REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. E032 OF 2023

-BETWEEN-

RUTH WANJIKU KAMANDE ..... APPELLANT

-AND-

REPUBLIC ..... RESPONDENT

Being an appeal from the Judgment of the Court of Appeal at Nairobi (H. M. Okwengu, M. Warsame and J. Mohammed, JJ. A) dated 6th November 2020 in Criminal Appeal No. 102 of 2018

Representation:

Prof. Githu Muigai SC, and Ms. Wambui Muigai for the Appellant
Mohammed Muigai LLP

Ms. Fredah Mwanza and Ms. Magdalene Ngalyuka for the Respondent
The Director of Public Prosecutions (DPP)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal is predicated on the provisions of Article 163 (4) (b) of the Constitution; Section 15 (A) of the Supreme Court Act 2011; Rules 3 (5), 38 and 39 of the Supreme Court Rules 2020. It is filed pursuant to leave issued by the Court of Appeal on 6th October 2023.

[2] Principally, the matter certified as being of general public importance concerns the applicability of the battered woman syndrome as a defence under criminal law. While the Court of Appeal did not explicitly delineate questions of law to be determined by this Court, it accentuated that the battered woman syndrome is a fairly unexplored issue in Kenya, with limited judicial decisions thus far in existence, thereby creating an opportunity for interrogation by this Court.

B. BACKGROUND

[3] In the year 2015, the respondent charged the appellant with murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63. The particulars of the offence were that: on the 20th day of September, 2015 at Buruburu Estate within Nairobi County the appellant murdered Farid Mohamed Halim (hereinafter "*the deceased"*); who at the time was in a relationship with her.

C. LITIGATION HISTORY

i. Proceedings before the High Court

[4] On that account, the respondent instituted in the High Court, ***Criminal Case No. 93 of 2015*** against the appellant. It was the respondent's case that on 20th September 2015 at 9.00AM or thereabouts, screams and calls for help were heard from the house of the deceased, which he had rented from Ndwiga Gatugu Runyenje (PW7) and Harriet Muthanje Ndwiga (PW8), husband and wife respectively.

[5] As PW8 walked towards the deceased's house to find out what the matter was, she heard the deceased saying *"nisaidie, nisaidie amenidunga"* translated as *"help me, help me she has stabbed me"*. PW8 knocked on the door and loudly asked what was happening. Then she heard the deceased say, *"It is this one who has stabbed me"* followed immediately by the words *"I have been stabbed again*". At that point, PW7 arrived at the scene.

[6] Since the deceased's house was locked from the inside, PW7 was left trying to rescue the deceased as PW8 tried to find another way to access the house. When he looked inside, he saw the deceased standing facing the appellant who had her

back on PW7. The deceased was holding his abdomen and appeared to be in great pain, unable to release his hands. Meanwhile, the appellant was blocking the deceased from entering the kitchen where the keys to the house were located.

[7] Unable to access the house, PW7 sought the assistance of a neighbour to call police officers from Buruburu Police Station which was a kilometre away. Upon his return, he heard the deceased crying out that he had been stabbed again, along with screams coming from inside the bedroom. Peering through the window, he saw the appellant in the bedroom still holding a knife, while the deceased was kneeling beside the bed with his body leaning on it. By the time the police officers arrived, the deceased had already died.

[8] When the post-mortem examination was carried out on the body of the deceased, the Pathologist, Dr. Oduor Johansen (PW12), concluded from his observations that the deceased died of multiple injuries and blood loss due to penetrating force trauma, resulting from a total of 25 stab wounds to the chest, hands, head, abdomen, back, and shoulders, with intestines protruding.

[9] The appellant was also admitted to Kenyatta National Hospital and examined by two doctors. According to Dr. Muya, PW11, the appellant complained of assault from a sharp object and sexual assault. Upon examination, he found multiple soft tissue injuries on the chest and abdomen; on pelvic examination, her genitalia were normal; and the abdominal ultra sound scan revealed no injuries; and the chest x-ray showed no injuries or fractures.

[10] Further before trial, Dr. Maundu, PW13, examined the appellant to assess the degree of her injuries and mental status, and established that the appellant had cuts on the chest wall, abdomen, left hand and right leg. He classified the injuries as harm and found the appellant fit to stand trial. He added that the appellant did not complain of any sexual assault.

[11] When the appellant was put to her defence, she gave an unsworn statement. She stated that the deceased attacked her because, on that fateful morning, she had threatened to expose him to his family because of the AIDS report she had found concerning him. She alleged that as a result, the deceased became violent against

her, threw her on the bed, sat on her, and stabbed her several times on the chest, hand, thighs, and stomach with a knife he was carrying. By poking the deceased's eyes, she disarmed him and took the knife from him. While lying on the bed with the deceased seated on her, she stabbed him severally, eventually losing count of how many times.

[12] Upon hearing and considering the parties' arguments, in a Judgment delivered on 31st May 2018, the court (*Lesiit J, (as she was then)*) made certain findings before determining whether the respondent had established malice aforethought so as to bring the appellant's actions on the material day, for which she was charged with, within the purview of the offence of murder.

[13] The court found that it was undisputed that the appellant and deceased were living together and had a tense relationship. From the evidence of PW1, two days before the incident, the appellant was upset with the deceased for changing his phone PIN number and password, which made it difficult for her to access his phone messages. She went to the extent of taking his SIM - card and trying it in her phone in an attempt to access the deceased's phone content. The court further found that the appellant admitted to the extent that she changed the PIN to the deceased's phone. Aside from that, there was evidence that the appellant was crying and had followed the deceased when he went to work on that morning of 18th September 2015, leading him to warn her that he was going to call off their relationship.

[14] Moreover, the learned Judge determined that the appellant and the deceased had a tense night before the incident over love letters the deceased was keeping from his past relationships. This was witnessed by Edward Mwangi Gatonye (PW3), uncle to the deceased, who visited the deceased that night and found that the appellant had locked herself in the bedroom and was cold towards him. Further, that Serah Waithera Mohamed (PW4), sister to the deceased, stated that the night before, the deceased sounded uneasy but could not respond to her questions because he was with the appellant. The court found that the appellant admitted to her unusual behaviour of locking herself up in the bedroom when PW3

visited. She, however, explained that the reason she left them in the sitting room was because she was experiencing painful periods.

[15] On the *issue of malice aforethought*, the court found that when the incident occurred, according to the two eye witnesses (*PW7 and PW8*) who were the first to arrive at the scene, there was no one else in the house. They found the deceased and the appellant in a small space that was outside the kitchen but before the sitting room entrance. By that time, the deceased had been stabbed several times, and the appellant continued to stab the deceased intermittently right next to the kitchen. By the time they both moved into the bedroom, the deceased could no longer cry out for help. Consequently, the court established that the appellant and the deceased were not in the bedroom when the attack started, contradicting the appellant's defence.

[16] Moreover, considering the multiple stab wounds: nine (9) on the chest, several others on the abdomen, rib cage, backside, shoulder, back of the head, and on the legs on both the front and the back, totaling to 25, inevitably, it was illogical to conclude that at the time of these stabbings, the appellant was in a lying position while the deceased was seated above her. Besides, evidence from persons who entered the house indicated that there were blood stains all over the house which debunked the appellant's defence that the incident occurred only in the bedroom. Accordingly, the court held that from the evidence, it was clear that the deceased was on his feet both in the kitchen and corridor when the appellant attacked him.

[17] The learned Judge further held that the appellant climbed onto the sink to reach for the keys to the house after the deceased had already succumbed to his injuries. This taken together with the attestation that the appellant blocked the deceased from reaching the kitchen to get the keys where he normally kept them in order to escape from her, as well as the fact that the appellant stabbed the deceased 25 times all over the body intermittently, established beyond any doubt that the appellant had formed the intention to cause grievous harm or death of the deceased. Subsequently, the court held that the appellant inflicted each stab, not in a frenzy as she alleged, but deliberately and intermittently; her action was calculated to inflict pain and cause death slowly but assuredly; and was clear proof

of malice, of spite, callousness and hatred. As a matter of course, the court concluded that there was no doubt in its mind that the appellant's action was caused by malice.

[18] On *whether the action was provoked*, the learned Judge held that based on the events that took place between the appellant and deceased two days prior to the incident up to the night before, it was demonstrated that the appellant was extremely jealous of the deceased and harbored a huge grudge against him for having kept some cards sent to him while in school, six years earlier. In that vein, the court concluded that the appellant was manipulative, cried to get the deceased's attention, which ultimately led to him notifying the appellant that he was going to call off their relationship.

[19] Subsequently, the court discredited the explanation put forth by the appellant pleading provocation, to the extent that she had seen a document related to AIDS on the morning of the incident, which she said the deceased tore up when she threatened to expose him to the family. In view of the fact that among the exhibits recovered at the scene of the incident, no documents torn or otherwise were found, other than love cards were recovered and produced in court; the court held that the allegation of an AIDS Control document was an afterthought as nowhere did the defence raise the issue of such a document with any witness, not even with the investigating officers. Under those circumstances, the learned Judge dismissed the allegation, stating that even if such a document existed, it could not justify the appellant's actions on the material day.

[20] Concerning *self defence*, the learned Judge, relying on the Court of Appeal decisions of ***Ahmed Mohammed Omar & 5 vs. Republic*** [2014] eKLR and ***Njeru vs. Republic*** [2006]2 KLR 46 stated that, in order to find that the appellant was justified to take immediate defensive action, she had to determine whether the attack on the appellant by the deceased was serious putting her in immediate peril; and whether at the time of the stabbing, the attack on the appellant caused a crisis, putting her in immediate danger, in order to justify instant reaction to avert the danger.

[21] The court found that from the evidence adduced, the appellant was the one in control, because she had the knife in her hand, and used it over a period of time, a stab at a time until the deceased was no more, which negated the allegation that she was warding off an attack on herself. Likewise, considering that the deceased had 25 stab wounds all over his body, that could not be accepted as an act of self-defence. It found that the force used by the appellant on the deceased was neither reasonably necessary nor reasonable force.

[22] Similarly, the court dismissed the defence put forth by the appellant that there was a confrontation between her and the deceased. Based on the x-ray and abdominal scan conducted on the appellant, the court held that the appellant had no injuries that could be comparable to those sustained by the deceased. Regarding her admission to Kenyatta National Hospital and the examinations conducted on her, the court stated that the appellant had tried to fool everyone into believing that she was a victim. Her superficial injuries posed no real danger since no serious injuries were found, and her continued hospitalization was superfluous.

[23] Accordingly, the court was satisfied that the charge of murder against the appellant had been proved beyond reasonable doubt, and proceeded to convict the appellant of murder as charged under Section 203 of the Penal Code and sentenced to death as prescribed under Section 204 of the Penal Code in a judgment delivered as prescribed under Section 322 of the Criminal Procedure Code.

ii. Proceedings before the Court of Appeal

[24] Dissatisfied with the outcome, the appellant moved the Court of Appeal by filing ***Criminal Appeal No. 102 of 2018*** against her conviction and sentence. She raised twenty (20) grounds of appeal, seeking orders that, *inter alia,* the judgment and sentence delivered by the trial court be set aside in its entirety and in the alternative, that the judgment of the High Court be substituted with a finding of manslaughter and a sentence of time served be entered against the appellant.

[25] In a Judgment delivered on 6th November 2020, the Court of Appeal (*Okwengu, Warsame & J. Mohammed, JJ.A*) proceeded on the three issues of determination distilled by the appellant hinged on her grounds of appeal: (i)

whether the prosecution had proved the charge of murder; (ii) *whether the appellant's defence was inconsistent with a finding of guilty beyond reasonable doubt*; and (iii) *whether the appellant's sentencing was unduly harsh and failed to take into account her mitigation*.

[26] Cognizant of the standard and burden of proof beyond reasonable doubt, the appellate court in the first instance, determined that from the postmortem report and the testimony of PW12, the cause of death was multiple injuries and blood loss due to penetrating force trauma; coupled by the fact that the deceased and the appellant were the only persons in the house. The learned Judges therefore had no difficulty finding that the deceased's death was caused by the actions of the appellant.

[27] On *whether there was malice aforethought*, the learned Judges of the appellate court underscored that what constituted malice aforethought was the nature of the weapon used; nature of injuries suffered by the deceased; the conduct, before, during and after the incident; and the manner of use of the weapon. Consequently, the appellate Judges upheld the trial court's cogent and irrefutable picture of a person who meant by their action to kill. They were mindful that it was the appellant who inflicted the injuries that caused the deceased's death and held that, based on the nature of the injuries, it was evident that the appellant's actions were intended to result in death. They also found that the offence of murder was proved beyond any reasonable doubt in regards to malice aforethought.

[28] The Court of Appeal then proceeded to address each contradiction, discrepancy and inconsistency raised by the appellant. On the submission that the authorities blatantly mismanaged the investigations and allowed for tampering of evidence and that the testimonies of witnesses were riddled with inconsistencies as to the events that had taken place, which are errors and discrepancies that were overlooked; the learned Judges found that the appellant neither substantiated what evidence was tampered with nor how such tampering compromised the evidence that was gathered by the police.

[29] Subsequently, the Court of Appeal held that the alleged unreconciled contradictions, discrepancies and inconsistencies in the prosecution evidence, were either well explained in other testimony, inconsequential or adequately addressed by the learned trial Judge. In the end, the appellate court affirmed the decision of the trial court that the appellant violently, intentionally and unlawfully killed the deceased. Inescapably, the appellant's alleged defence of self-defence was unbelievable given the cogent and compelling evidence of the prosecution witnesses. Accordingly, the appeal was dismissed.

[30] Undeterred, the appellant filed ***Criminal Appeal (Application) No. 102 of 2018***, before the Court of Appeal, seeking leave to lodge an appeal in this Court. The appellant argued that the intended appeal raised fundamental points of general public importance on the battered woman syndrome. By a Ruling dated 6th October 2023, the Court of Appeal (*Asike-Makhandia, Murgor & Kantai JJ. A*) granted the leave sought to file an appeal before this Court. It is on this basis that this appeal has found its way to the Supreme Court

iii. Proceedings before the Supreme Court

[31] Pursuant to the leave granted, the appellant filed her appeal before this Court premised on the following two grounds:

1. *That the learned Judges of appeal erred in law by failing to appreciate and apply the doctrine of battered woman syndrome in their assessment as to whether the appellant's conduct was reconcilable with the defence of self defence; and*
2. *Both the superior court and the Court of Appeal erred in law in failing to appreciate that the appellant pleaded the defence of self-defence and led evidence in support of the defence; the prosecution's failure to affirmatively and conclusively repudiate each element of the defence entitled her a conviction on the reduced charge of manslaughter.*

[32] Accordingly, the appellant seeks the following prayers from the Court:

i. A declaration that the doctrine of the battered woman/man syndrome is applicable as a defence to the defence of murder;

ii. *A declaration that the applicable test for the battered woman/man syndrome is contextual and based on the test of cumulative loss of self-control;*

iii. *A declaration that where an accused pleads self-defence under the doctrine of the battered woman syndrome, the burden of proof shifts to the prosecution to disprove every element of the defence beyond reasonable doubt;*

iv. *A declaration that the prosecution's failure to conclusively repudiate each and every element of the defence of self-defence entitles an accused person to conviction on the lesser charge of manslaughter;*

v. *The Judgment of the Court of Appeal affirming the appellant's conviction on the charge of murder be and is hereby set aside in its entirety and be substituted with a conviction on the charge of manslaughter and the appellant be sentenced to time served;*

vi. *That the sentencing of the appellant to death by the trial court as affirmed by the Court of Appeal be set aside in favour of a more lenient sentence taking into account the doctrine of the battered woman syndrome as a mitigating factor; and*

vii. *Such other or further consequential and appropriate relief as this Honourable Court may deem just and expedient in the interests of justice.*

[33] In opposing the appeal, the respondent filed a replying affidavit sworn by Everlyn Onunga, Assistant Director of Public Prosecutions, on 16th November 2023 and filed on 17th November 2023. She depones that the grounds of appeal raised by the appellant were not issues raised in either the trial or appellate courts. Specifically, the issue of battered woman syndrome was not raised. No medical evidence was adduced by the appellant during the trial proceedings to suggest that she suffered consistent intimate partner violence trauma. Furthermore, the appellant's choice to provide an unsworn testimony denied the respondent the opportunity to test the veracity of her claims through cross examination. As a result, the battered woman syndrome is a factual issue, and since the appellant failed to provide evidence in support of it in the lower courts, the courts could only

rely on the available evidence to make their findings. Therefore, that the appeal lacks merit and ought to be dismissed.

D. PARTIES SUBMISSIONS

i. Appellant's Case

[34] The appellant relied on her written submissions dated 22nd July 2024 and filed on 25th July 2024, anchored on two issues: (1) *the applicability, standard of proof, burden of proof and guiding principles for the doctrine of the battered woman syndrome as a defence,* and (2) *the applicable standard and burden of proof in a self-defence plea and the consequences thereon once the accused provides prima facie circumstantial evidence of their plea*.

[35] On the first issue, the appellant submits that the decision in ***State vs. Truphena Ndonga Aswani*** [2021] KEHC 8758 (KLR) (hereinafter referred to as the "***Truphena Case***") applied the battered woman syndrome in determining the appropriate sentence, paving way for its applicability as a defence in Kenya. However, as it presently stands, the law is silent on this defence with no established principles governing its application. The appellant contends that the Penal Code viewed in light of Section 17, acknowledges and facilitates the evolution of the defence of self-defence. This is because the provision incorporates the application of English Common Law, which has shifted from an objective to a subjective test. This evolution recognizes that the reaction of a victim suffering from battered woman syndrome may differ from that of a reasonable man. In any case, this does not negate a self defence plea. The appellant relies on ***Ahmed Mohammed Omar & 5 others v Republic*** [2014] eKLR to bolster this submission.

[36] The appellant argues that the defence of battered woman syndrome recognizes that living in domestic violence has a major impact on a woman's state of mind, which could make an act of homicide justifiable. This is because the psychological state of abuse victims is considered to dilute the requisite *mens rea* for commission of an offence. Under English law, the use of battered woman syndrome helps a judge look beneath the surface to understand the reasons for such retaliation and determine whether the attendant circumstances mitigate the

offence. However, battered woman syndrome does not stand on its own; it aids defences such as provocation, self-defence, and duress, allowing the court to adopt the standard of *'loss of self-control'* rather than that of the reasonable man; thus, availing victims to claim *'diminished responsibility'*. The appellant made reference to ***Attorney General for Jersey vs. Holley*** [2005] 2 AC 580 and ***R vs. Thornton*** [1996] 1 WLR 1174 to support this averment.

[37] It is the appellant's contention that, in accepting the plea of self-defence, despite the court finding that the force used was excessive on account of battered woman syndrome, the court in the ***Truphena Case*** recognized that what is considered *"reasonable"* in the context of an abuse victim may differ significantly from the ordinary standard and adapted the defence to ensure the ends of justice were met. In all, the appellant argues that battered woman syndrome is also a mitigating factor for sentencing, as adopted in the ***Truphena Case***.

[38] The appellant posits that the battered woman syndrome characterizes a wide range of physical and psychological responses to battering, like depression or heightened threat perception. As such, it is a diagnosable condition, and evidence of the syndrome can be presented as a medical diagnosis from a psychiatrist and through expert testimony, in a manner similar to the process of assessing an accused's fitness to stand trial. She adds that this is not to say that the burden shifts to the accused to establish their innocence; rather, once the accused pleads self-defence and presents *prima facie* evidence of the syndrome, the prosecution must rebut that defence and establish the accused's guilt beyond a reasonable doubt.

[39] Taking the aforesaid into account, the appellant submits that she gave uncontroverted testimony that she endured a cycle of abuse and victimization by the deceased. That on the day of the incident, she found evidence suggesting that the deceased had exposed her to HIV/AIDS, which led her to confront him. The deceased who held a knife, grabbed her at the throat, and told her that *'he would rather kill me and himself than expose his status'*. The appellant asserts that although the prosecution did not tender evidence to rebut this testimony, her plea of self-defence was rejected by the superior courts on the basis of proportionality,

with the courts comparing the wounds inflicted on the deceased with her own and concluding that the force used to dispel his attack was excessive.

[40] The appellant submits that if she had had the opportunity to plead the battered woman syndrome defence at trial, and if the lower standard of *"loss of self-control"* had been adopted, her self-defence plea would not have been negated on a proportionality challenge. Instead, the material question would have been whether she was, in fact, caused to lose her self-control by the deceased's conduct. The appellant emphasizes that at the time of her trial in 2016, the defence had never been adopted in Kenya, and as a result, she was shut out from accessing justice. In turn, she urges this Court to find that the battered woman syndrome defence is applicable in Kenya and may accompany the defences of provocation and self-defence in appropriate circumstances.

[41] On the second issue, the appellant contends that under our criminal justice system, an accused person should enjoy automatic reduction of the charge before court once the defences of self-defence and provocation in connection with battered woman syndrome are invoked, evidence is presented to support this, and the prosecution fails to rebut each and every element of the defence. Furthermore, given that Section 207 of the Penal Code accords an accused person charged with murder to be convicted of the lesser charge of manslaughter if provocation is established, then a similar entitlement should apply to self-defence. Therefore, once a battered woman syndrome defence is raised and not rebutted to the criminal standard, then the accused ought to be convicted on the lesser charge of manslaughter.

[42] In addition, that where an accused person pleads self defence and provocation, and battered woman syndrome applies, the court ought to apply the lower test of loss of self-control. Since the necessary mental state for murder is vitiated, any conviction can only be for the lesser charge of manslaughter pursuant to Section 179(2) of the Criminal Code Procedure which provides that *when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it*. Considering that the prosecution tendered no evidence to disprove the

appellant's testimony that the deceased attacked her out of fear, she prays that this Court reconsider her conviction on account of the prosecution's failure to sufficiently rebut her self-defence plea and set aside her conviction.

ii. Respondent's Case

[43] The respondent relied on its written submissions dated 22nd August 2024 and filed on 12th September 2024. The respondent addresses the two issues as delineated by the appellant. With reference to the first issue, *the applicability, standard of proof, burden of proof and guiding principles of the doctrine of battered woman syndrome as a defence*, the respondent submits that based on the ingredients of the offence of murder, the battered woman syndrome defence finds that the *mens rea* element of murder is not established when an abused woman murders her abusive spouse. At present, there are two defences available under Kenyan law to a battered woman upon which she can base her defence: insanity; and defense of self, others or property.

[44] To the respondent, when an accused person pleads the defence of insanity, the burden rests upon her to establish this claim on a balance of probabilities. Even though this defence may appear to be available to battered women, it may not fully cover them, as it is restricted to the time of committing the act or making the omission. In the context of self defence, the court must be satisfied that the accused person reasonably perceives that she is in imminent danger and that the force used was reasonable and necessary under the circumstance.

[45] The respondent submits that, according to Walker in ***The Battered Woman Syndrome and Self-Defence***, **Notre Dame Journal of Law, Ethics and Public Policy 1992, 323**, the reasonable man's standard is essentially based on the idea of physical conflict between two males. However, the situation becomes complex when the accused is a battered woman with a history of abuse, and there is no expert testimony to explain her state of mind and how it affects her perception of danger. For this reason, the respondent belabors the need for expert testimony as essential when relying on the battered woman syndrome to support the defence of self-defence. Be that as it may, the respondent asserts

that the syndrome should not serve as a defence in itself, but rather as support for a self-defence claim. The mere fact of being a battered woman should never justify the actions of an accused.

[46] Likewise, the respondent submits that the battered woman syndrome was developed as a psychological tool to understand the mental state of a battered woman who kills her abuser. Therefore, it is crucial to differentiate between the mental status of an accused during the commission of a crime and their mental fitness to stand trial. These are two distinct mental assessments with different objectives hence should never be used interchangeably. The respondent maintains that if the appellant suffered from the syndrome, she neither raised the issue nor provided expert evidence and cannot therefore claim it before this Court.

[47] The respondent acknowledges that various jurisdictions, including Canada, have recognized the admissibility of battered woman syndrome. As held by the Supreme Court in ***R v Lavallee*** [1990] 1 S.C.R. 852, the syndrome is admissible only as an extension of self-defence, and being a battered woman does not entitle an accused to an acquittal. In the United States, only nine states have enacted legislation on the admissibility of expert testimony on the syndrome. In ***State v Kelly,*** 478 A.2d 364 (1984) the New Jersey Supreme Court endorsed the use of expert testimony to assist the court arrive at a just decision in cases involving battered woman syndrome. Ultimately, the respondent contends that these jurisdictions have not accepted the state of being battered as *prima facie* evidence of innocence.

[48] To this end, the respondent affirms that the burden of establishing the existence of battered woman syndrome or a history of domestic violence that would support the defence of self-defence based on the syndrome should lie with the defence, not the prosecution, as these are issues within the special knowledge of the appellant. Besides, it should not be enough for the appellant to merely claim that she was a battered woman. The respondent underscores that the appellant did not suffer from the battered woman syndrome, and that the claim is purely theoretical, speculative and generally academic, especially since no medical report

was produced to substantiate it, despite this being within the purview of both the trial and appellate courts.

[49] On *the applicable standard and burden of proof in a self-defence plea,* the respondent states that merely claiming self-defence is not enough. An accused person must lay down facts and evidence in support of that defence in order to justify that the homicide was lawful. It reiterated that once an accused introduces the battered woman syndrome, expert testimony should be admitted under Section 48 of the Evidence Act if the accused seeks to establish that the use of deadly force was imminent and necessary. In the instant appeal, the respondent asserts that it presented overwhelming evidence in support of its case, demonstrating malice aforethought on the part of the appellant. Meanwhile, the appellant failed to introduce any evidence supporting her version of events and instead gave an unsworn testimony claiming she was in imminent danger.

[50] As to provocation, the respondent avows that the superior courts rightly dismissed this defence, as it was the appellant who was found to have viciously attacked the deceased and inflicted injuries that speak for themselves devoid of an iota of self defence; there being no evidence that the deceased attacked the appellant. Accordingly, that the appeal lacks merit and ought to be dismissed.

E. ISSUES FOR DETERMINATION

[51] The rationale behind our position in ***Sum Model Industries Limited v Industrial and Commercial Development Corporation,*** Sup. Ct. Civ. Appl. No. 1 of 2011, [2011] eKLR is that the application for certification should first be made in the Court of Appeal before a party seeks certification from this Court. In that matter, we stated thus:

> *"This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed*

and advanced before it by the parties. Accordingly, the Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal would lie to the Supreme Court or not."

[52] We had the opportunity to pronounce ourselves on the criteria for an appeal to be eligible for certification and consideration by this Court in ***Steyn v Ruscone*** [2013] KESC 11 (KLR) (hereafter referred to as the "***Hermanus case***") where we proceeded to demarcate, in summary, the governing principles on certification of a matter as one involving general public importance. These principles were adverted to by the Court of Appeal in its ruling on certification when it expressed itself as follows:

> *"18. The applicant has submitted that the instant matter pertains to a novel issue of law that requires the Supreme Court to pronounce itself on the standard and burden of proof to guide other courts. Furthermore, that it is trite that in criminal proceedings, the standard of proof is beyond reasonable doubt and the burden of proof rests with the prosecution. In her appeal to the Supreme Court, the applicant seeks to canvass the proposition that once a defence of self-defence is adduced and circumstantial evidence is led to that effect, the accused ought to enjoy the benefit of the law and the charge automatically reduced to manslaughter.*
>
> *19. While we are alive to the requirements under the Hermanus case [supra], we also are aware of the finding of the Supreme Court that the Hermanus principles are not exclusive or exhaustive."*

[53] Consequently, the Court of Appeal found merit in the appellant's application for certification in the following terms:

> *"20. We have looked at the issues that have been raised by the applicant and note that* ***the issue surrounding battered woman syndrome is ideally raw in the Country and has had not so many decisions on the same. We feel the same be given a window for interrogation by the Supreme Court****."* (Emphasis ours)

[54] We have consistently reiterated and emphasized, including in ***Gatuma v Kenya Breweries Ltd & 3 others*** [2024] KESC 52 (KLR) that under Article 163(4)(b) of the Constitution, it is for the Court of Appeal to identify the specific question(s) (of law) which in its view constitutes a matter(s) of general public importance. This is because, unlike in a general appeal, it is the question framed by the appellate court that confers jurisdiction upon this Court. Where the Court of Appeal fails to identify the specific issues or points of law, or makes a broad and/or vague finding as it did in certifying this appeal, it is incumbent upon this Court in the circumstances of this case to delineate the issues for determination meriting this Court's attention from the outset.

[55] To echo Lord Tucker of the House of Lords in ***Attorney General for Northern Ireland vs Gallagher*** (1963) AC 349, as we did in ***Dhanjal Investments Limited vs Kenindia Assurance Company Limited*** (Petition of Appeal 7 of 2016) [2018] KESC 16 (KLR), once the court from which the appeal is brought has certified that a point of law of general importance is involved in the decision and leave to appeal is established, the jurisdiction to hear the appeal is established pursuant to Article 163(5) of the Constitution. It, however, remains a matter for the exercise of discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed from the decision in this case that the appellant can as a matter of right raise any such point.

[56] In the absence of any specific questions outlined by the Court of Appeal, the parties were led to assimilate and frame the appeal on the issues set out by the appellant in her application for certification. Thus, the issues put forth for our consideration are:

a) *the applicability, standard of proof, burden of proof and guiding principles for the doctrine of the battered woman syndrome as a defence, and*
b) *the applicable standard and burden of proof in a self-defence plea and the consequences thereon once the accused provides prima facie circumstantial evidence of their plea.*

These issues were not only submitted on by the appellant but were responded to by the respondent.

[57] In addition, the respondent contends that the issue of battered woman syndrome was neither pleaded before nor addressed by the trial court or the Court of Appeal; therefore, this Court is precluded from considering the issue in a second appeal. Our understanding of this submission is that, while the respondent has no objection to the certification of the issue relating to the battered woman syndrome, as that involving general public importance, the appellant should not benefit from it having failed to raise it at the onset before the trial and appellate courts below.

[58] On this basis, we are satisfied that the appeal will be disposed of on the basis of the following considerations:

i. *the applicability, standard of proof, burden of proof and guiding principles for the doctrine of the battered woman syndrome as a defence.*
ii. *the applicable standard and burden of proof in a self-defence plea and the consequences thereon once the accused provides prima facie circumstantial evidence of their plea.*
iii. *The applicable reliefs.*

In our determination, we remain cautious of our lack of jurisdiction to revisit factual findings of either the High Court or Court of Appeal in line with our edict in ***Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR).***

F. ANALYSIS AND DETERMINATION

i. the applicability, standard of proof, burden of proof and guiding principles for the doctrine of the battered woman syndrome as a defence

[59] In certifying the matter as raising general public importance, the Court of Appeal concluded that the issue surrounding the battered woman syndrome is at a nascent stage of development in the country warranting interrogation by the Supreme Court. The appellant contends that, as it stands in Kenya, the law is silent on the applicability of the battered woman syndrome as a defence with no established principles governing its application. She adds that the battered woman syndrome does not stand on its own but aids defences such as provocation, self-defence and duress. The respondent agrees to the extent that the only two defences available under Kenyan law to a battered woman, upon which she can base her defence; insanity and defence of self, others or property. On our part, we are not blind to the troubling surge in incidences of violence in Kenya, particularly intimate partner violence which manifests, *inter alia,* through acts of femicide and other forms of sexual and gender-based violence.

[60] To put the issue in context, it is imperative to understand the battered woman syndrome. This term was coined by psychologist, Lenore E. Walker, an American Psychologist in the 1970s, to understand and explain the psychological state of women suffering from intimate partner violence. It refers to a set of behavioural and psychological reactions displayed by women who are subjected to severe, long - term domestic abuse. In her book, Walker L. ***The Battered Woman Syndrome***, Fourth Edition, Springer Publishing Company, 1984 at pages 49 - 50 she states:

> ***"BWS, as it was originally conceived, consisted of the pattern of the signs and symptoms that have been found to occur after a woman has been physically, sexually, and or psychologically abused in an intimate relationship, when the partner (usually, but not always, a man) exerted power and control over the woman to coerce her into doing whatever he wanted, without regard for her feelings. As there are significant differences between the theory underlying the construct of BWS, and to date there are no empirically supported data, it has not yet been applied to battered men. Therefore, the term used is BWS***

rather than a gender-neutral battered person syndrome (BPS) or even battered man syndrome (BMS).”

To her, a battered woman is “*a woman, 18 years of age or over, who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse*”.

[61] ***Black’s Law Dictionary*** 11th Edition at page 187, defines the battered woman syndrome as:

“A constellation of medical and psychological symptoms of a woman who has suffered physical, sexual, or emotional abuse at the hands of a spouse or partner and who, as a result, cannot take action to escape the abuse. Battered-woman syndrome was first recognized in the 1970s by Rd. Lenore Walker, who described the syndrome as consisting of three stages: (1) the tension-building stage, which may include verbal and mild physical abuse; (2) the acute battering stage, which includes stronger verbal abuse, increased physical violence, and perhaps rape or other sexual abuse; and (3) the loving – contrition stage, which includes the abuser’s apologies, attentiveness, kindness, and gift – giving. This syndrome is sometimes proposed as a defense to justify or mitigate a woman’s killing of a man.”

[62] From the foregoing, we can surmise that the definition of the battered woman syndrome is a psychological condition of individuals who, have endured prolonged and severe abuse at the hands of an intimate partner. It is this condition that can be extended as a basis for defence where such an individual finally resorts to killing their abuser. Given that the concept transcends cultural and legal boundaries, exploring its place in other jurisdictions provides a nuanced approach.

[63] In the ***United Kingdom***, the battered woman syndrome is not a stand-alone defence, but rather is typically used to support arguments related to other

defences such as self-defence, provocation, or diminished responsibility, depending on the facts of the case. For instance, in ***R v. Ahluwalia*** [1992] 4 All ER 889 Ms. Ahluwalia poured petrol on her sleeping husband and set him on fire. The Crown Court found her guilty of murder and sentenced her to life imprisonment. She appealed, contending that the history of violence she suffered from her husband amounted to provocation and that she suffered from battered woman syndrome, though not explicitly named. She also sought to admit fresh medical evidence to support her plea of diminished responsibility. The Court of Appeal held, having regard to the fresh medical evidence adduced, that at the time of the killing, the appellant's mental responsibility for her actions was diminished and the fact that without any fault on the part of the Ahluwalia there may have been an arguable defence which was not put forward at the trial, the verdict of murder was found to be unsafe and unsatisfactory; a retrial was ordered.

[64] In ***R v Thornton*** (No.2) [1996] 2 All ER 1023 Ms. Thornton, who had been assaulted by her husband on a number of occasions, used a knife and stabbed him to death. She was convicted of murder. Her appeal was later dismissed. The Home Secretary thereafter referred her case to the Court of Appeal on the basis of further medical evidence to the effect that she possessed two particular characteristics at the time of the killing: (i) her personality disorder, and (ii) the effect of her husband's abuse over a period of time on her mental state, which would have required the judge to direct the jury to consider whether a reasonable woman with those characteristics might have lost her self-control and murdered her husband. The Court of Appeal was of the firm view that whether Ms. Thornton lost her self-control at the time of the killing was essentially a matter for a jury to decide. Accordingly, the court quashed her conviction and ordered for a retrial.

[65] The Canadian Supreme Court in ***R v Lavallee*** [1990] 1 SCR 852 had an occasion to grapple with this issue. In that case, Ms. Lavallee killed her partner one night by shooting him in the back of the head as he left her room. The shooting occurred after an argument where the appellant had been physically

abused and was fearful for her life after being taunted with the threat that either she kills him or he would get her. A psychiatrist with extensive professional experience in the treatment of battered wives prepared a psychiatric assessment of the appellant which was used in support of her defence of self-defence. The court emphasized the importance of allowing expert testimony to assist the jury in understanding complex issues beyond the knowledge of a lay person, especially in cases involving the battered woman syndrome.

[66] In the United States, the New Jersey Supreme Court in ***State v Kelly,*** 478 A.2d 364 (1984) Ms. Kelly killed her husband who had subjected her to years of abuse. She raised the defence of self-defence invoking the battered woman syndrome to explain her actions. The court determined that the syndrome could be introduced as evidence, that is expert testimony, in a self-defence claim to explain the woman's state of mind and the perceptions of her actions. The decision was a significant milestone, acknowledging that a victim of prolonged abuse might perceive threats that others would not recognize as imminent or sufficient to justify self-defence. The Battered Woman Syndrome has therefore been used in the United States, including by defendants, in cases of self-defence and duress.

[67] Despite limited research to support its validity and reliability, battered woman syndrome was quickly adopted for use as a defence in criminal contexts in the United States and other countries including Canada and the United Kingdom. A number of scholars have however raised questions about the legal use of the battered woman syndrome as this syndrome has not been recognised as a psychiatric condition by any edition of the Diagnostic and Statistical Manual of Mental Disorders. They also voice concerns over the difference in factors that affect the level of trauma and consideration of battered women as survivors instead of victims.

[68] Critics often argue that allowing the battered woman syndrome as a blanket defence could lead to unjust outcomes, such as allowing women to kill their abusers without sufficient scrutiny. Although numerous studies have been conducted regarding the experiences of women and intimate partner violence,

the validity and reliability of battered woman syndrome as a clinical diagnosis (as opposed to a legal construct) remains controversial. (see **Russell BL. Battered woman syndrome as a legal defense: *History, effectiveness, and implications*. Jefferson, NC: McFarland & Company, Inc., Publishers; 2014).** This explains the approach by many legal systems in adopting a more nuanced approach, assessing each case individually to ensure fairness and justice for both the accused and the victim. Also, as held in ***R v Coats*** [2013] EWCA Crim 1472:

> *"However, fortunately not every woman who suffers from domestic violence goes on to suffer from Battered Woman's Syndrome."*

[69] Additionally, **Aman Deep Borthakur,** in ***The Case for Inclusion of 'Battered Woman Defence' in Indian Law***, 11 NUJS L. REV. 1 (January-March 2018) at page 8, writes:

> ***"However, an interesting argument made against the formal inclusion of BWS as a defence and one that merits deeper engagement is that the formal inclusion is that a guarantee of application based on being a battered woman would permit women to intentionally kill their husbands. Therefore, it would be best if this defence was only availed on the basis of the circumstances of each individual case and not as a general exemption granted to all women who are battered by their partners. This strikes a reasonable balance when weighing the interests of both stake holders and has been incorporated in the proposals that follow."***

[70] The acceptance of battered woman syndrome by courts has continued to be met with mixed responses. Some applaud it for recognising the plight of abused women and extending the traditional definition of self-defence. Others criticise the extension of self-defence to situations where no immediate physical threat is present. Apart from ***the Truphena case*** which applied the concept of battered woman syndrome, there are no past cases in this jurisdiction where

the concept has specifically been used as a defence in murder trials. Building on the comparative jurisprudence, it can be noted that there is broader acceptance that the battered woman syndrome does not establish a new defence, but rather offers an explanation within established legal frameworks of the existing defences. It remains necessary to assist judges, understand the distinct mental and emotional state of a woman who has endured prolonged abuse, which may influence her actions. While it enables the courts to consider the trauma a woman has faced, it does not serve as a stand-alone justification for acquittal or reduced punishment.

[71] The appellant argues that the decision in ***Truphena case*** paved way for the applicability of the defence in Kenya. This is supported by the respondent, who underscores this averment by highlighting the syndrome's applicability in other decisions including ***Republic v J C*** [2021] eKLR and ***Republic v Collet Tabitha Wafula*** [2016] eKLR.

[72] In ***Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)*** (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (hereinafter referred to as the "***Muruatetu Case***") this Court at Para. 71 issued guidelines with regard to mitigating factors for the conviction of murder charge to include:

(a) age of the offender;
(b) being a first offender;
(c) whether the offender pleaded guilty;
(d) character and record of the offender;
(e) ***commission of the offence in response to gender-based violence****;*
(f) remorsefulness of the offender;
(g) the possibility of reform and social re-adaptation of the offender;
(h) any other factor that the Court considers relevant. (Emphasis ours)

[73] It emerges that the battered woman syndrome has so far primarily been used as a mitigating factor rather than a legal defence to a murder charge in

Kenya. The syndrome has also been recognized as a contributing circumstance that can reduce the severity of the charge or sentence in line with the guidelines issued in the ***Muruatetu case*** for mitigation on the part of convicted persons. The implication of the ***Muruatetu case*** is that mitigating factors, such as gender–based violence, must be understood in the proper context. As we perceive it, the battered woman syndrome falls within the category of gender-based violence in the context of marriage or an intimate partner relationship. However, while we acknowledge the syndrome as a mitigating factor in sentencing, the present appeal raises the significant question: can the battered woman syndrome be considered and elevated to a valid defence capable of justifying or excusing the actions of an accused person? This calls for careful consideration.

[74] Indeed and as noted by **Magato Valentine, *To Kill or Be Killed: Evaluating the Prospect of Situating Battered Woman Syndrome Within the Kenyan Criminal Law*** (October 9, 2023) available at SSRN: https://ssrn.com/abstract=4596238 or http://dx.doi.org/10.2139/ssrn.4596238 the creation of the battered woman syndrome into the criminal justice system caught public attention and exposed the widespread intimate partner violence occurring in many households. Additionally, it entered the legal field to aid defense claims for women faced with homicide charges. Magato postulates that Kenya has not adopted battered woman syndrome as a completely new defence or as an affirmative defence of self-defence; neither has the criminal justice system applied expert testimony to understand a battered woman's circumstances.

[75] With the above background, it is appreciated, the applicability of the syndrome continues to gain legal traction in Kenya, as evidenced from the cases cited above. The parties raised cogent arguments to assist the Court in determining the applicability and extent of the doctrine of battered woman syndrome. These include:

a. *whether battered woman syndrome as a defence is adequately covered under the existing defences of insanity, self-defence, duress and /or provocation;*
b. *whether the defence of battered woman syndrome should be acceptable as a defence in Kenya and if so, whether it is a distinct defence or should be looked at in the context of which of the existing defences;*
c. *whether battered woman syndrome must be supported or proved by way of expert evidence;*
d. *whether there is a distinction between the mental state at the time of commission of the offence and generally as a battered woman to establish mens rea;*
e. *whether battered woman syndrome should be determined factually on a case to case basis or generally;*
f. *when the defence of battered woman syndrome can be raised i.e. as a preliminary issue, during the trial process, as evidence from expert witnesses or in mitigation;*
g. *whether the defence of battered woman syndrome of itself connotes innocence to occasion an acquittal or reduced sentence;*
h. *who bears the burden of establishing the existence and applicability of the battered woman syndrome between the prosecution and the defence, and to what extent;*
i. *what is the applicable standard of proof in establishing the applicability of the battered woman syndrome bearing in mind the applicable standard of proof in criminal trials;*
j. *in the context of an abusive or toxic relationship, how do you identify the victim deserving of the defence of battered woman syndrome as against a manipulative and abusive partner.*

[76] There was common ground by the parties to the appeal that the applicability of this syndrome as a defence stands out, even though the syndrome can aid the existing defences of temporary insanity, provocation or self defence. In that regard, invoking the syndrome alludes to diminished *mens*

rea and responsibility resulting to loss of self-control. Thus, a different standard should apply as the syndrome removes the application of the reasonable man's test on account of diminished responsibility. This calls for expert testimony that requires the syndrome to be established as a diagnosable condition, anchored on the mental status of the accused person at the time of the commission of the offence of murder. This is contradistinguished with the mental assessment undertaken to ascertain the capacity of an accused person to undergo trial for the offence of murder.

[77] The point of departure in the arguments by the parties to this appeal was on who bears the burden of proof between the prosecution and the defence, once the syndrome is raised by an accused person. The other disagreement was on whether there should be an automatic reduction of the charge from murder to manslaughter if the battered woman syndrome is raised and not rebutted to criminal standards. This is something we shall consider under the next issue for determination.

[78] In our view, and based on the comparative jurisprudential underpinning, some of which we have set out, the application of the battered woman syndrome must be carefully tailored to individual cases, rather than applied universally as a blanket and stand-alone defence. A court cannot take a restrictive view that limits the scope of defences available in such circumstances. A case-by-case evaluation is needed to ensure that the legal system as is, remains committed to justice while considering the unique psychological and emotional effects of prolonged abuse.

[79] We hasten to add that where a party seeks to rely upon the battered woman syndrome in the course of trial, the same should be raised at the earliest in a similar manner that any other defence would have been raised. This does not prevent a party from raising it in mitigation upon conviction. Neither will it prevent admission of additional medical evidence at an appellate level, in rare and exceptional cases, such as in the ***Thornton*** and ***Ahluwalia*** cases referred to above. We however emphasize that it should not be left to the court to infer the existence and applicability of the battered woman syndrome from the facts

and evidence adduced before it. As already stated, the battered woman syndrome has not in our view attained the status of a stand-alone defence and it has to be raised in aid or as an extension of one of the existing legal stand-alone defences: self-defense, provocation or temporary insanity. However, the courts cannot singularly elevate the battered women syndrome to a stand-alone defence of itself, as to do so would, in our view, amount to usurpation of legislative mandate bestowed upon Parliament under our Constitutional architecture.

[80] While the profound impact of domestic violence in the context of criminal law must be recognized, each case should be assessed on its own merits to avoid potential misuse or overgeneralization of the defence of battered woman syndrome. This strikes a fair balance between protecting women who act out of genuine fear for their safety and life and holding accountable those whose actions may not meet the criteria for the defence raised. By adopting this nuanced approach, the law would better serve both victims of abuse and the broader principles of justice, ensuring the fair application of battered woman syndrome within established legal standards.

[81] We caution ourselves that our position is not exhaustive particularly at this nascent stage of any determination of the issue. This is so as to allow the courts below, to have an opportunity to fully articulate and apply the said doctrine in appropriate cases and respond to some of the issues raised above. The battered woman syndrome as a matter of law, may at the opportune time require our further input in exercise of the appellate mandate of this Court in an appropriate case.

ii. The applicable, standard, and burden of proof in a self-defence plea and the consequences thereon once the accused provides prima facie circumstantial evidence of their plea

[82] The appellant's submission pertaining to this issue is that once the accused pleads self-defence and presents *prima facie* evidence of the battered woman syndrome, the prosecution must rebut that defence and establish the

accused's guilt beyond reasonable doubt. Accordingly, an accused person should automatically enjoy a reduction in charges once the defences of self–defence and provocation in connection with the battered woman syndrome is invoked, evidence presented to support this, and the prosecution fails to rebut each and every element of the defence presented. Thus, that once a battered woman syndrome defence is raised, either in a defence of provocation, self defence or temporary insanity and not rebutted to the criminal standard, then an accused person ought to be convicted on the lesser charge of manslaughter.

[83] It is a well settled legal principle that the burden of proof in criminal matters never leaves the prosecution's backyard. It is imperative to recognize that the term burden of proof encompasses both the *legal burden of proof* and the *evidential burden*. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, at paras 13 and 14, what is meant by legal burden of proof is:

> ***"13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.***
>
> ***14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

[84] Kenya has adopted this common law approach. The position on the legal burden of proof in criminal cases as stated by the House of Lords in the time honored case of ***Woolmington v DPP*** [1935] AC 462, where Viscount Sankey LC stated as follows:

> **"***Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. … No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

[85] In contrast, when it comes to evidential burden generally in law, in ***Munya v The Independent Electoral and Boundaries Commission & 2 others*** [2014] KESC 38 (KLR) we held that:

> ***"On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden.*** *"The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue"* ***PARA Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)."*** *(Emphasis ours)*

[86] Undoubtedly, the legal burden of proof in criminal cases does not and cannot shift from the prosecution. In contrast, the evidential burden initially rests with the party carrying the legal burden, which is typically the prosecution. However, as the evidence is presented during the trial, the evidential burden may shift to the party who risks losing its case without additional evidence.

[87] Given that the burden of proof remains with the prosecution to prove guilt beyond reasonable doubt, when the defence invokes the battered woman syndrome, it does not need to disprove the crime but raise a reasonable doubt regarding the accused's actions and intent. This may be achieved through expert testimony and evidence addressing the psychological effects of sustained abuse, which helps to exemplify the mental state of the accused at the time of commission of the offence, and not necessarily the mental capacity to stand trial. The standard of proof in involving the battered woman syndrome has to be

addressed within the context of legal standards for defences relied upon by the accused. In particular, the burden rests on the defence to not only establish the existence of the battered woman syndrome but also the extent of such application to the offence in which the syndrome is to be relied upon.

[88] In light of our finding above on the applicability, standard of proof, burden of proof and guiding principles for the battered woman syndrome as a defence, we maintain that a tailored case by case approach remains most appropriate in such instances for the trial or appellate court. Issuing blanket guiding principles may not be most apt approach under the circumstances especially when the courts below have not been given the opportunity to address the issue. Moreover, the specific circumstances of each case would call for a different approach both in considering the defence and in mitigation. In line with our earlier approach therefore, this is a developing legal principle and the Court may at the opportune time be called upon to make an authoritative finding as an appellate court.

iii. What reliefs should issue?

[89] From the appeal, and as already noted, the crux of the respondent's argument is that the questions raised by the appellant as matters of general public importance were never raised before the trial court and the Court of Appeal. Specifically, the issue of battered woman syndrome was only introduced during the certification of this appeal before the Court of Appeal. The respondent claims that the Court should not be left to assume the existence of certain facts that have not been alluded to or proved.

[90] Conversely, the appellant contends that her relationship with the deceased was fraught with challenges, including physical and psychological abuse. She posited that she endured continuous victimization in an abusive and tumultuous relationship. Counsel for the appellant elucidated at the hearing before us that although battered woman syndrome was not explicitly pleaded, the totality of the evidence presented in the superior courts demonstrates that the appellant suffered

from long-term trauma from systematic abuse, consistent with the effects of battered woman syndrome. As such, the appellant's defence of self-defence must be understood in the context of battered woman syndrome.

[91] What then follows is, was the battered woman syndrome pleaded and addressed by the courts below? Could it be inferred from the facts? To answer this question, we resort to the record. The trial court made several observations one of which was that the appellant and the deceased had a tense relationship two (2) days before the incident. This observation was not refuted by the Court of Appeal, on appeal. However, according to the appellant's submissions before the Court of Appeal, she and the deceased were having difficulties in their relationship and as a result, they usually had a lot of altercations. A review of the proceedings before the trial court reveals that when the appellant was called to enter her defence, she gave an unsworn statement. This is what she had to say regarding her relationship with the deceased:

> *"We have had a relationship between 2011 to 2015. It was a normal boyfriend/girlfriend relationship where we had long and short-term dreams to achieve together. However we had bad days and good days just like any other romantic relationship."*

[92] At certification before the Court of Appeal and now before this Court, it was contended that the appellant should now benefit from the defence of battered woman syndrome and incessantly painted a picture of a victim in an abusive and rather toxic relationship. To the appellant, this syndrome can be contextualised as an offshoot of self-defence and/or provocation, which defences she raised at the trial. On the other hand, she argued that in 2016, the defence of battered woman syndrome was not available to her and as such, she could not raise it. That the syndrome was first applied in Kenya in the ***Truphena case.*** Incidentally, the respondent pointed us to ***Republic v Collet Tabitha Wafula*** [2016] eKLR and ***Republic v J C*** (supra) as cases where the battered woman syndrome was raised in mitigation. The former case that was concluded on 31st October 2016 at a time when the appellant's trial was ongoing before the High Court. In both cases, no specific reference was made to

the battered women syndrome, but the fact that they were cases of domestic violence.

[93] In totality, we find it contradictory on the appellant's part. Her own evidence demonstrates that she was not involved in a toxic relationship, but rather in a typical boyfriend-girlfriend dynamic. This raises the crucial question of whether the battered woman syndrome was adequately raised and addressed by the courts below. We firmly find it was not. The nature of the relationship between the appellant and the deceased, while it may have been raised at the trial court as self-defence, did not persuade the court from concluding that the appellant was not a victim but rather the perpetrator who contributed to the toxicity of the relationship. The trial court instead adopted the proportionality test in comparing the wounds inflicted by the appellant to the deceased as against those that had been inflicted by the deceased to the appellant, including the circumstances of such infliction. The appellant's actions were thus held to be aggravating in nature rather than demonstrative of lack of self-control within the parameters of self-defence or provocation.

[94] Additionally, in her mitigation, the appellant highlighted *inter alia* that she was a devout Muslim who had participated in various theological activities during her long period in remand. She was also pursuing further education having received an offer for undergraduate studies at a local university. Throughout her remand, she maintained exemplary conduct and was a first-time offender who was genuinely remorseful for her actions. At no point during this stage did the appellant bring up any history of long standing and severe abuse in her relationship with the deceased; bearing in mind, that it is only on the day of the incident that the appellant alleged that the deceased accosted her and a physical altercation ensued.

[95] By giving an unsworn statement, the appellant's testimony could not be tested or challenged by way of cross examination. Without making any adverse inference against the appellant's choice of giving an unsworn statement in her defence, as that we cannot do, we remain careful not to wade into factual findings, particularly at the second appellate stage.

[96] The deliberately detailed narration of the proceedings before the courts *ante* was to illustrate the nature and substance of the matter argued in this case, including the defence raised by the applicant during these proceedings. It also brings to the fore the need to explicitly raise the issue of the syndrome before the trial court. It is not lost on this Court that at no point in her defence did the applicant raise the defence of battered woman syndrome either implicitly or explicitly. It was neither raised during the trial at the High Court nor during the appeal thereof as an issue for determination despite the doctrine being in existence since the 1970s. The issue concerning the battered woman syndrome was raised for the first time in the application for certification before the Court of Appeal. This is of significant import to the propriety of exercise of appellate jurisdiction of the apex court in this matter.

[97] In ***Malcolm Bell v Daniel Toroitich Arap Moi & another*** the Court stated that:

> "*...as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law...matters only tangentially adverted to, without a trial focus or a clear consideration of facts in the other Courts, will often be found to fall outside the proper appeal cause in the Supreme Court.*"

In the English case of ***Glancare Teorada v. A. N. Board Pleanala*** 2006FEHC 250, cited in the ***Hermanus case***, the court therein stated that the point of law in question in regard to determining whether a matter is of general public importance, "*... must have arisen out of a decision of the Court, and not from a discussion of a point in the course of the hearing*." Further, in ***Wanjigi vs. Chebukati & 2 others,*** (Application No. 6 (E012) of 2022) [2022] KESC 40 (KLR) this Court held that: "*An appeal must of necessity be against the outcome of a case based on the reasons for such outcome.*"

[98] These are important principles and central to the efficacy of our, and indeed any, appellate scheme. To exercise its appellate jurisdiction the matter before this Court must be ripe for consideration. In addition to ensuring

suitability, accountability, and fairness of judicial decision, a crucial function of the appellate decision is to develop and clarify the law and legal principles through the various layers of consideration and clarification through the hierarchy of courts. As a matter is ventilated through the appellate system, the issues in contest, especially those of jurisprudential gravitas, are refined and distilled. At the apex court, once the superior courts below have had occasion to exercise their respective jurisdictions, the matter is then ripe for final determination.

[99] Under the ***Hermanus case*** test, each case must be considered on its own peculiar facts, merits and context. We find that in the instant matter, the elucidation, clarification and development of the law on the issue of the battered woman syndrome, would particularly benefit from the consideration of the facts in an appropriate matter; the testimony of victims and witnesses including the specialist analysis by expert witnesses on relevant related subjects; and the interpretation and application of laws and legal principles by the courts *ante*, before the matter could be considered ripe for final determination at this court.

[100] In ***Macharia & another vs Kenya Commercial Bank Limited & 2 others*** (Application 2 of 2011) [2012] KESC 8 (KLR), this Court held: "*The [Supreme] Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation*." The extremely pertinent issue of battered woman syndrome will be properly ventilated and adjudicated by the courts in due course. If and when moved correctly, the Supreme Court will no doubt provide opinion and guidance on the matter. But we are afraid that, despite the importance of this issue, it is not properly before us and as such the only proper recourse thereto is for the Court to dismiss this appeal. The remedies sought by the appellant relating to her conviction and sentence cannot therefore issue. At any rate the severity of sentence is a matter of fact not appealable in a second appeal in line with Section 361 of the Criminal Procedure Code.

[101] On the issue of costs, this Court in the case of ***Rai & 3 other v Rai, Estate of & 4 others*** (Petition 4 of 2012) [2014] KESC 31 (KLR) set out the

legal principles that guide the grant of costs and enunciated that generally, costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. Taking into consideration all the circumstances of this appeal, we find that there shall be no order as to costs.

G. ORDERS

[102] In the premises, the appeal fails and we issue the following orders:

(i) The Petition of Appeal dated 6th November 2023 and filed on 7th November 2023 be and is hereby dismissed.

(ii) There shall be no order as to costs.

(iii) Security for costs in the sum of Kshs.6,000/- deposited by the appellant be refunded.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **11th** day of April, **2025.**

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT

.....	.....
P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE PRESIDENT OF THE** **SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**

…… ……

I. LENAOLA **W. OUKO**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA