused person?

12. In so far as Section 203 is concerned the court in the case of *Anthony Ndegwa Ngari* (Supra) set out the elements of the offence subject matter of the trial to be proven beyond reasonable doubt as’

- i. The fact of death.
- ii. The fact that deceased was caused by an unlawful act or omission.
- iii. That the accused committed the unlawful act which caused the death of the deceased and,
- iv. That the accused had malice aforethought.

The most distinct element when an offender is charged of murder, is for the prosecution to prove malice aforethought besides the fact of death and that his/her death was unlawfully caused. In this context under Section 206 of the Penal Code malice aforethought is defined as constituting where it is established by evidence providing inter alia either of the following circumstances:

- a. An intention to cause the death of any person, whether such person is the person actually killed or not or
- b. Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

13. The contention by the accused persons is that the prosecution did not discharge the burden of proof for the offence of murder as known in law, if anything the scanty evidence leans towards a lesser charge of manslaughter that in any case no evidence of malice aforethought was adduced. In evaluating the evidence, we adopt the approach of itemizing each ingredient to have it analyzed against the evidence for the prosecution with a rejoinder from the defence.

- a. That whether the deceased Beatrice Kimaiyo is dead?

The answer to this question is deducible from the testimony of PW1 as the husband to the deceased and PW2 who testified as the daughter to the deceased. On the other hand, on death of the deceased medical evidence of the pathologist being an autopsy report dated 26/11/2019 speaks for itself as admitted in evidence marked as exhibit 1.



14. The second ingredient comprising of the offence of murder is unlawful act of causing death. In determining whether such an unlawful act occurred I must consider whether the prosecution has established unlawful act which had been committed caused the death of the deceased. According to PW2 on 19/11/2019 at the close of business of the day, she returned home at around 10:00 hrs and started helping the deceased with household chores. While they were in the river washing their clothes the deceased noticed that the 1<sup>st</sup> accused kept staring at her. Further PW2 stated that on finishing washing clothes they went back home to prepare the evening meals. In a little while the 2<sup>nd</sup> accused came to their homestead dragging the deceased out of the kitchen pushing her to the ground, soon thereafter the 1<sup>st</sup> accused armed with a knife stab the deceased about six times as the 2<sup>nd</sup> accused held her to the ground. This testimony by PW2 was corroborated with that of PW3 who told the court that on 19/11/2019, at around 16:00 hrs she was at the home of the 1<sup>st</sup> accused to borrow some salt. As the 1<sup>st</sup> accused agreed to that request it was conditioned on PW2 remaining to take care of the child as she ran some errands. It is on record from PW3 evidence that she saw the 1<sup>st</sup> accused person taking a knife from the cupboard and at the same time invited the 2<sup>nd</sup> accused to join her in visiting the home of the deceased. It did not take long PW3 heard screams from the home of the deceased and on stepping out saw the second accused with injuries to the forehead and blood oozing body. That same moment PW3 saw the deceased being rushed to the hospital. The investigation officer recovered, a wooden cooking stick with blood stains and a knife with blood stains. According to PW6 the recovered exhibits handed over by PW5 were subjected to the DNA analysis by the Government Analyst who prepared a report dated 22/4/2020. The DNA profile generated established that the blood stains in the exhibits matched the DNA blood sample of the deceased. Ultimately from the evidence of the witnesses it is beyond reasonable doubt to conclude that the death of the deceased was unlawfully caused.
15. The third ingredient is that of malice aforethought as defined under Section 206 of the Penal Code. Turning to postmortem report the deceased suffered multiple stab wound of almost the same size. The deepest wound on the left thigh cutting through the femoral artery 3x1 cm, right leg posterior 2x1 cm, 2x1 cm and 4x2 cm, right side of the chest posterior/back 2x1 cm and 2x1 cm. As indicated by the pathologist as a result of the examination the cause of death of the deceased was severe hemorrhage due to stab wounds. The evidence in the case from PW2, PW3 and further circumstantial evidence from PW4, PW5 and PW6 overwhelmingly discloses that the accused persons intended to cause grievous harm to the deceased by stabbing her with a knife. In this case the DNA profile from the wooden cooking stick and the knife having been subjected by the government analyst matched the DNA profile of the deceased one Beatrice Kimaiyo. The term grievous harm in our Penal Code is defined as “any harm which amounts to a main or dangerous harm, or seriously or permanently injures health or which is likely to injure health or which intends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense.” The injuries to the deceased body demonstrates the accused person’s intentions to cause her death. This brings in the resistible inference of the application of Section 21 of the Penal Code to the facts of this case. It provides as follows;
- “When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.
16. The test as to whether common intention has been proven by the prosecution beyond reasonable doubt was delved into in the valued judgements of the courts in *Njoroge Vs Republic* 1983 KLR 197 in which it was held that “If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provide that the death



was caused by act of someone of the party in the course of the endeavors to effect the common object of the assembly.” This was also the position taken by the court in Republic Vs Cheya 1973 EA “That the existence of common intention being the sole test of total responsibility it must be proved that the common intention was as that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under the section. It is only when a court can with some judicial certitude hold that a particular accused must have pre-conceived or premeditated the result which ensued or acted with others to bring about that result that this section can be applied.”

17. In this circumstances of this case the common intention as harbored by the accused persons can be found in the evidence of PW2, PW3, P4 and PW5. I am convinced that the accused persons travelled together to the home of the deceased while armed with a knife mainly intended to be used as a weapon to inflict serious harm upon the deceased. It is also clear from the prosecution case that the deceased was dragged from her kitchen pushed to the ground as one of the accused held her hostage the other accused used the opportunity to inflict multiple stab wounds as opined by the pathologist in the postmortem report. That evidence surrounding the attack at the close of the trial was never controverted by the defence testimonies from the accused persons. It is sufficient therefore, to draw an inference that besides malice aforethought the accused persons executed the murder with a common intention.
18. In this trial the findings of the court would be incomplete without the aspect of whether the accused persons were placed at the scene of the crime. To test carefully identification evidence I rely on the threshold guidelines in the case of R v Turnbull and others (1976) 3 ALL ER 549 where Lord Widgery CJ had this to say;

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification or the accused which the defend alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance, in what light, was the observation impeded in any way, as for example by passing traffic or a press of people, had the witness ever seen the accused before, how often, if only occasionally, had he any special reason for remembering the accused, how long elapsed between original observation and the subsequent identification to the police, was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.”

The [Evidence Act](#) Dictionary of New South Wales defines identification evidence in the following terms;

- a. An assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where;
  - i. The offence for which the defendant is being prosecuted was committed or



- ii. An act connected to that offence was done,  
At or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time or
- b. A report (whether oral or in writing) of such an assertion.

19. In this murder scene involving the deceased material identification evidence came from the testimony of PW2, PW3, PW4 and PW5. For PW2 & PW3 the question of relevance of their evidence is that of them having prior knowledge of the accused persons to reach a conclusion about the identity. This is therefore, an obvious case of recognition and no difficulties arose as to the witnesses evidence of recognition of the accused persons depicted as the assailants who fatally inflicted serious harm against the deceased. There was no need for an identification parade with regard to the identification evidence adduced by the prosecution placing the two accused persons at the scene. The well recognized considerations emerge from the testimony of PW2 & PW3 whose evidence was never negated by the defence.

20. By dint of the defence case the prosecution case is presumed not to have been proven beyond reasonable doubt for reasons of provocation as defined under Section 207 & 208 of the Penal Code. It is the law in Kenya culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who cause death does so in the a heat of passion caused by sudden provocation.

Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool.

Whether any particular wrongful act or insult, whether may be tis nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact provided that no one shall be deemed to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in or to provide the offender with an excuse for killing or doing bodily harm to any person.

21. In the case of Mancin 1942 ALL ER it was observed that “To retort in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short the mode of retaliation must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.”

If the defence elected the rely on the evidence that the accused persons by reason of the usage of the word prostitute by the deceased in reference to impute bad character against the 1<sup>st</sup> accused any such evidence of provocation is a question of law. Whether indeed the accused persons where deprived of the power of self-control and therefore inducing them to commit the act of murder are also question of facts which were not presented before this court to contradict the case of the prosecution. So the fact is provocation being a question of law and for it to exist in particular circumstances such factual characteristics is a matter of evidence.

22. For purposes of section 207 and 208 of the Penal Code provocation may be triggered by things done or by things said or by both together but it does not include anything said or done which was incited or sought by the offender to provide himself/herself with what might appear to be an excuse or justification for killing or doing bodily injury to or assaulting any person. It does also not include



anything said or done by any other person than the deceased unless in cases in which that other person in doing or saying what he did was acting at the instigation or in concert with the deceased. The provisions are not also applicable where the offender follows up the incident long after the alleged provocation had occurred. Again for one to avail himself or herself the defence of self flowing from provocative acts or conduct must have carried out the attack under the influence of extreme mental or emotional disturbances for which there is reasonable explanation, justification or excuse. In the case of the accused persons, this formulated test of provocation does not apply to their circumstances to have constituted a reasonable excuse for the loss of self-control on their part to proceed and arm themselves with a knife to the extent of inflicting fatal injuries upon the deceased. No one anticipates that an offender would plan to execute a homicide at the door step of his/her domicile territory. Undoubtedly, this is what the accused persons did in the killing of the deceased.

23. The logic and analogy of the situation and in a wide variety of circumstances or relationship on provocation and deprivation of self-control was profoundly revisited in the persuasive case of *Regina v McGregor* (1962) NZLR 1051. “That it implies as sudden transition to a state, necessarily temporarily during which the power of self-control is absent and that for the moment the accused is not master of his mind. The court went on to consider the meaning of the expression “an ordinary person but otherwise having the characteristics of the offender.” The judges thought that this new expression of the ordinary man must have been to give some relief from the rigidity of the purely objective test of the reactions of a reasonable man and they interpreted the legislature’s intention as being to provide a defence for a person with the power of self-control of an ordinary person but nevertheless having some personal characteristics of his own. So that his reaction to provocation is to be judged on the basis whether the provocation was sufficient to bring about loss of self-control in an ordinary person who nevertheless possessed as well the special characteristics of the offender.”

“The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence of warrant its being regarded as something constituting part of the individual’s character or personality. A disposition to be unduly suspicious or to lose one’s temper readily will not suffice nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility. These matters are either not of sufficient significance or not of sufficient permanency to be regarded as “characteristics” which would enable the offender to be distinguished from the ordinary man. The unusually excitable or pugnacious individual spoken of in *R Vs Lesbini* is no more entitled to special consideration under the new section than he was when that case was decided. Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor.

The word characteristics in the context of this section is wide enough to apply not only to physical qualities but also to mental qualities and such more indeterminate attributes as colour, race and creed. It is to be emphasized that of whatever nature the characteristics may be, it must be such that it can fairly be said that the offender is thereby marked off or distinguished from the ordinary man of the community. moreover, it is to be equally emphasized that there must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic. In short, there must be some



direct connection between the provocation words or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test. Such a connection may be seen readily enough where the offender possesses some unusual physical peculiarity. Though he might in all other respects be an ordinary man, provocative words alluding for example to some infirmity or deformity from which he was suffering might well bring about a loss of self-control. So too, if the colour, race or creed of the offender be relied on as constituting a characteristic, it is to be repeated that the provocation words or conduct not be sufficient, for instance, for the offender to claim merely that he belongs to an excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again, characteristic before it can be relied upon.

Special difficulties, however, arise when it becomes necessary to consider what purely mental peculiarities may be allowed as characteristic. In our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded. To allow this to be said would...deny any real operation to the reference made in the section to the ordinary man, and it would, moreover, go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it. there must be something more, such as provocative words or acts directed to a particular phobia from which the offender suffers. Beyond that, we do not think it is advisable that we should attempt to go.”

24. In so far as the accused persons are concerned the truism of their defence failed the threshold of the principles as set out in cases of *Katana Kaka Alias Benson & 2 Others vs Republic COA CRA. No. 93/2014* and *Joseph Kipkoech Kurgat vs Republic COA CRA. 73/2009*. In a nutshell the defence of self based on provocation lacks merit and the same is dismissed. As for the prosecution case, the evidence presented promotes the doctrine of a charge of murder proved beyond reasonable doubt. To that extent the two accused persons are found guilty and duly convicted of the offence under section 203 as punishable in section 204 of the Penal Code.

### Sentence

25. The court had the opportunity to consider submissions on behalf of the convicts as canvassed by learned counsels Mr. Miyenda for the 2<sup>nd</sup> accused and MS Kogo for the 1<sup>st</sup> accused. In reference to mitigation by learned counsel Mr. Miyenda on behalf of the 2<sup>nd</sup> accused, he had this to say;

Janet Jemurgor is a single parent of 3 children aged 13,9 and 5 respectively. The children are under the care of her aged parents. The father of Janet Jemurgor is a patient of diabetic while the mother is a patient with a heart condition. Both of them are under medical attention by the doctors and are straining to look after the children of Janet. The family of Janet Jemurgor has held some discussion with the family of the deceased and the deceased's family have said that Janet Jemurgor did not participate in the actual murder of the deceased.

Janet Jemurgor, while in prison, contracted a serious illness for which she has severally been admitted at MTRH Eldoret and she has been transfused severally time.

We urge the honorable court to consider the above facts and grant Janet Jemurgor a non-custodial sentence so that she can seek better treatment and take care of her little children.

26. According to probation officers report, dated 11/12/2023 it was contented that the convict was born in 1993 and after a while she was blessed with 2 children and she prays for leniency arising out of her involvement in the commission of the crime. From the home based interview, the probation officer urged the court to exercise discretion in arriving at the best outcome on punishment. Whereas, on the



part of the 1<sup>st</sup> convict it is stated in the probation officers report that she is a child from a family of 7 siblings. She is a person not to have committed any offence prior to the current incident. She was born in 1995 and schooled at Kapilol secondary school and upon graduation she got married and thereafter their union was blessed with 2 children. She also prays for leniency from the seat of justice of this court.

27. When the probation officer interviewed the victim family as part of their contribution the sentencing process the following statement captures the tone and impact as to what they seek for in our justice system.

The deceased husband, siblings and mother have not forgiven the offender. They indicated that, they accepted the first reconciliation gesture from the offender family. However, they have not initiated any further reconciliation process as per Kalenjin culture. They felt that, the offender's family do not understand the gravity of the incident to their psychological makeup. Since the offender is a mother, a wife and a daughter just as their kin was. It's their opinion that, the accused person deserved a deterrent punishment.

In this respect learned Senior Prosecution counsel submitted that in imposing appropriate sentence the court should take into account that the convicts are both first offenders with no previous convictions however, the offence committed was premeditated resulting in the loss of life. He reiterated that the discretion to be exercised towards rendering a just custodial sentence for the offence.

28. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 to be the following: -

- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
- 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
- 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- 5) Community protection: to protect the community by incapacitating the offender.
- 6) Denunciation: to communicate the community's condemnation of the criminal conduct.

In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -

- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
- b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
- c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
- d) Protection of the community: - where the offender is likely to pose a threat to the community.



- e) Offender's responsibility to third parties: - where there are people depending on the offender.
- f) Children in conflict with the law: - non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.

29. The court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017]eKLR cited the decision of the Supreme Court of India in *Alistar AnAnthony Pereira v State of Maharashtra* at paragraph 70 – 71 where the court held the following on sentencing;

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence”

30. The imposition of an appropriate sentence in Kenya is a difficult task even with the guideline principles in the various jurisprudential decisions and the sentencing policy guidelines of the judiciary 2023. This is because every case has its colours and every sentencing court approached the determination of an appropriate sentence subjectively depending fundamentally on the courts assessment of the matter before it. It is not lost for this court to bear in mind that there are relevant factors which have been alluded to in mitigation, aggravating components of the case and pre-sentence report of both convicts. There is no doubt that all those further compounds the already complex nature of the exercise of sentencing discretion. The practicability of the matter can be seen from our repository that judges are individuals and if three different judges are given the same factual matrix case and they are invited to impose an appropriate sentence I can't hesitate to observe that that there would be three different sentences outcome of that case. What is the saving grace in such a scenario so long as their verdicts are not far apart? It is for this reason for this particular case I take into account “the circumstances in which the crime was committed such as to render it necessary for me to impose a sentence of imprisonment. The killing was premeditated and planned. It was also carried out in the execution of a common purpose to kill the deceased. Giving all due weight to the enormity of the crime and the public interest in an appropriately need for a severe punishment being imposed for it. Consequently, each of the convict is sentenced to 30 years' imprisonment. The only rider is the application of section 333(2) of the CPC on sentence credit for pre-trial detention during their continued confinement to a residential prison facility. The above section though not couched in a mandatory language it mandates that credit be given to convicts for time served in official detention prior to sentencing. Various jurists in our legal system have employed several computing theories while attempting to interpret the true meaning of section 333(2) of the CPC. These typologies include the plain meaning rule, purposivism, internationalism and practical meaning. In essence each typology uses an objective set of criteria to



ensure proper interpretation of section 333(2) of the CPC under all circumstances and to restrain the judges' interpretive freedom. That is aimed at to give effect as to language in custody versus pre-trial detention ordered by court for an accused who is incapable of meeting the conditional release on bail under Art.49(1) (h) of *the Constitution*. It follows that in the committal warrant of the convict did the time spent in pre-trial custody before final order on sentence be computed and form part of the credit in the overall period to be served as pronounced by the court. For clarity the convicts were arraigned in court on 27.11.2019 and such calculation of the credit to take into account the commencement date. 14 days right of appeal explained to the convicts.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

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**R. NYAKUNDI**

**JUDGE**

